SELF-DEFENCE

One of the conflicts has been whether we can allow this defense purely on someone's *subjective* belief compared to making it an *objective* standard or a *modified objective* standard – taking it into account the characteristics of the person who is in need of the defense.

Self-defense is *entirely* based on the *Criminal Code* and is not based in common law. Some defenses are purely still common law.

APPLICABILITY OF NEW PROVISION

There is a presumption against retrospectivity and the *Charter* affords an accused the greatest protection under the law.

REGINA V. CARRIERE, 2013 ABQB 645

ISSUES: Did Parliament intended the new self-defense rule to apply retroactively?

RULES: The new self-defense rules do not apply retroactively before the law came to be.

CONCLUSION: No, Parliament did not intend the new self-defense rule to apply retroactively.

RATIONAL: Parliament did not say so expressly and there is no compelling reason to give the new self-defense rule a retroactive effect. In the absence of an unequivocal legislative declaration, a court should be extremely reluctant to approve such an unusual result. Nothing in the *Citizen's Arrest* and *Self-defense Act* suggest that Parliament intended to create a legal order in which an accused could, in effect, select the self-defense norm which applied to his or her case.

R V EVANS, 2015 BCCA 46

FACTS: Accused is appealing the fact that the old self-defense provisions were used in his case vs. the new self-defense provisions. The new provisions were more favorable to him than the former provisions. His trial started on the day the legislation was proclaimed.
RULES: Adoption of *R v Carriere*.
CONCLUSION: Appeal of the accused is dismissed.

R V BENGY, 2015 ONCA 397

ISSUES: The question is again raised whether the new self-defense provisions or the old self-defense provisions should apply.
RULES: The new self-defense rules do not apply retroactively before the law came to be.

RATIONAL: The amendments are **substantive** (they impact the content and not the manner) rather than merely a procedural change to the law of self-defense; had it been procedural, the accused would be able to have that benefit. The presumption against retrospectively Is rebuttable where it is possible to discern a clear legislative intent that the statute in issue is to apply retrospectively. However, there is nothing in the Act that indicates any such intent. Parliament recognized the need to clarify the law of self-defense.

R V ARP, [1998] 3 SCR 339

RULE: To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to, "increase or diminish the probability of the existence of a fact in issue".

ONUS AND BURDEN OF PROOF

R V CINOUS, 2002 SCC 29

FACTS: Accused was paranoid that someone was going to kill them, but he kills them and claims it was self-defense.

ISSUE: When is a defense put before a jury?

RULES: **The Air of Reality Test** determines whether there is evidence upon which a properly instructed jury, acting reasonably, would acquit. A judge must put to the jury all defenses that have an air of reality (evidentiary foundation); a judge must also not put to the jury any defense with no air of reality.

CONCLUSION: There was no air of reality to the defense of self-defense.

NOTES: It is an error of law to put to the jury, or to keep from the jury, any defense that has an air of reality. A single air of reality does not determine how likely the defense is; the jury decides the substantive merits of the defense. Whether or not there is an air of reality to a defense is a question of law and is determined by the judge.

R V PAPPAS, 2013 SCC 56

ISSUES: Can a trial judge engage in weighing of the evidence?

RULES: The ability of the trial judge to engage in 'limited weighing' depends on the type of evidence. If the evidence is direct, the trial judge must put the defense to the jury. Where the evidence instead requires the drawing of inferences in order to establish the elements of a defense (circumstantial), the trial judge may engage in a limited weighing to determine whether the elements of the defense can reasonably be inferred from the evidence. In conducting this limited weighing, the trial judge must examine the totality of the evidence.

R V CHAN, 2005 NSCA 61

FACTS: Two prisoners of Springhill Institution got into an altercation and, as a result, Mr. Williston sustained an injury to his neck and spent 8 days in hospital. Chan was charged with assault with a weapon and raised the defense of self-defense. He was eventually found not guilty through jury. The Crown is appealing on the basis that there was no air of reality to the defense of self-defense.

RULES: In coming to the threshold decision of whether there was an air of reality, the trial judge can consider the totality of the evidence emanating from an accused, a defense witness, one of the Crown witnesses, and through cross examination; the evidence need not solely come from the accused.

CONCLUSION: Appeal of the Crown dismissed.

RATIONAL: From the evidence, there was no error on the part of the TJ in concluding that a jury, acting reasonably, could draw an inference from those circumstances that the respondent, Chan, actually believed that he had no alternative but to defend himself as he did, and that a properly instructed jury acting reasonably could infer the reasonableness of Chan's belief that he had no other alternative.

R V RASPBERRY, 2017 ABCA 135

FACTS: Raspberry, a professional engineer, and Harvy Kelloway, a teacher, were neighbors in a Calgary community when they met for the first time on May 4, 2013. They gathered at Kelloway's home for a BBQ and, that evening, Kelloway died of multiple stab wounds inflicted by Raspberry. The judge found there was an air of reality to the defense of provocation, but rejected an air of reality to self-defense; he was convicted of manslaughter. Crown appeals based on provocation finding and defense appeals the lack of reality to the defense of self-defense.

RULES: Self-defense does not arise out of the ether; this defense needs some evidence of some kind from someone or somewhere to raise the necessary doubt. The requirement to provide some evidence is not a reverse onus.

CONCLUSION: Both appeals are dismissed.

RATIONAL: The trial judge did not err in his determination that Raspberry's evidence did not raise a reasonable doubt as to the objective reasonableness of his actions.

ELEMENT 1 – A REASONABLE APPREHENSION OF FORCE OR A THREAT OF FORCE AGAINST A PERSON

R V PAICE, 2005 SCC 22

FACTS: Two people get into a fight and the accused was challenged by the deceased to go outside and fight. Once there, the deceased pushed the accused twice and, as a result, the accused punched the deceased in the jaw, causing him to fall backwards, hit his head on the pavement, and then the accused struck him 2 or more times; he died. The trial judge acquitted on the ground of self-defense. The Court of Appeal set aside the acquittal and ordered a new trial.

RULES: Where a person willingly engages in mutual combat, he cannot later say that he did not provoke the assault.

CONCLUSION: Appeal should be dismissed and a new trial is confirmed.

RATIONAL: There are two errors in the trial judge's decision:

1. The conclusion that Mr. Bauck's pushing of Paice was an unlawful assault because it was 'without the consent of Paice' was based on his legal conclusion that neither party could rely on the consent of the other because they each had entered the fight with the intention to cause bodily harm to the other. This conclusion stems from the trial judge's misinterpretation of the principle in *Jobidon*. *Jobidon* requires serious harm both intended and caused for there to be no consent. Whether or not Bauck intended to cause harm to Paice, he did not in fact do so. It was never actually determined if Paice had consented at all.

2. He did not address the question of provocation. An accused can only rely on s.34(1) if he was unlawfully assaulted without having provoked the assault. They both engaged in a mutual combat, so relying on provocation is not available. Further, there is still the question of whether Paice consented to the fight at all.

NOTES: Under the new self-defense laws, *Paice* is unlikely to apply anymore.

R V MACDONALD & VARCOE, 2000 49 OR (3D) 417 (ONCT CA)

FACTS: The charges arose out of a failed police takedown where the police surrounded the car of the accused/co-accused and attempted to apprehend them; the police were wearing plain clothes with POLICE on a hat. The accused was shot and claimed to now know they were police until he was at gunpoint.

The accused attempted to use self-defense as a defense and that he did not intentionally assault anyone. The accused argues that the jury charge was incorrect because the judge indicated that the level of police force was irrelevant; he argues they should have been told that, if he believed the force they used was excessive, that he was entitled to forcibly resist the arrest and flee.

RULE: You cannot use force to defend yourself against a police officer unless the force used against you is unreasonable. Self-defense is available even against police officers.

CONCLUSION: A new trial was ordered on other grounds, so no decision was needed whether this ground of appeal would require a new trial standing alone.

R V BERRIGAN, (1998) 127 CC (3D) 120 (BCCA)

FACTS: The deceased was a drug trafficker; the appellant admitted killing the deceased to two undercover police officers posing as members of a criminal organization. At trial, he testified that him and Boos met with the deceased to purchase cocaine, that he was extremely high on cocaine at the time, and then Boos began choking him, the appellant thought that the deceased was reaching for a gun, so he stabbed him. He was actually reaching for his cellphone.

The trial judge put both intoxication as well as self-defense to the jury, but it was submitted on appeal that the trial judge did not give correct instructions to the jury.

RULES: An accused is entitled to rely on self-defense on a reasonable, but mistaken belief if, on his own evidence, his belief was mistaken.

CONCLUSION: Taken together, their cumulative effect requires a new trial. Verdict of guilty is set aside and a new trial is ordered.

RATIONAL: The trial judge did not instruct the jury on how a reasonable mistake of fact applied to the defense. His remarks may have left the jury with the impression that the defense could only operate if there was an actual assault. The jury may have rejected self-defense on the basis that no actual assault occurred or was about to occur. The instructions do not suggest that self-defense is available on a mistaken belief.

R V CAMERON, (1995) 48 CR (4^{TH}) 199 SCC

FACTS: Two individuals met for a drug transaction involving 40-50 dollars of cocaine. After that transaction, an altercation occurred and that ended without harm to either. Later, they met again, the victim on bike, and the accused on foot and got into a fight. There was various testimony, but ultimately the accused argues that he tried to defend himself because the victim had a knife and was considerably bigger. The knife ended up becoming removed from the victim's hand and, somehow, entered the victim. The issue is over the admittance of evidence and the subsequent charge to the jury; defense tried to have admitted instances where the victim had shown a propensity for violence.

RULES: Evidence of previous acts by the victim, which are not known to the accused, must be confined to evidence of previous acts of violence which may legitimately and reasonably assist the jury in arriving at a just verdict.

CONCLUSION: Appeal allowed; set aside conviction and allow a new trial.

RATIONAL: The trial judge correctly rejected the proposed evidence and allowed the correct evidence. The accused cannot rely on the admitting of evidence of past instances of violence and cocaine abuse by the victim because he could not have taken it into account, therefore, in deciding what steps were appropriate and reasonable to defend himself.

ELEMENT 2 – THE REACTION OF ACCUSED HAD A DEFENSIVE PURPOSE

R V MACCONNELL, (1996) 48 CR (4TH) 199 SCC

FACTS: Prison fight where the object of the fight ended up killing one of the aggressors by mistakenly believing the fight had started and took the first shot. Tons of witnesses and evidence that there would be an attack on his life.

RULES: The importance of adequately answering questions put by the jury should be borne in mind. The question will generally relate to an important point in the jury's reasoning, so that any error the judge may make in answering it becomes all the more damaging.

There is no formal requirement that the danger be imminent. Imminence is only one of the factors the jury should weigh in determining whether the accused had a reasonable apprehension of danger.

CONCLUSION: Appeal is allowed and a new trial ordered; the trial judge was right to leave the defense with the jury, but the jury might have thought it was not open to the appellants to defend themselves unless the actual physical part of the assault was imminent.

RATIONAL: The trial judge had indicated to the jury that the threat had to be immediate; the requirement of immediacy as an element as opposed to a factor for consideration is an error. While the appellants' state of mind must be measured at the exact point in time they struck the victim, they could be acting in self-defense to an assault by threat with present ability to carry out the threat, although the actual physical act threatened was not to be carried out in that exact moment.

Similar to battered women's syndrome, 'the prison environment syndrome' indicates that a person could believe he or she was being assaulted without it being immediate. Further, the jury returned 7-8 minutes after they were instructed re: immediacy, so it is clear that question and corresponding error were material.

ELEMENT 3 – THE ACTION IS REASONABLE IN THE CIRCUMSTANCES

R V BAXTER, [1975] OJ NO 1053

RULES: Section 34(1) does not import a purely objective test. The doctrine of mistake of fact is applicable to section 34(1) as well as section 34(2). In deciding whether the force used by the accused was more than was necessary in self-defense under both section 34(1) and 34(2), it must be remembered that a person defending themselves cannot be expected to weigh to a nicety, the exact measure of necessary defensive action.

R V H.S., 2015 ABQB

FACTS: H, who is a 13-year-old boy of two individuals, W and E, and had many siblings. W viciously beat E to the point that she was hospitalized and beat her consistently for 21 years. During the incident in question, after E was released from the hospital, W was beating her again and claiming he was going to kill her. H shot W twice with a gun, but he was not dead when H retreated. The judge in this case applied the factors under s.34(2) to find that H shot W twice out of defense for himself and defense for his mother.

RULE: Self-defense provisions can be used for protective situations.

DEFENCE OF PERSONS IN AUTHORITY

CANADIAN FOUNDATIONS FOR CHILDREN, YOUTH, AND THE LAW V CANADA (AG), 2004 SCC 4

FACTS: The Canadian Foundation for Children, Youth, and the Law brought an action stating that s.43 of the *Criminal Code* violates the rights that children have under s.7, 12, and 15 of the *Charter*. S.43 allows school teachers, parents, or persons standing in the place of a parent, to use force by way of correction of a child under their care if the force did not exceed what was reasonable in the circumstances.

RULES: A person applying force much have intended it for education or corrective purposes. The child must be capable of benefitting from correction. Only minor corrective force is exempt from criminal sanction. This is an objective test. s.43 does not apply to children under 2 or teenagers.

CONCLUSION: Appeal dismissed.

RATIONAL: This section of the *Criminal Code* does not violate the *Charter*. It is not unduly vague or overbroad and sets real boundaries and delineates a risk zone for criminal sanction. The force used must have been intended for educative or corrective purposes. Considering Canada's international treaty obligations, the circumstances in which the discipline occurs, social consensus, expert evidence and judicial interpretation, a solid core of meaning emerges for 'reasonable under the circumstances'. This is sufficient to establish a zone in which discipline risks criminal sanction.

BATTERED WOMEN'S SYNDROME

R V LAVALLEE, [1990[1 SCR 852

FACTS: Lavallee was a battered woman in a volatile common-law relationship who killed her partner late one night by shooting him in the back of the head as he left her room.

RULES: There are two elements of the defence under **s.34(1)**:

1. **A temporal connection between the apprehension of death or grievous bodily harm and the act taken in self-defence.**
    a. Subjective belief that is reasonable in the circumstances; and
        i. What is included in what is reasonable is that they felt incapable of escaping.
    b. Imminence is not a requirement; there is no duty to retreat.
2. **Assessment of the magnitude of force used – was it necessary and proportionate?**

CONCLUSION: Appeal allowed and acquittal restored.

RATIONAL: Expert evidence on the psychology of battered women is relevant and necessary in determining if there was a reasonable apprehension of harm. Generally, the courts believe that reasonable apprehension would only occur if under physical attack, but this needs to be expanded in the context of a battered woman. Men outmatch women in size and strength in a fight. It would be unreasonable to ask a battered woman to wait until physical assault before apprehension was validated. The difference between a cycle of abuse and an encounter with a stranger is the degree of predictability of future violence.

R V CHARLEBOIS, 2000 SCC 53

FACTS: Charlebois had an overwhelming fear of Jette, which developed over the course of their long and difficult relationship. Charlebois had a difficult childhood and was Jette's flogging boy. The night of the murder, Jette argued with his GF, went over to Charlebois' apartment and, in front of his neighbor, flicked a knife and said, "we're going to have some fun tonight you and me". When Jette was sleeping, Charlebois shot him in the head.

RULES: s.34(2) places in issue the accused's perception of the attack upon him and he response required to meet it; the accused may still be found to have acted in self-defense even if he was mistaken in his perception. Reasonable and probable grounds must still exist for this mistaken perception in the sense that the mistake must have been one which an ordinary man, using ordinary care, could have made in the same circumstances.

CONCLUSION: Appeal dismissed. Against the accused.

RATIONAL: Taken as a whole, the charge could not have given the jury the impression that they were to consider the reasonableness of the appellant's perceptions from the perspective of the hypothetically neutral reasonable man, divorced from the appellant's personal circumstances.

NOTES: This case is different from *Lavallee* because the relationship between them was different and the circumstances.

JUSTIFICATION OF FORCE TO PREVENT COMMISSION OF OFFENCE (S.27 CODE)

s.26: Everyone who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes excess.

The problem with this provision is the lack of definition of 'excessive force' and it is too broad to know what it means.

s.27: Everyone is justified in using as much force as is reasonably necessary
(a) to prevent the commission of an offence **(i)** for which, if it were committed, the person who committed it might be arrested without warrant; and **(ii)** that would be likely to cause immediate and serious injury to the person or property of anyone; or
(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in (a).

R V GEE, [1982] 2 SCR 286

FACTS: One male prostitute and female impersonator and another female prostitute killed a 'kinky trick with lots of money' in his home. The Crown had a theory that the killing was a result of a planned robbery, which the victim resisted. The theory of defense was that the victim attacked the third individual in the room and, as a result, the two prostitutes attempted to prevent that assault and, in the process, killed the victim (s.27).

ISSUES: In Canada, does there exist a 'qualified' defense of use of excessive force in preventing the commission of an offence, which would have the effect of reducing what would otherwise be murder to manslaughter?

RULES: The honest, although mistaken, belief that no more force is being used than is necessary is a defense that reduces what would otherwise be murder to manslaughter and that such defense is applicable by virtue of s.27(3) of the *Code* to the defense of self-defense.

The reduction from murder to manslaughter is applicable where the defense is that the force was to prevent the commission of a crime.

CONCLUSION: Appeal dismissed and a new trial ordered.

R V HEBERT, [1996] 2 SCR 272

FACTS: This case involves an altercation between a son, who was 30 years old, and a father, who was 75 years old and consumed a good deal of alcohol. The son stated that he did not assault his father, but attempted to protect himself from his father hitting him with a fish club. Although the only section pertinent to this case was s.34(1), the trial judge instructed the jury with regard to ss. 26, 27, 34(1), 34(2), and 37(1) of the *Criminal Code*. The BCCA concluded ss. 26 and 27 were unnecessary, and that there was no air of reality to s.34(2) because the son could not have been under a reasonable apprehension of death or grievous bodily harm; the BCCA confirmed the conviction (through s.686(1)(b)(iii)).

RULES: Once it has been determined that an error in law has occurred at trial, then the onus is upon the Crown to satisfy the Court that the verdict would necessarily have been the same is the error had not been made.

When you have an assault, and a defense of that assault, you should rely on s.34 and not s.27.

CONCLUSION: New trial was ordered; there was an error in law, and s.686(1)(b)(iii) is inapplicable.

RATIONAL: There were several serious errors of law including that the charge was so unnecessarily confusing that it constituted an error of law.

R V GUAY, 2008 NBCA 72

FACTS: At a staff party, the victim became drunk and confrontational. He approached the accused and his GF, words were exchanged, and he tried to grab her arm. The accused punched him in the face, he fell backwards, and hit his head, which caused a broken jaw and a head injury.

ISSUES: Was the force used in the circumstances excessive?

RULES: s.27 allows one to use 'as much force as is reasonably necessary' to prevent the commission of certain offences. The Crown must prove BARD that at least one of the elements of each defense is not established.

CONCLUSION: Appeal dismissed.

RATIONAL: There is an inability to find any error of law in the trial judge's reasoning in concluding the Crown had discharged their burden of proving the force the accused used was excessive. There is nothing in the trial reasons to suggest that the trial judge improperly imported a requirement of immediacy into the defenses, erred in considering the consequences of the force the accused used against the

victim, or misunderstood how to assess the requirement for proportionality of defensive force. On the evidence adduced at trial, the trial judge's decision that, in the circumstances, the force used was more than was necessary is a reasonable one.

DEFENCE OF PROPERTY

CHANGES IN DEFENCE OF PROPERTY

"A PRELIMINARY ASSESSMENT OF THE NEW SELF-DEFENCE AND DEFENCE OF PROPERTY PROVISIONS"

Section 35 now contains one defence for defence of property and makes no distinction between various forms of property and dwelling houses. There must be an air of reality on all four requirements of defence of property to put the defnece to the jury and there must be a reasonable doubt on all four requirements to justify an acquittal. The requirements are:

1. The accused under s.35 must believe, on a reasonable grounds, that they are in peaceable possession of property.
2. Under s.35(1)(b), the accused must believe on reasonable grounds that another person is entering, taking, damaging, or destroying the accused's personal property.
3. Under s.35(1)(c), the accused must be committed for the subjective purpose of protecting the property.
4. The offence committed by the accused must be reasonable in the circumstances.

***If required, review pages 119-124 for detailed ways in which the new provisions are different than the old.**

Peaceable possession: continuous and not interrupted by adverse suits or other hostile action intended to oust the possessor from the land. The property should be held without any adverse claim to possession of title by another.

DEFENCE OF PROPERTY AND REMOVAL OF TRESPASSER

R V KEPHART AND OLIVER, (1988) 44 CC (3D) 97 (ALTACA)

FACTS: Police try to remove two youths from the accused's home who were not supposed to be there. When the police entered the home, the accused then pushed the officer and an altercation ensued. They were arrested and the juveniles were apprehended. The accused were convicted of obstructing a police officer in the execution of his duty.

RULES: It is only in exceptional circumstances that police are allowed to forcibly enter residential premises without warrant. There is an onus to establish a justification for entry and, if not, then the occupants are entitled to resist the entry with force and may invoke s.40 of the *Criminal Code*.

CONCLUSION: Appeals allowed and convictions quashed.

RATIONAL: The evidence failed to establish that there was a justification for the police entry. There was no crime to be prevented and no life in danger. Nor was physical injury to the person or criminal damage to property to be feared.

R V GUNNING, 2005 SCC 27

FACTS: Accused fatally shot C, a person unknown to the accused, who had entered his home uninvited during a party. The accused denied that he intended to kill C, but had a sketchy memory due to alcohol. He claimed he was scared, that C assaulted him, and that he refused to leave his house.

ISSUES: #4 of the requirements for a defense of property was in dispute: was the force used reasonable?

RULES: Where the defence arises on the facts, the onus is on the Crown to prove beyond a reasonable doubt that the accused did not act in defence of property. There are 4 elements of this defense (old provisions): (1) the individual must be in the possession of the property; (2) the possession must be peaceable; (3) the person must be a trespasser; and (4) the force used must be reasonable in the circumstance.

CONCLUSION: Appeal of the accused allowed. The trial judge erred in taking too narrow of a view of the scope of the defence advanced and then he took an erroneous view that the defence could only be raised in respect of the 'use' that actually caused the death.

*orbitor case, doesn't seem important.

R V CORMIER, 2016 ABPC 159

FACTS: Mr. Blaikie submitted that the complainant became a trespasser when she was involved in the altercation and the accused, who was in peaceful possession of his room, was entitled to use minimal force to remove her.

RULES: In terms of the defence of property, a person is able to act when they believe on reasonable grounds that the person is 'about to enter, entering, or has entered' the property without legal right to do so. The phrase can be used to cover the situation where a person enters initially with permission, but becomes a trespasser.

CONCLUSION: Decided for accused; 'if I had had a reasonable doubt that the accused simply carried the complainant a few feet, his actions might as well be justified as common law and by the provisions of s.35'.

RATIONAL: It's difficult to believe that Parliament's intention was to reform the law of defence of property such that property owners or their agents could not remove individuals who were originally invitees, but has become unruly trespassers. This right was well entrenched in the CL prior to the enactment of any *Code* provision.

DEFENCE OF PERSONAL PROPERTY AND DEFENCE WITH COLOUR OF RIGHT

R V DOUCETTE, (1960) 129 CCC 102 (ONTCA)

FACTS: A purchaser who could not afford to pay the TV entered into a conditional sale agreement defaulted on his payment. The pawn shop wanted it back because they did not pay. The bailiffs, acting on behalf of an unpaid sale, entered the premises to seize the TV.

RULES: The owner of a chattel improperly detained by another, is not entitled to repossess the chattel by force and unless repossession can be achieved peacefully and without provoking a breach of the peace recourse must be had to legal proceedings in order to recover the property.

CONCLUSION: Appeal allowed, set aside the judgment of acquittal, and direct a verdict of guilty of common assault.

RATIONAL: The bailiffs had no official status as peace officers nor were they engaged in lawful execution or seizure with respect to the chattel, but on the contrary they were only private agents of the vendor and, as such, were guilty of trespass and assault in employing force to remove the chattel against the person in possession.

R V MCKAY, 2007 SCC 16

FACTS: Pashe has been partying at McKay's house and McKay had assaulted another partygoer and then told everyone to leave. Pashe returned with another partygoer to retrieve some property. He was told to leave, but refused to do so out of fear of is friend's safety. McKay obtained a knife and attacked Pashe, who disarmed him. McKary rearmed with two knives and, when Pashe again tried to disarm him, McKay was cut across the face.

RULE: Defense of property alone will not justify the intentional use of a weapon against a trespasser or the intentional killing of a trespasser. Such force will only be justifiable where the circumstances permit the accused to rely on self-defense principles.

CONCLUSION: Appeal is allowed, the conviction set aside, and the manner remitted to QB for a new trial.

R V SZCZERBANJWICZ, 2010 SCC 15

FACTS: S was a Lieutenant-Colonel in the Canadian military and had an argument with his wife. His wife took a mounted diploma off the wall and threw it on the floor. S then pushed her, she fell back, and fell down the stairs. He was charged with assault causing bodily harm. S argued it was justified because he was protecting his personal property (diploma).

RULES: s.39(1) provides a defense to criminal responsibility where the accused acts to defend their property; subjective belief about what force is required is relevant, but the subjective belief must be based on reasonable grounds, that is, it must be based on grounds that are objectively reasonable in the circumstance.

CONCLUSION: Appeal of accused dismissed.
NOTES: This case is still the old legislation.

R V SIMPSON, 2015 SCC 40

FACTS: Simpson and F are squatters on the property. There is some debate about whether they were told they were allowed to be there or now. There is a question re: color of right as a defense; it is most commonly invoked in relation to the offence of theft under s.322 of the *CC*, which prohibits the taking of an object "fraudulently and without colour of right". The term is also used to denote an honest belief in a state of facts which, if actually existed, would at law justify or excuse the act done.

RULES: To put the colour of right defense into play, the accused bears the onus of showing that there is an air of reality to the asserted defense. Once established, the burden falls on the Crown to disprove the defense beyond a reasonable doubt.

INTOXICATION

After a development in the law, intoxication became a defense when considering the mental element of most offences. It is not raised that often and, when it is, it requires that there be an air of reality to the defense.

Important Factors re: whether this defense can succeed:

1. The amount of alcohol consumed/ingested; is there evidence of that?
2. The time of drinking in relation to their physical state during/following the offence.
3. Any evidence of the accused's mental state during/following the offence such as confused thinking/speech.
4. The evidence of any bizarre behavior.
5. The evidence of any plan or deliberate behavior.
6. Ability for accused to remember event at all.

7. Any scientific testing such as a breath test, blood sample, ect.

With intoxication, it doesn't matter if they were *able* to form the intent, but if they DID form the intent. *Mckinley case*

****Mostly only important for historical reference and documenting how the law of intoxication has developed.**

DPP V BEARD, [1920] AC 479 (HL)

RULES: Three conclusions that can be drawn:

1. Insanity, produced by drunkenness or otherwise, is a defense to the crime charged.
2. That evidence of drunkenness, which renders the accused incapable of forming the specific intent essential to constitute the crime, should be taken into consideration with the other facts, to prove whether he had intent.
3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent, and merely establishing that his mind was affected by drink s that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

R V LEARY, [1978] 1 SCR 29 (SCC)

FACTS: This was a case of sexual assault. The accused raised that she had consented and, ALTERNATIVELY, if she did not consent, he was too drunk. The victim claimed there had been no consent.

RULES: A distinction is to be drawn between offences of general intent and those which also require a specific intent attending the purpose for the commission of the act. Drunkenness can only be a defense to specific intent offences.

CONCLUSION: Appeal should be dismissed.

RATIONAL: Rape is a crime involving a general intent as distinguished from a specific intent and is, therefore, an offence to which the defence of drunkenness can have no application.

R V BERNARD, [1988] 2 SCR 833 SCC

FACTS: Accused was charged with sexual assault causing bodily harm. The accused did not testify, but stated to the police that he forced her to have intercourse, but did so because he was drunk and, when he realized what he was doing, he got off.

RULES: **General Intent Offences:** ones in which the only intent involved relates solely to the performance of the act in question, with no further ulterior intent or purpose. Evidence of intoxication is inadmissible.

Specific Intent Offence: ones in which the performance of the actus reus, coupled with an intent or purpose going beyond the mere performance of the questioned act, must be shown. Evidence of intoxication is admissible to show lack of capacity.

CONCLUSION: Appeal of the accused should be dismissed.

****Mostly only important for historical reference and documenting how the law of intoxication has developed.**
As per e-mail: The *Leary* rule was an assumption that, because you intended to get drunk, you must have intended the act. The legal term for this is 'substituting *mens rea*' and is a common trend with some cases. *Daviault* eventually shows that this 'substitution of *mens rea*' is not proper, which is why intoxication is allowed as a defense for certain offences – the essence of criminal law is moral blameworthiness, so if an individual either fails to have the capacity to form the intent or does not form the intent to commit the offence, they do not have the moral blameworthiness.

R V DAVIAULT, [1994] 3 SCR 63 SCC

FACTS: D. was a chronic alcoholic, drank 6-8 bottles of beer, and then a bottle of brandy. He sexually assaulted a 65-year-old woman in a wheelchair. D. had no recollection of the assault and denied that it had happened. A pharmacologist testified that D. suffered a blackout due to the amount of alcohol that was consumed, which caused a temporary dissociative state.

RULES: Evidence of intoxication can be used as a defense in a specific intent offence. Evidence of intoxication can be used as a defense in general intent offences if it demonstrates such extreme intoxication that there is an absence of awareness akin to a state of automatism.

CONCLUSION: Appeal by the Crown is allowed and a new trial is ordered.

RATIONAL: Extreme intoxication to the point of automatism can negate mens rea. We cannot convict people without fault and we cannot substitute fault because of the fair labeling problem: labeled a sexual assault/rapist, but the actual wrong was drinking too much. To make sure people don't fake it, the burden is on the accused (balance of probabilities) to prove that he was a drunk automaton.

***however, this is now subject to s.33.1 – s.33.1 disallows the use of extreme intoxication for general intent offences with bodily harm.**

SECTION 33.1 CRIMINAL CODE

s.33(1) It is not a defense to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behavior, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act, or any other Act of Parliament, that includes an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

s.33 only applies to general intent offences and not specific intent offences. Intoxication is typically only available for specific intent offences and not general. Example) It can be raised on a break and enter, but not an assault alone (unless akin to automatism).

R V LEMKY, (1996) 1 SCR 757 SCC

FACTS: A man shot his wife and repeatedly confessed. They had both been drinking.
RULES: To use evidence of drunkenness, there must be an air of reality to the defense. Once an air of reality is present, the onus shifts to the Crown to prove that the accused formed the intent to commit the offence, and not that they had the capacity.
CONCLUSION: Appeal of the accused is dismissed. There was no air of reality to the defense of intoxication.

R V DALEY, 2007 SCC 53

FACTS: After a heavy night of partying, Mr. Daley's wife was found in a pool of her blood, dead, in the kitchen. Mr. Daley was found drunk in a bedroom and charged with first degree murder. He claimed he was too drunk to remember the events of that night.

RULES: There are three legally relevant degrees of intoxication: 'mild', 'advanced', and extreme intoxication.
Advanced Intoxication: individuals lack specific intent (addresses *mens rea*) of the offence and has an impairment of their foresight.
Extreme Intoxication: the level of intoxication of automatism and negates involuntariness.

The threshold for instructing juries on intoxication was set out in *Robinson*: before a trial judge is required by law to charge the jury on intoxication, they must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt.

CONCLUSION: Appeal of the accused is dismissed.

R V BOUCHARD-LEBRUN, 2011 SCC 58

FACTS: Two men took pills, got high, and decided to beat up the victim because he 'wore an upside-down cross'. A neighbor, D, jumped in to help, but was severely beaten and left disabled in a hospital for the rest of his life. They were convicted on the counts of aggravated assault on the basis that **s.33.1** of the *Criminal Code* provides that self-induced intoxication cannot be a defence to an offence against the bodily integrity of another person.

RULE: You start with the presumption that temporary psychosis caused by intoxication is excluded from **s.16**; the presumption can be rebutted by showing that the accused was suffering a disease of the mind that was unrelated to intoxication-related symptoms.

CONCLUSION: The appeal was dismissed; B was not suffering from a disease of the mind.

RATIONAL: The accused voluntarily took pills and was in a psychotic condition due to intoxication at the time of the attack. Taking the pill was the external cause; a normal person would likely develop psychosis. The delusions stopped at the same rate as the intoxication.

Internal Cause Factor: look at the nature of the trigger and determine whether a normal person in the same circumstances might have reacted to it by entering an automatistic state as the accused claims to have done; the comparison between the circumstances of the accused and those of a normal person will be objective and may be based on the psychiatric evidence. If a normal person, not suffering from a disease of the mind, would react similarly = easier to say the trigger was external.

Continuing Danger Factor: the purpose of this factor is to assess the likelihood of recurring danger to others; where a condition is likely to present a recurring danger, there is a greater chance that it will be regarded as a disease of the mind. Danger to public safety caused by the accused voluntarily taking drugs would not be a result of a mental disorder under **s.16**. Apply the *Stone* test on a case-to-case basis.

R V TATTON, 2015 SCC 33

FACTS: Tatton, in a highly intoxicated state, placed a pan with oil on the stove, set the burner to high, and left the house to get a coffee at a nearby Tim Hortons. When he returned approximately 20 minutes later, the house was on fire. Tatton relied on the defense of accident based on his drunkenness to rebut the intent requirement for the offence of arson.

RULES: The test/framework for determining if there is specific vs. general intent:
What is the mental element?

i. Complexity of the thought and reasoning that make up the *mens rea* of the offence.

What are the social policies underlying the offence?

i. Is alcohol habitually associated with the crime? (YES for violent, unruly, property damage crimes).
ii. Presence of a lesser included general intent offence in the main offence.
iii. Presence of judicial sentencing discretion.

Specific Intent Offences – those where there is an intention beyond mere performance of an act. General Intent Offences – simply the intent to perform the act in question with no ulterior purpose.

CONCLUSION: No, intoxication short of automatism is not a defense to a charge of arson under **s.434** of the *Criminal Code*.

RATIONAL: The AR for arson = damaging property (fire is the method of the damage). The MR for arson = the intentional or reckless performance of damage to property; no additional knowledge or complex thought is needed. Property damage is often associated with intoxication. There would be an erosion of policy underlying the offence if intoxication was allowed to be a defense.

THE CONSTITUTIONALITY OF S.33.1 OF THE *CRIMINAL CODE*

R V FLEMING, 2010 ONSC 8022

FACTS: Accused was charged with sexual assault. He intended to raise a defence of self-induced intoxication, but s.33 disallowed him to do so. He applied for a declaration that s.33.1 was of no force and effect and contrary to s.7 and s.11(d) of the *Charter*.

CONCLUSION: Application allowed; the accused was permitted to advance an intoxication defence at trial.

R V SN, 2012 NUCJ 02

FACTS: Accused has brought an application to have s.33.1 of the *Criminal Code* declared unconstitutional and, therefore, of no force and effect. He is accused of sexually assaulting another adult male. SN and alleged victim were locked up in the drunk tank at the RCMP detachment when the incident occurred. Neither remembers the event because of their intoxicated state, but the police and civilian guard have a recollection.

CONCLUSION: Application dismissed; the defence of extreme intoxication is not available to SN at trial.

These two cases are trial court decisions, so there are no SCC decisions re: constitutionality of s.33.

MENTAL DISORDER

NOT CRIMINALLY RESPONSIBLE BY REASON OF MENTAL DISORDER (INSANITY)

s.16(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

s.16(2): Every person is presumed *not* to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until contrary is provided on the balance of probabilities.

s.16(3): The burden of proof that an accused was suffering from a mental disorder is on the party that raises the issue.

Fitness: the inability to understand the proceedings (any stage) and can include: the nature/object of the proceedings, the possible consequences of the proceedings, or if you can't communicate with counsel.

'While Suffering': during the time of the incident and not at the time of trial; 'suffering' means it's impacting your thought patterns.

s.672.12 allows for an accused to ask for a fitness assessment; the judge is able to ask for a fitness assessment, which cannot be contested. The Crown can ask for an assessment if the accused raises it, or if there are probable grounds.

PRESUMPTIONS

1. Every person is presumed to be sane;
2. Unless you raise the defense of automatism, then you're presumed to be insane (suffering from a disease of the mind).

DISEASE OF THE MIND

Disease of the Mind: embraces any illness, disorder, or abnormal condition, which impairs the human mind and it's functioning, excluding self-induced states such as alcohol or drugs. A disease of the mind is *internal* and not caused by an external cause.

The central question in deciding whether an accused is suffering from non-mental disorder automatism or mental disorder automatism is whether the accused is suffering from a disease of the mind. This is a question to be determined by the judge and contains a legal, policy, and medical component.

R V RABEY, (1977) 17 OR (2D) 1 (ONTCA)

FACTS: Rabey and the victim were friends at college. The accused attacked the victim and hit her in the head with a rock and choked her. Witnesses testified that Rabey was pale, sweating, glassy-eyed, and had a frightened expression. Rabey testified that he couldn't remember what happened. **Dr. Orchard:** he was suffering from non-insane automatism due to a psychological blow. **Dr. Rowsell:** he went into extreme rage; he suffers from a disease of the mind and has a psychiatric problem.
ISSUE: Was this insane automatism or non-insane automatism?

RULE: The ordinary stresses and disappointments of life do not constitute an external cause that explains the malfunctioning of the mind that would take it out of the category of a 'disease of the mind' (insane automatism).

Transient disturbances of the consequences resulting from external factors do not amount to a disease of the mind. 'Disease of the mind' is not a medical term, it's informed by a medical opinion, but it is a legal term.

CONCLUSION: Appeal dismissed.

RATIONAL: Infatuation with the woman had created an abnormal condition in his mind under the influence of which he acted unnaturally and violently to an imagined slight to which a normal person would not have reacted in the same manner (non-insane automatism). Non-insane automatism: the presence of an external factor, with includes: an emotional shock without injury, a serious accident, seeing a loved one murdered/sexually assaulted = allow a non-insane automatism defense. Emotional stress cannot be said to be an external factor.

R V COOPER, 1980 1 SCR 1149

FACTS: The accused was charged with murder of a patient at a psychiatric hospital. The accused and victim went for a walk, they had a failed attempt at intercourse, and he strangled and killed her. He claimed he did not intend to kill her (murder requires subjective fault).

ISSUES: Did the accused suffer from a disease of the mind? What does 'disease of the mind' mean?

RULE: 'Disease of the mind is a **legal term and NOT a medical term** (informed by medical/scientific knowledge, but ultimately a legal determination) which includes any illness, disorder, or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.

CONCLUSION: Appeal allowed & new trial ordered; the trial judge instructed the jury incorrectly on **s.16**.

RATIONAL: The legal concept is not a medical one and it is a question of law for the judge. Medical expert evidence may be considered, but it is not determinative; this is what led to the new trial - the trial judge erred in only using the medical evidence as a determinative factor. The appellant had a history of breaking with reality, he was unstable, and he was aggressive. He had limited intelligence. When it is all put together = not able to form request intention to kill = NCR MD.

R V BARNIER, 1980 1 SCR 1124

FACTS: Accused is on trial for murder and raised defense of insanity. All psychiatrists testified that he was insane under the meaning of s.1692), but the Crown has a psychiatrist who testified that the accused *could appreciate* the nature and quality of the act of shooting the deceased. The TJ charged the jury that, within s.16(2), 'known' means 'appreciate'.

RULE: s.16(2) means an accused must be incapable first of appreciating, in an analytical sense, the nature and quality of the act or of knowing in the positive sense that his act was wrong.

CONCLUSION: Appeal decided for the accused. The psychiatrist used the wrong interpretation.

RATIONAL: Due to the fact that the legislation includes BOTH appreciate AND know within it, it can only be assumed that the Legislature meant for them to have different meanings.

Intoxication can cause some of the similar symptoms of someone who might be suffering from a disease of the mind. It becomes difficult when determining if they're suffering from intoxication or a disease of the mind.

R V TURCOTTE, 2013 QCCA 1916

FACTS: After he put his children to bed, he wanted to end his life. He drank a large quantity of windshield washer fluid, but realized he didn't want his kids to find his body. He wanted to 'bring them with him' and killed them with a knife. He was suffering from an adjustment disorder with anxiety and depression. Crown appealed a jury verdict of NCR because the effects of intoxication made the defense of mental disorder inadmissible.

ISSUES: Did the judge correctly conclude that the respondent's mental condition met the legal test of mental disorder?

RULE: Self-induced intoxication does not rule out the defense of mental disorder, unless it was the sole reason for the disorder.

CONCLUSION: Appeal allowed. The judge should have charged the jury re: the degree to which the self-induced intoxication contributed to the incapacity.

RATIONAL: There is evidence that the accused was suffering from a mental condition that rendered him incapable of appreciating the nature and quality of his actions or of knowing that they were wrong. The source of that mental disorder was a disease of the mind independent of intoxication. The intoxication only *worsened* his state. The judge was correct in allowing the defense of mental disorder to go to the defense, but he erred in the charge to the jury re: the effect of intoxication.

INCAPABLE OF APPRECIATING NATURE AND QUALITY OF ACTS

R V COOPER, 1980 1 SCR 1149

RULE: To appreciate is more than merely to know and be aware of the physical act; it involves appreciating and understanding the consequences of the act (not the legal consequences, but physical consequences).

R V BARNIER, 1980 1 SCR 1124

RULE: 'Knowing' requires a bare awareness, the act of receiving information without more. The act of appreciating is a second stage in a mental process requiring the analysis of knowledge or experience in one manner or another.

"APPRECIATE" – PHYSICAL CHARACTER OF ACT OR PHYSICAL CONSEQUENCES

R V KJELDSEN, 1981 2 SCR 617

FACTS: Accused was a patient at a mental hospital. He was detained having been found NCR of rape and attempted murder. He was given a day pass where he took a flight to Calgary and got a taxi to take him to Banff. He told her to go on a back road where he raped her and then murdered her. Defense argued he was a psychopath and that 'appreciating' involved a capacity to foresee and understand the subjective or emotional reactions of those affected. A psychopath would not have this ability.

ISSUES: What is the definition of the word 'appreciating' in s.16?

RULE: Appreciation of the nature and quality of the act does not import a requirement that the act be accompanied by appropriate feeling about the effect of the act on other people.

R V ABBEY, 1982 2 SCR 24

FACTS: Abbey was charged with importing cocaine and possession for the purpose of trafficking. Psychiatric evidence said that he suffered from the delusion that no harm would befall him and he would not get into trouble; delusion that he was protected from punishment by some external force. He appreciated the nature and quality of the act. This is a knowledge crime.

RULE: The ability to appreciate penal consequences is irrelevant to the *mens rea* requirement; the accused must be incapable of appreciating the nature and quality of actions as it pertains to their consequences. The punishment is a result and not part of the element of the offence.

RATIONAL: The appreciation of the consequences of actions is a restatement of *mens rea* or the intention requirement. A delusion which renders the accused incapable of appreciating the appropriate penal sanctions does not go to the *mens rea* and it does not render the accused incapable of appreciating the nature of his acts. Punishment is not an element of the crime itself.

KNOWING ACT OR OMISSION IS WRONG

R V OOMMEN, 1994 2 SCR 507

FACTS: The accused suffered from paranoid delusions; he thought the female victim was part of a conspiracy to kill him. He shot her.

RULE: 'Wrong' – the question is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and, hence, the ability to make a rational choice about whether to do the action or not.

CONCLUSION: A new trial was ordered.

RATIONAL: The accused knew discharging a gun was a death-threatening act. The accused's mental disorder deprived him the capacity of knowing his actions were wrong by the standards of an ordinary person.

R V CHAULK, 1990 3 SCR 1303

FACTS: Convicted of murder and his only defense was mental disorder. This is a result crime.

ISSUE: What is the meaning of the word 'wrong' in **s.16(1)**? Does it mean legally wrong, or does it mean morally wrong?

RULE: Everyone under the law is presumed to be sane. A person may be aware that an act is legally wrong, but by reason of disease of the mind, is incapable of appreciating that his act was morally wrong according to the standard of society.

RATIONAL: The term 'wrong' used in **s.16(1)** means more than simply legally wrong.

R V OLAH ET AL., 1997 33 OR (3D) 386

FACTS: Accused stated one week before the killing that, 'the one thing I want to do before I die is kill someone'. He snuck out of his bedroom, arrived at a gas station where his friend worked, smoked hash, and waited for someone that had a good car, money, and who could be easily subdued. His friend put a garbage bag over the victim's head and they killed him. Accused seemed fine during and after the incident and gave a statement to the police.

ISSUES: Did Olah have the capacity to know at the time of the killing that his act was wrong in the context of s.16(1)?

RULE: 'Wrong' in s.16(1) could be two things: (1) an accused, who because of the disease of the mind, believes that his act is justified – that is not wrong; and (2) an accused who, because of a disease of the mind, is incapable of rationally considering whether a particular act was right or wrong, as a normal person would. Both are entitled to the benefit of s.16 because the accused is incapable of knowing that the particular act is wrong.

CONCLUSION: Appeal of Crown dismissed.

RATIONAL: The TJ's charge to the jury re: 'wrong' within s.16(1) was correct and satisfied both *Chaulk* and *Oommen* requirements.

R V DE GROOD, 2016 ABQB 294

FACTS: Accused became a drug addict in grade 11 and sought ADAC counselling. He eventually completed a degree and was accepted into law school. He fatally stabbed 5 people at a house party in Calgary.

ISSUES: Whether it is possible that an accused is malingering or feigning a mental illness?
RULE: Expert evidence can help inform an opinion re: whether an accused is feigning a mental illness.
CONCLUSION: There is no evidence to suggest that Mr. de Grood was malingering such as his incident searches re: NCRMD, the consistency of his delusions, and the progress that he had made in response to his medications.

WHEN THE CROWN MAY RAISE INSTANITY DEFENSE

The Crown might raise NCRMD after the jury has determined guilt for protective purposes in terms of the accused as well as the public.

R V SWAIN, 1991 1 SCR 933

FACTS: Charged with assault and aggravated assault; he assaulted his wife and child by picking them up and swinging them around. He seemed to be in a delusional state based on the things he said.

ISSUES: Can the Crown adduce evidence of insanity over and above the accused's wishes?
RULE: Mental disorder can only be put to the jury without the accused's consent if:

1. The accused raised the issue of his consciousness (non-insane automatism) or;
2. The jury determines guilt.

CONCLUSION: No, adducing evidence over and above the accused's wishes is not a violation of someone's **s.7** *Charter* right.

RATIONAL: The objective CL rule allows the Crown, in some cases, to raise evidence of insanity over and above the accused's wishes is twofold:

1. To avoid the conviction of an accused who may not be responsible on account of insanity, but who refuses to adduce cogent evidence that he was insane.
2. The protection of the public from presently dangerous persons requiring hospitalization.

REFUSAL TO SUBMIT TO PSYCHIATRIST EXAM BY CROWN

R V JONES, 1994 2 SCR 229

FACTS: Accused was charged with several sexual offences allegedly committed while he was on parole from serving a sentence for other sexual offences. He was submitted for psychological testing and was not specifically warned that the evidence of the psychiatrists could be used to assist in determining whether or not he was a dangerous offender. The Crown sought to have him labeled a dangerous offender. TJ = dangerous offender. Appeal dismissed.

ISSUES: Was the use of the evidence from the psychiatrists in violation of his s.7 and s.10(b) rights?

RULE: s.7 does not extend to a denial of critical evaluative evidence from psychiatrists legally gained at a pre-trial evaluation that may show whether an offender could be qualified as dangerous.

CONCLUSION: SCC dismissed his appeal. There was no violation of either right.

RATIONAL: Use of the evidence gathered by the psychiatrist did not violate his s.7 rights because they were not used to incriminate him in his dangerous offender proceedings. By the time the accused had reached the proceedings, he had already been found culpable of the offence for which he was charged. He was no longer an accused, but an offender. The accused not only consented to the evaluation, but requested it. He was fully warned that his statements might be used against him in court and proceeded anyways.

R V PAUL, 2010 ONCA 696

FACTS: Accused, who lives in London, flew to Canada. He drove to victim's house, broke in using a key he made from a previous visit, and called to tell her he was in England. Victim and boyfriend came home, went to bed, and accused began to attack both of them with a hammer. They eventually were able to get away.
ISSUES: Were the statements the accused made as part of his fitness assessment protected from use by s.672.21 re: dangerous offender hearing?

RULE: To exclude psychiatric evidence obtained in pre-trial evaluation, which tends to show someone is dangerous, it would deny the court access to important evidence it can use to most accurately tailor the sentence while its admission can assist the court in reaching the most appropriate sentence, having regard to the interests of both the offender and of society.

CONCLUSION: Appeal from accused is dismissed.

R V WORTH, 1995 23 OR (3D) 211 (ONTCA)

FACTS: Sentenced to life imprisonment through jury as a result of a second-degree murder charge. It was not contested. He had the girl's severed head in a bag in his car. He did not agree to be assessed by a psychiatrist and, in his charge to the jury, the accused argues he infringed his s.7 right to silence by drawing an adverse inference from his refusal.

ISSUES: Whether the accused had established the defense of mental disorder within s.16?

RULE: If the appellant puts his sanity into question, he has the burden of proving his mental disorder. Should he refuse to have a psychological assessment, he cannot use s.7 to invoke a right to silence to protect him from an assessment.

CONCLUSION: Appeal of accused dismissed.

s.672.21(1): protected statements are any statements made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the assessment, or to anyone acting under that person's direction.

Under s.672.21(1)(f), a protected statement is admissible for determining criminal responsibility, if the accused puts their mental capacity in issue, to challenge the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously.

S.672.21 CRIMINAL CODE – PROTECTED STATEMENTS

s.672.21: in this section, protected statement is a statement made by the accused during the course and for the purpose of an assessment directed by a disposition, to the person specified in the assessment. No protected statement is admissible in evidence, without the consent of the accused, in any proceeding before a court. **Exceptions:** determining whether the accused is unfit to stand trial, making a disposition or placement decision respecting the accused, determining whether to refer to the court for review a finding that an accused is a high-risk accused, determining whether the accused was suffering from automatism or a mental disorder as to exempt from criminal responsibility, challenging the credibility of an accused, or establishing the perjury of an accused.

R V G(B), 1997 119 CCC (3D) 276

FACTS: Accused appeals a judgement where he was found guilty of 22 counts of committing various sexual acts against his young cousin. He attended a police statement and, after being read his rights and denying a lawyer, he wrote a statement explaining in detail the occurrence of the sexual acts. Dr. Wolertz examined him re: fit to stand trial (under s.672.21) and, during that examination, he questioned him re: his statement to the police. Dr. Wolertz's report was admitted at trial.

ISSUES: Can the admission contained in the report of Dr. Wolwertz be admitted under exception (f): for the purpose of establishing/attacking credibility.

CONCLUSION: Decided for the accused; appeal allowed and a new trial is ordered.

RATIONAL: The trial judge erred in using the statements against the accused because:

1. As the protected statement was obtained by using inadmissible evidence, it could not be used for any purpose.
2. The accused never was confronted with this protected statement and, therefore, did not have the opportunity to explain himself in that regard.
3. The TJ could not accept the admission made to Dr. W without considering the opinion of Dr. L, which he had however accepted in his judgment on the voir-dire.

EVIDENCE FALLING SHORT OF INSANITY

R V KJELDSEN, 1981 2 SCR 617

FACTS: Accused was a patient at a mental hospital. He was detained having been found NCR of rape and attempted murder. He was given a day pass where he took a flight to Calgary and got a taxi to take him to Banff. He told her to go on a back road where he raped her and then murdered her. Defense argued he was a psychopath and that 'appreciating' involved a capacity to foresee and understand the subjective or emotional reactions of those affected. A psychopath would not have this ability.

RULE: s.16(2) does not extend to a person who has the necessary understanding of the nature, character, and consequences of the act, but merely lacks appropriate feelings for the victim, or lacks feelings of remorse of guilty for what he has done, even though such lack of feeling stems from a 'disease of the mind'.

CONCLUSION: Decided against the accused.

R V BROWNING, 1976 34 CCC (2D) 200 ONTCA

FACTS: Accused was found guilty on two counts of murder and was sentenced to two concurrent, mandatory life sentences. The only real defense at trial concerned the evidence of a psychiatrist on the question of his intent to either mean to cause the death, or mean to cause them bodily harm as he knew was likely to cause death/reckless as to the consequences. Dr. Wickware testified that he was *not* insane within the meaning of s.16, but he had some emotional problems that may have affected his ability to form the necessary intent.

RULE: Emotional problems, which may affect an ability to form a necessary intent, will not be sufficient for a s.16 defense.

CONCLUSION: Appeal on behalf of the accused dismissed.

R V CHARTRAND, 1977 1 SCR 314

FACTS: Chartrand was convicted for the capital murder of a police officer. CA upheld conviction. Appellant claimed that, at the time of the crime, he was mentally ill and, therefore, insane in the sense of s.16 of the *Criminal Code*.

RULE: Evidence re: the subject of the inner pathological process cannot be taken into consideration under our criminal legislation, which does not recognize the diminished responsibility theory.

CONCLUSION: Appeal on behalf of the accused is dismissed.

PARTIAL DEFENSE OF INFANTICIDE

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

'Mind is disturbed': mentally agitated, mentally discomposed, and it does not need to be a mental illness.

The difference between NCRMD and infanticide is the fact that the act/omission does not actually have to be caused by the disturbance of the mind.

R V BOROWIEC, 2016 SCC 11

FACTS: Charged with 2 counts of second degree murder of her two newborns. TJ acquitted her of second degree and charged with infanticide. Crown appealed and the Court of Appeal dismissed.

RULE: Infanticide if a form of culpable homicide and applies in the narrow set of circumstances where:

1. A mother, by a willful act or omission, kills her new born child; and
2. At the time of the act or omission, the mother's mind is 'disturbed' either because she is not fully recovered from the effects of giving birth, or by reason of the effect of lactation.

'her mind is the disturbed":

a) "Disturbed" is not a legal or medical term, but should be applied in its grammatical and ordinary sense.
b) In this context, the term can mean 'mentally agitated', 'mentally unstable', or 'mental discomposure'.
c) It need not constitute a mental disorder under s.16 or amount to a significant impairment of the accused's reasoning faculties.
d) The disturbance must be present at the time of the act causing the child's death and the act must occur at the time when the accused is not fully recovered from birth.
e) There is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is the *actus reus* and not the *mens rea*.
f) The disturbance must be by reason of the fact that the accused was not fully recovered from the effects of giving birth consequent on the birth of the child.

CONCLUSION: Appeal dismissed.

RATIONAL: Does not agree with the dissenting judge at the Court of Appeal that Parliament intended to restrict the concept of a disturbed mind to those who have 'a substantial psychological problem'.

AUTOMATISM

DEFINITION

Automatism: without full awareness, will, intention, or purpose; an individual enters into a dissociative state and is no longer acting voluntarily. A lack of a memory is a factor, but it does not restrict them from raising the defense.

Automatism is not codified, it is a common law offence, and it deals with *mens rea*, which is the inability to make a link between your acts and your behavior.

Two types of Automatism:

1. **Insane Automatism** – when there is a malfunction of the mind or something specific to your internal makeup that arises from an internal cause; a psychological or emotional makeup of the person.
    a. If this is found, then the person is found NCRMD.
2. **Non-insane Automatism** – a malfunctioning of the mind that is transient and produced by an external factor.
    a. If this is found, then the person is entitled to a full acquittal.
    b. Examples: concussions, involuntary intoxication, or sleepwalking.

Example) Psychological blow that a lot of people would react the same such as if you freaked out after watching someone you loved get murder.

EVEN in instances where you do not have a disease of the mind, it could be either insane or sane automatism. The starting presumption is that it is *insane automatism* and the accused has to demonstrate whey it's sane automatism.

R V RABEY, 1980 2 SCR 513

FACTS: Rabey and the victim were friends at college. The accused attacked the victim and hit her in the head with a rock and choked her. Witnesses testified that Rabey was pale, sweating, glassy-eyed, and had a frightened expression. Rabey testified that he couldn't remember what happened. **Dr. Orchard:** he was suffering from non-insane automatism due to a psychological blow. **Dr. Rowsell:** he went into extreme rage; he suffers from a disease of the mind and has a psychiatric problem.

ISSUE: Was this insane automatism or non-insane automatism?

RULE: The ordinary stresses and disappointments of life do not constitute an external cause that explains the malfunctioning of the mind that would take it out of the category of a 'disease of the mind' (insane automatism). Was the cause of the automatism a blow, or a weakness/defect of an individual? If a weakness → insane automatism.

Transient disturbances of the consequences resulting from external factors do not amount to a disease of the mind.

RATIONAL: Infatuation with the woman had created an abnormal condition in his mind under the influence of which he acted unnaturally and violently to an imagined slight to which a normal person would not have reacted in the same manner (non-insane automatism). Non-insane automatism: the presence of an external factor, with includes: an emotional shock without injury, a serious accident, seeing a loved one murdered/sexually assaulted = allow a non-insane automatism defense. Emotional stress cannot be said to be an external factor.

R V PARKS, 1992 2 SCR 871

FACTS: The accused was having difficulty sleeping and had an episode of sleepwalking. He left his house, drove 23 km to his in-laws place, then strangled his father-in-law and stabbed/beat his mother-in-law. He then went to the police station and told them he had killed them with his bare hands. He was charged with murder and attempted murder.

ISSUES: Is sleepwalking properly classified as non-insane automatism, or does it stem from a disease of the mind?

RULE: Sleepwalking is not a disease of the mind; it is a special category of non-insane automatism. No act is punishable unless it is done voluntarily. When automatism stems from a disease of the mind, then the accused is not entitled to a full acquittal, but a verdict of insanity. When an automatism does not stem from a disease of the mind, then the accused is entitled to a full acquittal.

CONCLUSION: Crown appeal dismissed; the trial judge did not err in charging the jury with the defense of automatism.

RATIONAL: A disease of the mind is a legal concept with a medical component and a policy component. The Dr.'s testimony showed that Parks was sleepwalking at the time of the crime, that sleepwalking is not a neurological, psychiatric, or mental illness, and that there is no medical treatment for it except 'sleep hygiene'. Sleepwalking is a special category of non-insane automatism.

Policy Considerations:

1. The scope of the exemption from criminal responsibility; and
2. The protection of the public by the control and treatment of persons causing harm while in a mentally disturbed state.

There are two approaches to the disease of the mind inquiry:

1. **Continuing Danger Theory:** any condition likely to present a recurring danger to the public should be treated as insanity.
2. **Internal Cause Theory:** a condition stemming from the psychological or emotional makeup of the accused (a genetic susceptibility), rather than some external factor, should lead to a finding of insanity.

Reoccurrence is not a mandatory component. Transience/duration is also not determinative on its own.

R V STONE, 1999 2 SCR 290

FACTS: The accused stabbed his wife 47 times after she repeatedly was verbally abusive to him in the car. He heard a 'whoosh' before he killed her and woke up to a knife in his hand. He hid the body, cleaned up the mess, sold the car, and flew to Mexico. While there, he felt a 'whoosh' sensation, returned to Canada, and turned himself in.

ISSUES: Should non-insane automatism have been put to the jury?

RULE: The legal burden is on the accused to prove on a balance of probabilities that he wasn't acting voluntarily when he raises non-insane automatism (reverses the legal burden). Steps to prove:

1. The judge must decide if there is evidence upon which a jury could find the accused acted involuntarily on a balance of probabilities – is there an involuntary action? Look at the expert evidence, the severity of the triggering stimulus, corroborating evidence of bystanders, corrborating medical history of automatistic-like dissociative states, evidence of motive for the crime, and whether the alleged trigger of the automatism is also the victim of the violence.
2. If you're satisfied that there is automatism, then the presumption is what it is caused by a disease of the mind. The trier of fact then asks whether there is evidence that it is not a disease of the mind.

CONCLUSION: Appeal dismissed; the trial judge had the right ruling re: disease of the mind.

RATIONAL: The law presumes that only voluntary behavior can be punished; genuine cases of automatism will be rare. Automatism is easily faked and all of the knowledge rests with the accused – it is therefore a reasonable infringement of **s.11(d)** that the burden rests on the accused to prove involuntariness on a balance of probabilities. Making the Crown prove voluntariness in an automatism case negates the purpose of the presumption of voluntariness.

Approach to determining the disease of the mind:
The courts should take a more holistic approach: internal factors + continuing danger factors + policy factors (protection and safety).

R V LUEDECKE, 2008 ONCA 716

FACTS: Appeal by the Crown from the respondent's acquittal on a charge of sexual assault. The respondent acknowledged that he engaged in non-consensual sexual relations, but he claimed he was asleep when it occurred, was unaware of what was happening, and was unable to control his actions. He raised non-mental disorder automatism.

RULE: At the pre-verdict stage, social defense concerns dominate, which focus on the risk posed by the potential recurrence of the conduct in issue. Where that risk exists, the risk combined with the occurrence of the conduct that led to the criminal proceedings will almost always justify further inquiry into the accused's dangerousness, so as to properly protect the public.

In the post-verdict stage, the emphasis shifts to an individualized assessment of the actual dangerousness of the person found NCR-MD. Where that personalized assessment does not demonstrate the requisite significant risk, the person found NCR-MD must receive an absolute discharge.

Paragraphs 90, 91, and 98 are important.

CONCLUSION: Appeal of the Crown allowed. A new trial ordered.

RATIONAL: An outright acquittal reflected the non-culpable nature of the conduct, but did not address the potential danger posed by the respondent's condition. The *Criminal Code* responded to the public safety concerns by treating almost all automatisms as the product of a mental disorder leading not to an acquittal, but to an NCR-MD verdict.

EVIDENTIARY BURDEN ON ACCUSED

R V MCQUARRIE, 1998 ABCA 246

FACTS: Accused was charged with impaired driving, dangerous driving, and refusal to provide breath samples. The accused raised the defense of non-insane automatism (non-mental disorder automatism). He had two beers in a club house after a golf tournament. After a series of driving accidents, witnesses in contact with him after said he had no facial expression and was unresponsive. He appeared unaware of his whereabouts. A police officer testified that he appeared to be affected by something in addition to alcohol impairment and had difficulty understanding.

RULE: The test to be applied in determining whether the defense of non-mental disorder automatism should be left to the jury or considered by the judge as a trier of fact involves two separate considerations:

1. Whether there is some evidence on the record to support leaving the defense to the jury; and
2. Whether the condition alleged by the accused as the cause of his automatic behavior constitutes non-medical disorder automatism.

Where this foundation is present, the defense will be left to the jury. The mere assertion of a lack of memory is insufficient. The accused has an evidential burden to raise some evidence pointing to a condition that is in law non-insane automatism before the defense can be left to the jury. Expert evidence is necessary.

CONCLUSION: Appeal to CA dismissed.

RATIONAL: What is missing in this case was some expert evidence giving an air of reality to the claim that, at the time of the commission of the acts constituting the offences, the accused suffered from some condition which permitted or caused ihim to execute complicated acts unconsciously, or without conscious thought or intent.

R V BERGAMIN, 1996 187 AR 333 ALTACA

FACTS: Accused was convicted of aggravated assault upon her 7-year-old son. An expert witness who testified for the defense stated that it was possible that the accused suffered from intermittent explosive disorder, which may or may not result in a dissociative state. The sufferer may or may not have partial or complete memory of the episode in which he or she had no control and overreacts to a minor events. Crown adduced evidence that she was suffering from depression and that intermittent explosive disorder should only be used in situations with no other explanation. TJ concluded Crown proved BARD that the actions of the accused were voluntary.

RULE: It is not unreasonable for a trial judge to conclude that no doubt had been raised as to the voluntariness of an accused's actions. A trial judge has no obligation to consider and then articulate the reasons why he has rejected every single argument put before him.

The question should be whether the accused's actions at the relevant time were voluntary, not whether she was conscious or could recall the actions. Memory of lack thereof is not definitive in itself of an involuntary state.

CONCLUSION: Appeal of the accused should be dismissed.

R V MCCLENAGHAN, 2008 ABCA 7

FACTS: The accused and the deceased were business partners, but the accused has been trying to dissolve the business for some time. A disagreement occurred, which caused the accused to go to his truck, get a gun, shoot the deceased twice, pause, and then shoot for a third, which entered his head. TJ told the jury that the respondent had to prove he had a mental disorder as she defined it. She told the jury there was uncontradicted evidence that he suffered from a mental disorder.

ISSUES: Did the TJ properly instruct the jury with regards to the burden of proof; specifically, where did the burden of proof lie in this case, and what is the standard of proof?

RULE: The clear misdirection on the substantial lack of supporting evidence for a history of dissociation on the part of the respondent, coupled with serious mis-statement of the 'proven' evidence cannot be seen to be harmless, especially when supported by an instruction that mental disorder was effectively proven as a consensus.

Non-mental disorder automatism did not escape the burden of proof under s.16. If the trier of fact is satisfied, on BAP, that non-mental disorder automatism has been proven, then an acquittal must be entered.

CONCLUSION: Appeal allowed.

R V FONTAINE, 2004 SCC 27

FACTS: Fontaine worked at a car garage. Renaud, a former employee, called the store and said "we're coming to get you, pigs". Dompierre, the eventual victim, came in to the store and told a co-worker that there was a hit out for Fontaine and himself. Having been informed of this, when he left work, Fontaine purchased a firearm. That evening, Fontaine saw Renaud outside his house. During the night, Fontaine smoked marijuana and at some point in the night he freaked out and shot bullets through his windows and doors, thinking that someone was breaking in to get him.

The next day, Dompiere came into the garage to pay off a debt and Fontaine, thinking he was the hitman, shot him seven times, killing him. He turned himself into the police. He claimed that he was "frozen" at the time of the murder and only partially recollected it; he said that his actions were not his own. The doctor for the defence found conclusively that Fontaine did have a major psychological disorder and that he was unable to determine right from wrong.

ISSUES: How much evidence is needed to pass the automatism defense as laid out in *Stone*?

RULE: In order to put automatism to the jury, there just has to be an air of reality. As long as there is some evidence that the accused acted involuntarily, then the defense can go to the jury (modification of *Stone*). **Paragraph 82 is important.**

CONCLUSION: Appeal dismissed.

RATIONAL: It is not up to the judge to determine whether or not the evidence that was put forward is true. All that they should determine is if it is true, if it could be used to properly raise the defence of automatism. The evidentiary burden on the defendant is proved if he or she shows some evidence, including expert testimony, which could lead to a properly instructed jury finding that the defence applies (the air of reality test). It is then up to the jury as finders of fact to determine if the evidence is true, and if the defence applies.

Applying that to the case at bar, the Court of Appeal was correct in ordering a new trial. The accused did raise sufficient evidence that, if it were true, could lead to a finding that the defence applies. Therefore, the jury should have been charged with the defence of mental disorder automatism.

R V SH, 2014 ONCA 303

FACTS: SH was charged with sexually assaulting two of his neighbors on the same evening. TJ found his conduct occurred while he was in an automatistic state, but not caused by a mental disorder. He was found not guilty and the Crown appealed.

RULE: To satisfy the burden, an accused must:

1. Claim that he or she acted involuntarily; and
2. Adduce expert evidence to support that claim.

Where the accused has satisfied the burden, the TJ must determine whether mental disorder automatism or non-mental disorder automatism should be left to the jury.

Mental disorder = disease of the mind and the judge must take a holistic approach, informed by an internal cause factor, a continuing danger factor, and other policy considerations in determining if the accused is suffering from a disease of the mind.

Automatism results in involuntary conduct that is the product of a mental state in which the conscious mind is disassociated from the part of the mind that controls action. The person charged who invoked automatism bears the burden of rebutting the presumption of involuntariness.

CONCLUSION: Appeal allowed; set aside the respondent's acquittals and order a new trial.

Automatism successful: concussion, involuntary intoxication, hypoglycemia, somnambulism, epilepsy, and psychological blow.
Automatism not successful: emotional stress from family, financial problems, some psychological stress (marriage breakdown), depression caused by family breakdown, a state of non-insane automatism from a combination of stresses, and intermittent explosive disorder.

PROVOCATION

GENERAL

s.232(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) **Conduct of the victim that would constitute an indictable offence under this Act** that is punishable by 5 or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purpose of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

Provocation provides for a partial defense because, rather than producing an acquittal of a murder charge, it produces a conviction for manslaughter. It only applies where there is proof of an intentional killing and where an accused raises a reasonable doubt that he/she committed the murder 'in the heat of passion' after having lost control.

The onus is on the accused to raise an air of reality to the defense of provocation (*Cinous*).

ELEMENTS OF DEFENCE

Provocation has both a subjective and objective element.

1. **Objective:** the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person of the same age and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.

2. **Subjective:** the background and history of the relationship between the accused and deceased should be taken into consideration, particularly if it reveals a long history of insults, levelled at the accused by the deceased.

R V THIBERT, 1996 1 SCR 37

FACTS: Accused shot his wife's lover after the lover taunted him. TJ put the defense of provocation to the jury without specifying that it was the burden of the Crown to disprove provocation.

RULE: The threshold for whether provocation can be left to the jury is whether there is some evidence that the objective and subjective elements may be satisfied; if there is some evidence, it can be left to the jury. The objective test is a modified test.

CONCLUSION: Appeal allowed; the TJ was correct to leave provocation to the jury.

RATIONAL: There was some evidence, upon which a reasonable jury acting judicially and properly instructed, could find that the defense of provocation was applicable. Both the objective and subjective elements were established.

R V PARENT, 2001 SCC 30

FACTS: Accused charged with 1st degree murder for killing his estranged wife. They were in a fight over the division of their assets and, while talking, she had said, "I told you that I would wipe you out completely" and he shot her 6 times. Crown's appeal was dismissed; accused's appeal was allowed and reduced to 6 years. Crown appealed to SCC.

RULE: Anger may form part of the defense of provocation, but it cannot form a stand-alone defense. Intense anger along is not sufficient to reduce murder to manslaughter.

CONCLUSION: Crown's appeal allowed and a new trial ordered.

R V CAIRNEY, 2013 SCC 55

FACTS: Cairney shot his friend and roommate, Ferguson because Ferguson was being verbally/physically abusive to C's cousin/Ferguson's common law partner. Ferguson had said, "What are you gonna do, shoot me? You don't have the guts to shoot me," and "Fuck you, you goof. This is none of your business, I'll do with Fran whatever I want".

ISSUES: Was there some evidence upon which a properly instructed jury, acting reasonably, could have a reasonable doubt that an ordinary person in C's circumstances would be deprived of the power of self-control by F's insults?

RULE: Self-induced provocation refers to a situation where the accused initiates or invites the act or insult he says provoked him. However, the fact that an accused sought out an aggressive confrontation and received a predictable response is a factor which may deprive the defense of an air of reality. Whether the defense goes to the jury depends on whether the evidence provides an air of reality to it.

CONCLUSION: Appeal of accused dismissed and new trial ordered.
RATIONAL: There is no air of reality to the objective element of the defense.

OBJECTIVE/SUBJECTIVE TEST

R V CAIRNEY, 2013 SCC 55

RULE: Elements of Provocation:

1. Objective Element
    a. There must be a wrongful act or insult; and
    b. The wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control.
2. Subjective Element
    a. The accused must have acted in response to the provocation; and
    b. On the sudden before there was time for his/her passion to cool.

When contextualizing the objective standard, the only factors that should be considered are those which contribute to the significance of an act or insult. The standard should not be adapted to accommodate a particular accused's innate lack of self-control. The subjective element is not met where the accused in fact subjectively expected the victim's response.

OBJECTIVE TEST

R V NAHAR, 2004 BCCA 77

FACTS: N stabbed his wife to death. He claimed he killed her because she acted in a manner at odds with the traditions of the Sikh community in which they were raised. They got into an argument where she told him he wouldn't be able to stop her, so he stabbed her.

ISSUES: Did the TJ fail to take N's cultural background into account in concluding that the defense was not available to him?

RULE: The objective and subjective elements are distinct and there is no requirement that the judge proceed with the objective element first. In assessing the objective element, those factors that would give the wrongful act or insult a special significance to the accused are to be taken into account as being shared by the ordinary person.

Factors that give an act or insult a special significance could be said to include the implications of an accused person having been raised in a particular culture.

CONCLUSION: Appeal of accused dismissed.

ON THE SUDDEN

(2) …. that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purpose of this section, if the accused acted on it ***on the sudden*** and before there was time for their passion to cool.

It has to be that this person acted on what was found to be the provoked and the time in which a person acted around that provocation will determine if it can be found as a defense.

R V SHERIDAN, 1991 2 SCR 205

FACTS: Accused charged with first degree murder. Victim and respondent were drug dealers working together. The victim brought money to the victim's house after selling cocaine. There had been previous threats from the victim against the respondent and his wife. The respondent claims that the victim pointed a gun at him before he pointed and shot him. The victim said, 'you have been screwing me around all this time. It must be remembered that one of the threats was, if you fuck me around, only one of us will come out of it".

RULE: The question is whether there was any evidence enabling a reasonable jury to find that the respondent was deprived of the power of self-control as a result of the acts and statements of the victim. 'On the sudden' doesn't include cumulative threats.

CONCLUSION: Appeal dismissed.

RATIONAL: The subjective test was met because there was evidence that the respondent acted upon the provocation in the heat of passion, although he did not specifically state that fact.

SUFFICIENCY OF EVIDENCE

R V OLBEY, 1980 1 SCR 1008

FACTS: Thornton was the apartment owner where drugs were sold/used/drug addicts stayed. Accused killed someone who called him a, 'two-bit nigger punk'. Witnesses state there was 5 minutes between him being called that and him shooting the deceased three times. The account of the accused and the witnesses differ significantly; accused says there were many threats on his life and he acted in self-defense.

ISSUES: Did the CA err in finding that the failure of the TJ to instruct the jury that they should take into consideration the evidence of the appellant's intoxication in assessing whether he acted on the sudden and as a result of provocation was not a miscarriage of justice?

RULE: Where provocation is advanced, intoxication may be considered by the jury in the second branch of the inquiry; that is, whether the accused was actually deprived of the power of self-control by the provocation which he had received.

CONCLUSION: Appeal of accused dismissed.

RATIONAL: There is no evidence to suggest a wrongful act or insult existed of such a nature as to be sufficient to deprive an ordinary person of the power of self-control. There was also no evidence that the accused acted on the sudden before his passion cooled.

MISTAKE OF FACT

GENERAL RULE

This is based on the premise that, when a person makes a mistake, and that mistake is honest, then criminal liability should not occur.

- Mistake of fact has not been codified.
- It negates the presence of the guilty mind (*mens rea*).

- There must be an air of reality (low threshold) and, once established, the onus shifts to the Crown.

R V PAPPAJOHN, 1980 2 SCR 120

FACTS: A sexual assault occurred. Two were out drinking and the accused drove the complainant home. The accused and victim have different accounts of the events that occurred, but the accused argued he believed that the victim consented to sexual intercourse. He was convicted at trial, CA dismissed, and he appealed to SCC.

ISSUES: Did the TJ err in failing to put before the jury a defense of mistaken belief in consent (fact)?

RULE: For a defense of mistake of fact in consent to be available, there must exist an honest and reasonable mistake and some evidence which would convey a sense of reality. The defense is derived from the *mens rea* requirement, which is a subjective standard and, consequently, the mistaken belief did not need to be reasonable, it just needed to exist.

CONCLUSION: Appeal of the accused dismissed.

RATIONAL: There was no evidence to put the 'mistake of fact' to the jury aside from the statement made by the accused that she had consented.

R V PARK, 1995 2 SCR 836

FACTS: Accused is charged with sexual assault, but their stories diverge considerably. Accused claims he prematurely ejaculated on her stomach, but no intercourse took place. He asserted that she consented to the activity and, in the alternative, that he had the honest, but mistaken belief, that she was consenting. TJ did not put the mistaken belief in consent to the jury. CA allowed appeal and ordered a new trial.

RULE: Circumstances are not relevant to the defense of honest, but mistaken belief where they are only capable of supporting a belief on the part of the accused that the complainant would consent, rather than being capable of supporting his belief that she does, in fact, consent. An accused cannot say that he believed the complainant to be consenting without pointing out the basis for that belief.

The considerations relevant to this defense are:

1. The complainant's actual communicative behavior; and
2. The totality of the admissible and relevant evidence explaining how the accused perceived that behavior to communicate consent.

Even at the air of reality stage, there has to be a realistic basis for the defense.

CONCLUSION: Appeal allowed; conviction restored.

R V ESAU, 1997 2 SCR 836

FACTS: Accused was charged with sexual assault. The victim claimed she has absolutely no memory, but that she did not consent to sexual intercourse with the accused because they were related; she said that she was intoxicated. The TJ did not charge the jury re: honest but mistaken belief, but the defense did not object. Accused was convicted, but appealed and the CA ordered a new trial.

RULE: Before a court should consider HBMB and instruct a jury, there must be some plausible evidence in support so as to give an air of reality to the defense. The plausible evidence comes from the testimony of the accused, the complainant, and the surrounding circumstances of the alleged sexual assault.

The fact that the defense of HBMB was not raised at trial does not bar it from being raised on appeal. The TJ must charge the jury with respect to every defense that has an air of reality. The obligation remains with the trial judge to charge on HBMB.

CONCLUSION: Appeal of the Crown should be dismissed.

RATIONAL: Evidence from the accused establishes that, if believed, it might lead a jury to conclude that he honestly believed she consented despite his being mistaken about her ability to legally consent because of intoxication.

DISSENT: The victim was so drunk that reasonable steps must be taken before this defense could be relied upon.

ONUS OF PROOF

R V CINOUS

RULE: **The Air of Reality Test** determines whether there is evidence upon which a properly instructed jury, acting reasonably, would acquit. A judge must put to the jury all defenses that have an air of reality (evidentiary foundation).

The AOR analysis must be applied to each component of the defence, both subjective and objective. Evidence capable of supporting a particular finding of fact with respect to one component of the defense will not necessarily be capable of supporting the other.

With ‘affirmative’ defenses such as alibi, duress, provocation, ect, the persuasive and the evidential burdens are divided.

R V FONTAINE

RULE: No issues will be put to the jury in the absence of a sufficient evidential foundation. 'Sufficient evidence' must mean sufficient evidence to sustain a verdict of guilty BARD; is the evidence capable of supporting the inferences necessary to establish the essential elements of the case?

In the case of 'reverse onus' defenses, such as mental disorder automatism, it is the accused who bears both the persuasive and the evidential burdens. The persuasive burden is discharged by evidence on the BOP, a lesser standard.

DEFINITION OF MISTAKE OF FACT

R V PAPPAJOHN

RULE: Mistake of fact is a defense where it prevents an accused from having the *mens rea*, which the law requires for the very crime with which he is charged. The defense should avail when there is an honest belief in consent, or an absence of knowledge that consent has been withheld.

*court wrestling with what might be a mistake of fact. Doubtful whether this is good law because of s.33.1

R V VLCKO, 1972 10 CCC (2D) 139 (ONTCA)

FACTS: Accused was convicted of assaulting a police officer. The accused raised the defense that, by reason of his mental condition resulting from ingesting LSD, the accused was not in the condition to know that he was a police officer (mistake of fact).

ISSUES: Can the accused be convicted where he was not in the condition to know that the victim was a peace officer because of LSD?

RULE: On a charge of assaulting a peace officer, knowledge by the accused that the victim was a peace officer is an essential element and a conviction cannot stand where the accused was not in a mental condition to know that the victim was in fact a peace officer.

CONCLUSION: Appeal allowed and a new trial ordered.

R V DOCHERTY, 1989 2 SCR 941

FACTS: Accused was found in a car, drunk, but it was not on. He plead guilty to s.236: having care/control of a motor vehicle when blood alcohol exceeds 80mg/100ml of blood although he said he was unaware he was breaking the law. He was charged with willfully failing to comply with a probation order: s.666: an accused who is bound by a probation order and who willfully fails or refuses to comply is guilty.

ISSUE: Can we substitute proof of the *mens rea* for the underlying offence for proof of the *mens rea* for the breach of the probation?

RULE: Where knowledge of the law itself is a component of the requisite *mens rea* (an element of the offence), the absence of knowledge provides a defense.

CONCLUSION: Crown's appeal dismissed.

RATIONAL: Due to the fact that the car was not on, there was no *ar*. There is no *mr* for the offence of s.236, so he could not escape conviction for that offence as he had the *actus reus* of the offence. The *mens rea* for s.666 is that he willfully did not to comply with the probation order. "Willfully" imposes a high level of *mens rea* and requires that the accused intended to commit the offence. An honest belief, on the part of the accused, that he was not committing the offence means that he cannot be said to willfully have refused to comply with the probation order. Therefore, because he did not have the *mens rea* of the s.666 offence, he cannot be found guilty.

REASONABLE GROUNDS

R V PAPPAJOHN

RULE: The honest, but mistaken belief, must be reasonable. The jury will be concerned to consider the reasonableness of any grounds found, or asserted to be available, to support the defense of mistake. Although 'reasonable grounds' is not a precondition to the availability of a plea of honest belief in consent, those grounds determine the weight to be given the defense. The reasonableness, or otherwise, of the accused's belief is only evidence for, or against, the view that the belief was actually held and the intent was, therefore, lacking.

R V PARK

RULE:

RECKLESSNESS/WILFUL BLINDNESS

Recklessness: conscientious an assumption of a risk and proceeding in the face of that risk.
Willful Blindness: accused's fault results from a deliberate failure to inquire.

R V SANSREGRET, 1985 1 SCR 570

FACTS: Post-breakup, accused broke into his girlfriend's house, hit her, and threatened her. In an attempt to calm him down, she had sex with him. She tried to file a report, but his parole officer suggested that she not go through with it. Several weeks later, a very similar sequence of events occurred, and she reported it. Charged with sexual assault. **ACCUSED:** Honestly believed she was consenting to

sex (mistake of fact defense; believed her consent was real and not a product of threats). If this is the case, he won't have the MR of the offence.

RULES: Willful blindness & recklessness = subjective in nature.
Recklessness → forming part of criminal MR and must be subjective → it is found in the attitude of one who, aware that there is danger and that his conduct could bring about results prohibited by criminal law, nevertheless persists, despite the risk.

Willful Blindness → where a person who has become aware of the need for some inquiry, declines to make the inquiry because he does not want to know the truth.

Negligence is not sufficient to find any criminal liability in terms of the information collected/relied upon, but not tested.

CONCLUSION: Willful blindness and recklessness are subjective. Here, the accused possessed the subjective MR requirement of sexual assault because he was willfully blind (i.e. = knew) her consent was only given out of fear that he may kill or seriously hurt her.

RATIONAL: Sansregret raped complainant by extorting consent through threats and fear of bodily harm. A finding of recklessness in this case could not override the defense of mistake of fact.

R V TATTON, 2015 SCC 33

RULES:

MISTAKE OF LAW VS. MISTAKE OF FACT

The question becomes: is the legal characterization of the issue, is that an error of law?

*Berish does not believe this is accurately decided law and that it should have been mistake of fact.

R V LEGRANDE, 2014 ABCA 192

FACTS: After receiving information of illegal hunting in the area, officials put up a fake moose, with the accused shot at. Accused argued mistake of fact, but the Crown argued mistake of law.

ISSUES: Was the accused operating under a mistake of fact, or a mistake of law?
RULE: Generally, mistakes of law, or ignorance of the law, do not provide a defense.
CONCLUSION: Appeal of accused dismissed; they did not have a mistake of fact defense available. There mistake was one of law.

RATIONAL: In this case the accused was under the impression that they could hunt in the area, but the reason for that impression was that they were mistaken as to the legal characterization of the land on which they were hunting. What they did not realize was that, legally, this land was designated as a 'wildlife sanctuary', and that any authorization they had to hunt did not extend to that land.

COLOUR OF RIGHT

R V SIMPSON, 2015 SCC 40

FACTS: Simpson and F are squatters on the property. There is some debate about whether they were told they were allowed to be there or now. There is a question re: color of right as a defense; it is most commonly invoked in relation to the offence of theft under s.322 of the *CC*, which prohibits the taking of an object "fraudulently and without colour of right". The term is also used to denote an honest belief in a state of facts which, if actually existed, would at law justify or excuse the act done.

RULES: To put the colour of right defense into play, the accused bears the onus of showing that there is an air of reality to the asserted defense. Once established, the burden falls on the Crown to disprove the defense beyond a reasonable doubt.

CONSENT

DEFINITION – LACK OF CONSENT

Lack of consent is an element of many offences such as assault; where there is a lack of consent, this must be proven BARD by the Crown. Where mistake of consent is raised, the onus is on the accused to raise an air of reality.

*To date, this is good law.

R V EWANCHUK, 1999 1 SCR 330

FACTS: A 17-year old woman was lured into a man's trailer where he made progressively more sexual advances on her. Each time he did, she would say 'no', he would stop, but then continue to do the action again. At trial, he was acquitted because of the defense of implied consent: although the complainant says she did not consent, an accused can be acquitted on the basis that her conduct raised a reasonable doubt. The defense of implied consent is <u>not</u> available to assault cases in Canada.

RULE: Consent is determined subjectively:

1. Did the accused want it?
2. Is he/she consenting?
3. Must consider the victim's state of mind.

There is no such thing as implied consent in sexual assault in Canada.

For the *actus reus* of the offence, consent is something purely subjective and determined by the complainant's state of mind at the time of the offence. With respect to the *mens rea* of the offence, consent is determined from the perspective of the accused; the complainant must have demonstrated affirmatively to the accused, by words of conduct, her agreement.

CONCLUSION: D. convicted; implied consent is not a defense.

R V JA, 2011 SCC 28

FACTS: JA and his girlfriend, KD, are having sex. KD consented to JA choking her and her losing consciousness. She woke up 3 minutes later to her hands tied behind her back and being sodomize. After, they had vaginal intercourse. KD reported assault to the police 2 months later saying she did not consent to the dildo in her anus.

ISSUES: Whether consent for the purpose of sexual assault requires the complainant to be conscious throughout the sexual activity? Whether you can give advance consent to a sexual act?

RULE: Consent requires the complainant be conscious throughout the sexual activity. Consent must be ongoing and it can be revoked at any time. There cannot be advanced consent to engage in sexual acts.

CONCLUSION: 6-3 majority of the SCC allowed the appeal and restored the conviction for sexual assault.

RATIONAL, MCLACHLIN: The individual must be conscious throughout the sexual activity; this reduces the victims of sexual exploitation. **S.273.1(1):** definition of consent is the voluntary agreement of the complainant = a conscious agreement. There must be contemporaneity between consent and the sexual act at relevant time.

Policy considerations support this: what if the complainant consents to something, but some other touching occurs when she is unconscious? She would not be able to stop it and there would be no safeguards. There might not be evidence. There is also an issue when we think about a drunk/incapacitated individual: the defense can be brought that the person consented in advance of being drunk.

R V BSB, 2008 BCSC 917

RULES: As a general rule, non-verbal behaviors must be unequivocal. Where it is not unequivocal, reasonable steps must be taken, not themselves involving sexually assaultive activity, to clarify the limits of any agreement to sexual touching. A sexual encounter between persons with no history of sexual experience together requires clear and unambiguous consent.

There can be no consent if a complainant lacks the capacity to consent. If incapacity is established, the Crown does not need to prove prior consent because there can be no question as to their internal state of mind. Thus, the accused may be convicted if the Crown proved BARD that the complainant did not consent as they lacked capacity to.

R V SETRUM, 1976 32 CCC (2D) 109 SASK CA

RULES: A blow struck during a fight will not constitute assault within the meaning of s.244 of the *Criminal Code*, which provides that a person "commits an assault when, without the consent of another person, he applied force intentionally to the person of the other…" unless the Crown proves that such blow was inflicted without the victim's consent and this is so even where the blow results in the victim's death. Lack of consent is an essential element of assault. Accordingly, on a charge of manslaughter it consistutes misdirection for the trial judge to charge the jury that a fight by consent is per se an unlawful act where one of the parties to the fight is killed.

JOBIDON EXCEPTION

R V JOBIDON, 1991 2 SCR 918

FACTS: Fight at bar. D. and victim went outside to continue. D. punched V. in the face, rendering him unconscious and knocked him onto the hood of a car (trial judged determined unconscious). D. hit him 4-6 more times before V. rolled off the hood of the car and lay limp. V. died of contusions to the head.

ISSUES: Are there Common Law limitations which restrict or relate the legal effectiveness in certain types of cases?

RULES: Consent is vitiated if intentionally causing bodily harm that interferes with the health or comfort of the complainant; a person cannot consent to bodily harm. Consent is not a defense to a charge of assault where bodily harm was caused.

CONCLUSION: SCC dismissed appeal. Accused convicted of manslaughter.

RATIONAL: The Common Law has long had limits on what people could consent to - consent is not a defense to a charge of assault where bodily harm was caused. The *Code* does not have an exhaustive list for what is or what is not consented to, so we have to look at precedent (common law). Because the *Code* indicates, under s.9, that there are no common law offenses, this is an issue. The judge overcomes this by saying that consent is actually a defense to the action under 8(3) – Common Law Defenses. Because it is considered a defense, and not a new offense, then it is allowed. The judge uses 8(3) to include a broader meaning of assault.

CONCURRING MINORITY: Creating a new offense; cannot do under s.9. The exceptions for social utility are too broad. Believes they consented to a fair fight, but the fair fight ended when someone was unconscious, and victim didn't consent to the extra blows.

problem here: facts were changed from the trial judge. TJ said accused didn't know he was unconscious.

DISSENTING: The consent cannot be read out of the offence. Absence of consent is an element of the *actus reus* of a crime; not having consent is why is makes it unlawful to begin with. The more serious the harm, the more difficult it should be to establish consent. Here, the accused acted outside of what was consented to.

IS CONSENT AN ELEMENT OF THE OFFENCE OR OF THE DEFENCE

R V ROBERTSON, 1987 SCR 918

FACTS: Complainant testified that the accused gained entry into her apartment by claiming to be a friend of her roommate. He forced her to the ground, sexually assaulted her, and left. Accused argued that there was consent and, in the alternative, that he had an honest, but mistaken belief, in consent.

ISSUES: Does a TJ in a SA case must always instruct a jury that the Crown has to satisfy them BARD that the accused knew the complainant was not consenting or was reckless as to whether she consented or not?

RULES: There must be evidence that gives an air of reality to the accused's submission that he believed the complainant was consenting before the issue goes to the jury; in cases where there is nothing in the Crown's case to indicate that the accused honestly believed in the complainant's consent, the accused bears an evidentiary burden to introduce sufficient evidence if he wishes the issue to reach jury. If there is sufficient evidence, the Crown then bears the burden of persuading the jury BARD that the accused knew the complainant was not consenting or was reckless as to whether she was consenting or not.

CONCLUSION: Appeal allowed.

RATIONAL: In this case, the TJ was right to charge the jury without reference to the defence of mistake of fact. There was insufficient factual basis in this case for the accused's allegation that he believed the complainant consented.

s.265(3): for the purposes of this section, no consent is obtained where the complainant submits, or does not resist, by reason of (a), (b) threats or fear of the application of force to the complainant or to a person other than the complainant, (c), and (d).

R V EWANKCHUK

RULES: If the complainant's testimony establishes the absence of consent BARD, the *actus reus* analysis is complete, and the TJ should turn his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea*.

The third element of the offence, the absence of consent, is a subjective factor that is determined by reference to the victim's subjective internal state of mind towards the sexual touching.

NON-TRIVIAL HARM

R V JOBIDON, 1991 SCR 918

RULES: The limitation damanged by s.265 as it applies to the circumstances of this case, is one which vitiates consent between adults intentionally to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl.

CAPACITY TO CONSENT

R V JA

RULES: Consent requires the complainant be conscious throughout the sexual activity. Consent must be ongoing and it can be revoked at any time. There cannot be advanced consent to engage in sexual acts.

WHEN IS CONSENT INVALIDATED?

CONSENT OBTAINED BY FRAUD

R V CUERRIER, 1998 2 SCR 371

FACTS: D. charged with two counts of aggravated assault under s.268 of the *Criminal Code*. D. tested positive for HIV and was instructed by a nurse to (1) use condoms every time he engaged in sexual intercourse; and (2) always inform all prospective sexual partners that he is HIV-positive. D. rejected advice and had two unprotected sexual relations with two complainants without informing them. Both testified they would not have had sexual intercourse had then known he was HIV-positive; neither contracted HIV as a result. Charged with aggravated assault because he endangered their lives by exposing them to the risk of HIV.

ISSUES: What constitutes fraud in the *Criminal Code*?

RULES: Essential Elements of Fraud:

1. Dishonesty (which can include non-disclosure of important facts); and
2. Deprivation/the risk of deprivation.

A consent that is not based upon knowledge of the significant relevant factors is not valid consent. For fraud to vitiate consent, the greater the associated risks in fraud, the higher the duty of disclosure. The non-disclosure must be related to the gaining of consent.

CONCLUSION: Appeal granted; new trial ordered.

RATIONAL, CORY (MAJORITY): Dishonest means actively lying or not disclosing. Dishonesty must be connected to the getting of the consent (the Crown needs to prove that the complainant wouldn't have consented if she had known the truth), but doesn't require that the lie induced consent. A condom might reduce a risk, but it's not clear.

RATIONAL, L'HEUREUX: Fraud is a dishonest act that induced another to consent to the ensuring physical act regardless of whether or not that act was dangerous. It does not matter if it was dangerous or not; fraud is fraud. The real test should be whether the fraud deprived the complainant to exercise their will in relation to their physical integrity. ****criticism in that her interpretation is extremely broad****

RATIONAL, MCCLACHLIN: Views the above as being overboard. The Crown has to establish that the victim would not have consented to the act had they known D. was positive for HIV. In this case, it will only catch situations of this nature and should only apply to unprotected sex.

CLASS NOTES: This case received a lot of negative attention because it would criminalize the knowledge aspect of HIV and less people would get tested because they didn't want to be sucked into having the knowledge of HIV and open themselves up for criminal liability. At the same time, treatment for HIV were advanced and a reduction in the viral load resulted.

R V MABIOR, 2012 SCC 47

FACTS: D. charged with aggravated assault; 9 complainants. He tests HIV-positive, had treatment, his viral load was reduced, told none of the 9 that he was HIV-positive, and engaged in a variety of sexual acts with each.

ISSUES: When do sexual relations with an HIV-positive person pose a "significant risk of serious bodily harm"? Does the *Cuerrier* test apply? When is there a realistic possibility of transmission of HIV?

RULES: Three factors are relevant when assessing risk: the baseline risk of infection from unprotected vaginal intercourse, the percentage by which condom use reduced that risk, and antiretroviral therapy. Significant risk of serious bodily harm is if either one of those two components is missing.

The test is now a "realistic transmission of HIV", but this can be negated if there is a low viral load and if a condom is present.

CONCLUSION: Convictions restored with respect to the 3 complainants in which the accused had a low viral load but did not use a condom. Accused should not be convicted in relation to the one complainant where the accused had a low viral load AND condom.

RATIONAL, MCLACHLIN: 'Significant risk of serious bodily harm' connotes a position between the extremes of no risk and high risk. Where there is a realistic possibility of transmission of HIV, a significant risk of serious bodily harm is established, and the deprivation element of the *Cuerrier* test is met.

Risk of HIV negated if:

1. Low viral load at the time; AND
2. Condom is used

Cuerrier requirement of significant risk of serious bodily harm is not met; failure to disclose HIV status will not constitute vitiating consent. Where he did NOT use a condom + viral load low = deprivation within *Cuerrier* meaning; failure to disclose HIV status = impairs consent.

R V HUTCHINSON, 2014 SCC 19

FACTS: Complainant consented to sexual activity with a condom to prevent conception. Her partner, Mr. Hutchinson, poked holes in the condom. Complainant became pregnant as a result. D. was charged with aggravated sexual assault; she did not consent to unprotected sex.

ISSUES: Was there consent at all (s.272.1(1))? Is the consent vitiated by fraud (s.265(3)) (poking of the condoms)?

RULES: Fraud will vitiate consent when there is a lie and deprivation. The higher the health concern, considered a significant risk of bodily harm.

CONCLUSION: Appeal dismissed; consent was vitiated by fraud.

RATIONAL: Consent relates to the physical act and does not include conditions of qualifications (condom or not). Consent in this case was given. She consented to the sexual activity, but Hutchinson was dishonest by sabotaging the condoms, which deprived her of her choice to become pregnant; pregnancy poses significant risk of bodily harm. Here, fraud vitiated her consent.

RATIONAL, MINORITY: The decision misses the point – it doesn't matter if there is a risk to her at all, she never consented. She wasn't given autonomy for how she wanted to be touched; she did not want to be touched with a condom that had holes in it.

MAJORITY – based on the degree of bodily harm
M + W Sex, he pokes holes in condom fertile, risk of pregnancy.
Guilty of sexual assault under this approach.

M+ W, sex, infertile, no risk of pregnancy.
Not guilty; no risk of bodily harm.

M + M, holes in condom.
Not guilty; no risk of bodily harm.

M + W Sex, she pokes holes in condom.
Not guilty. No risk for serious bodily harm.
It's not clear in Hutchinson if this would apply; no autonomy given to him.

M + W, W on birth control.
Not guilty. No risk.

M + W, he replaces BC with sugar pills.
Guilty; fraud and risk of pregnancy/serious bodily harm.

MINORITY – based on self-autonomy
M + W Sex, he pokes holes, fertile, risk of pregnancy.
Guilty of sexual assault under this approach.

M+ W, sex, infertile, no risk of pregnancy.
Guilty; based on personal autonomy.

M + M, holes in condom.
Guilty; based on personal autonomy.

M + W Sex, she pokes holes in condom.
Guilty; based on personal autonomy. Has to consent to being touched with a condom with holes in it.

M + W, W on birth control.
Not guilty. Doesn't go to the act or touching.

M + W, he replaces BC with sugar pills.
Not guilty. Pills don't go to how she's touched. This is the initial consent stage. Once it moves to the second stage (whether it was fraud), they might find guilty.

CONSENT AND EXERCISE OF AUTHORITY

R V SAINT-LAURENT, 1993 90 CCC (3D) 291

FACTS: Accused was a psychiatrist charged with sexual assault of two of his female patients. Both had come to him for therapy. The accused argued that he should not have to stand trial because they had consented to the sexual acts.

RULES: "Authority" is not limited to relationships where there is a right to issue orders and to enforce obedience. The consent requirement is not satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation.

Consent is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious, or compelled will.

FREE AND VOLUNTARY CONSENT

R V DGS, 2004 72 OR (3D) 223 ONCA

FACTS: A relationship ended and the accused threatened to disseminate nude photographs of the victim to her friends/acquaintances unless she had sex with him. She engaged in anal and vaginal intercourse with him. He was acquitted of the sexual assault charges and the Crown appealed.

ISSUES: Whether the victim consented to the sexual acts in question and, if she did, was her consent vitiated under s.267.1(2)(c) (abuse by him of a position of power) because he threatened to disseminate the nude photographs?

RULES: The threat to expose nude photographs in order to gain sexual favors constitutes extortion. Extortion criminalized intimidation and interference with freedom of choice. It punished those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done. When threats are coupled with demands, there is an inducement to accede to the demands. This interferes with freedom of choice, as a victim may be coerced into doing something he/she would otherwise have chosen not to do.

CONCLUSION: Appeal of the Crown allowed, acquittals set aside, and conviction ordered.

RATIONAL: The victim's participation in the sexual acts was the direct result and the intended consequence of the extortionate conduct. On these facts, it cannot be said that the victim voluntarily agreed to sexual activity with the respondent.

RELATIONSHIP TO MISTAKE OF FACT

s.265(4) of the *Criminal Code*.

WILFUL BLINDNESS

R V R(R), 2003 159 CCC (3D) 11 (ONCA)

FACTS: Accused was charged with sexually assaulting a 57-year-old developmentally disabled individual. When both were in the kitchen she had said that it looked like he was wearing no underwear and he told her to check it out. They fondled for a bit. A psychiatrist

testified that she had the mental age of a 5.5 year old and lacked the capacity to consent and the TJ found that she lacked the capacity to consent and sentenced him to 8 months.

RULES: Where one participant has demonstrable mental limitations, the threshold responsibility escalates and a person must take all possible reasonable steps to ascertain consent.

CONCLUSION: Appeal of the accused dismissed.

RATIONAL: The accused had provided evidence that he believed she had consented based on the fact that she grabbed his penis, that she never said stop, and her prior sexual behavior towards other males. He said she thought she functioned between 8-10 years. The accused had a willingness to suspend all knowledge of the victim's reduced mental abilities and assumed her capacity to consent.

PROPOSED LEGISLATIVE AMENDMENTS TO CONSENT

page 60 of the Volume 2 reading: Baresh believes that the amendments will do away with any defense of implied consent. He believes it will complicate a judge/jury's ability to decide whether or not there was consent.

DURESS

GENERAL

This area can be argued as a justification for one's conduct. It is a narrow defense that arises in very few circumstances. It restricts the use of defenses like duress. We take the view that the common law protection is greater than the statutory protection.

Statute (s.17): **Compulsion by threats:** a person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treatson or treatson, murder, attempted murder, ect (see s.17).

R V RYAN, 2013 SCC 3

FACTS: Ryan was the victim of a violent, abusive, and controlling husband. She believed he would cause her and their daughter serious bodily harm or death, as he threatened many times. She hired an undercover RCMP who posed as a hit man and was arrested and charged. TJ found duress was present and CA upheld her acquittal.

ISSUES: Is duress available in law as a defense where the threats made against the accused were not made for the purpose of compelling the commission of an offence? Can the law of duress be clarified and how?

RULES: The defenses of self-defense, necessity, and duress all arise under circumstances where a person is subjected to an external danger, and commits an act that would otherwise be criminal as a way of avoiding the harm the danger presents. There are differences: Self-defense: the victim of the criminal act at issue is the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide. It is lawful to meet force with force. The attack-victim is the author of their own deserts. Self-defense is completely codified by the *Criminal Code* and parliament has established parameters. Self-defense is a justification.

Necessity/Duress: the victims of the otherwise criminal act are third parties, who are not themselves responsible for the threats or circumstances of necessity that motivated the accused's actions. The victim is generally an innocent third party. Duress is partly codified. With these two defenses, there is 'normative involuntariness', in other words – there is no 'legal way out'.

Duress is applicable only in situations where the accused has been compelled to commit a specific offence under threats or death or bodily harm, which limits the availability of the offence to factual circumstances. Duress requires:

1. An explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm. The issue of severity is better dealt with at the proportionality stage.
2. The accused reasonably believed the threat would be carried out.
3. The non-existence of a safe avenue of escape, evaluated on a modified objective standard.
4. A close temporal connection between the threat and the harm threated.
5. Proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard.
6. The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that the threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy, or association.

CONCLUSION: Appeal of the Crown allowed. A stay of proceedings is ordered. For the common law defense to exist, the above 6 points must be present.

R V LI ET. AL, 2002 162 CCC (3D) 360

FACTS: Accused were charged with three counts of kidnapping and forcible confinement. The accused admitted their involvement in the crimes, but claimed they acted as they did because of threats against them and their families made by T, someone who was not apprehended by police. The accused had become indebted to T. Accused were convicted and appealed.

RULES: *Ruzic* holds that s.17 of the *Code* is unconstitutional in so far as it restricts the defense of duress to circumstances where the threats are of immediate death or bodily harm and the threatenor is present when the offences are committed. The Common Law defense of duress does not include such restrictions.

The defense of duress can now arise from threats of future harm and not just immediate harm. It can arise from threats to third parties, not only threats to the accused themselves. There must be a close temporal connection between the threat and the harm threatened. The threat must be a real threat affecting the accused at the time of the offence. It is assessed by mixing the objective and subjective standard. It is available where a reasonable person, having reasonable firmness, sharing the same characteristics as the accused such as his/her age or background, would have acted on the threats.

Jurisprudence has precluded resort to the defense where the threats are made by a criminal organization which the accused voluntarily joined and knew might pressure them to engage in a criminal activity. Whether the accused has a safe avenue of escape is viewed objectively.

CONCLUSION: Appeals allowed for sentence, but dismissed for conviction.

RATIONAL: The facts in this case are distinguished from *Ruzic* significantly. In that case, she was forced to commit a criminal act through threat that her mother would be murdered. In this case, the accused individuals approached the criminal organization and agreed to their terms. They knew they were purchasing the services of the criminal organization and they voluntarily chose to get involved with them. There was no air of reality to the defense of duress.

R v Ruzic: http://casebrief.wikia.com/wiki/R_v_Ruzic

R V WILLIAMS, 2002 168 CCC (3D) 67

FACTS: Joseph learned that Hawkins, who stole a large amount of pot from him, was in the vicinity of a dance. Joseph arranged for the appellant to drive him to the hall. A chase ensued between Joseph/the appellant and Hawkins. Joseph started shooting at the victim, to which the appellant slowed down, but Joseph punched him and said, “drive or I will blast a cap in your head’.

RULE: The Crown has the burden of disproving beyond a reasonable doubt the availability of the defense of duress. The defense requires that there be a safe avenue of escape, which would include lawful and unlawful avenues of escape. The Crown is not required to disprove every conceivable avenue of escape, but only those that, on the evidence, have an air of reality.

CONCLUSION: Appeal dismissed because the TJ correctly put the defense of duress to the jury.

CONSTITUENT ELEMENTS

1. The threat must be 'of immediate death and bodily harm'.
2. Defence is only available if the threats are made by a 'person who is present when the offence is committed'.
3. The accused must be of the belief that the 'threats will be carried out'.
4. The defence is only available if the accused is 'not a party to a conspiracy or association whereby he is subject to compulsion'.
5. Duress is unavailable as a defense for section 17 enumerated offences.
6. S.17 is only available to the actual perpetrator of the offence.

R V RYAN,

RULES: The Common Law defense of duress is available to parties to an offence, but this is not available under the statutory defense. The statutory version of the defense had a lengthy list of exclusions, but it is unclear in the Canadian Common Law of duress whether any offences are excluded. The statutory and Common Law defense share the following elements:

- There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party.
- The accused must reasonably believe that the threat will be carried out.
- There is no safe avenue of escape. This element is evaluated on a modified objective standard.
- A close temporal connection between the threat and the harm threatened.

R V SHERIDAN, 2015 ABQB 790

FACTS: Ms. S charged w/ 4 counts of possession of a controlled substance for the purpose of trafficking. She admitted to the *mnes rea* and the *actus rea*, but said she did it under duress. She tried to bring drugs into a prison because she received a threatening phone call indicating her son's life was in danger if she didn't.

RULES: Before duress is to be considered by the trier of fact, there must be an air of reality to each of the components of the defense. *Ruzik* established that s.17 only requires that the threat be made to the accused, not that the object of the threatened harm be the accused.

There might not be a requirement in each case that the police be called depending on the circumstance. The requirement of there being 'no safe avenue of escape' must be considered within the context of the emotional frailties and particular state of knowledge of the apprehended harm, held by the person threatened.

CONCLUSION: Each of the statutory and CL requirements of duress had an air of reality.

RATIONAL: Based on the facts, the subjective element of the modified statutory requirement that the accused reasonably believe that the threat will be carried out, has been made out. The objective element also has an air of reality because her belief was anchored in the history of her knowledge of her son's particular circumstance. There is also an air of reality to the close temporal connection between the events.

NECESSITY

GENERAL

This is looked at in a similar way to compulsion/duress. Unlike duress, necessity is not codified in any way. Necessity is the defense that excuses the accused because of normative involvement. The defense is not available when more harm is done than necessary for averting the danger. The defense is not available to avoid a peril that is lawfully authorized by law, or when an accused owes a duty of care in a particular circumstance.

The law requires that the conduct that the accused undertakes MUST end as soon as soon as reasonably possible. Where the necessity ends, the conduct ends. There must be a situation of clear and imminent peril, there is no reasonable legal alternative to breaking the law, and there must be proportionality between harm inflicted and harm avoided. If there is a reasonable alternative available, there cannot be necessity.

The reasonable standard to apply to the conduct: 1 and 2 are on modified objective standard and 3 is purely objective. The accused's act must be unavailable, inevitable, and no reasonable other course of action. It may also be a defense to any absolute/strict liability offence. The defense is not available if the necessity is reasonably foreseeable to a reasonable observer, or if the accused could reasonably contemplate their actions.

There has to be an air of reality to the conduct and the onus falls on the prosecution to prove, BARD, that necessity does not apply. In the absence of evidence supporting the defense, moral voluntariness is presumed. This is the same as duress. This defense applies to any defense other than murder and attempted murder; does not apply to someone who knowingly exposes themselves to the danger. Foreseeability is an important element in deciding if the defense can be relied upon.

R V PERKA, 1984 2 SCR 232, 14 CCC

ISSUES: Did the TJ err in instructing the jury on the defense of necessity in light of the facts? Did the TJ err in imposing the burden of disproof of the defense upon the Crown, rather than imposing the burden of proof on the appellants?

RULES: The defense of necessity could be conceptualized as either a justification or an excuse; it should be recognized in Canada as an excuse, operating by virtue of s.7(3) of the *Criminal Code*. Necessity as an excuse implies no vindication of the deeds of the actor. The criterion is the moral involuntariness of the wrongful action; this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure.

Negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity. Actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle. The existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable, and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law.

The defense only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril. Where the accused places before the court sufficient evidence to raise the issues, the onus is on the Crown to meet it BARD.

Elements: urgent and peril, imminent, compliance with the law would be impossible, proportionality, and the defense does not fail because the accused was doing something illegal. Mere negligence would not disentitle him to the defense. There need be only an air of reality.

CONCLUSION: Appeal dismissed.

R V V(CW), 2004 ABCA 208

FACTS: 17-year-old Appellant was convicted of dangerous operation of a motor vehicle causing bodily harm. He attended a party to retrieve a keg of beer full knowing that there would be an issue with him doing so. His vehicle was surrounded by a group of people and, when he tried to escape, he hit someone.

RULES: If there is a law of necessity, it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible. The harm inflicted must be less than the harm sought to be avoided (proportionality).

If the necessitous situations were clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then it is doubtful whether what confronted the individual was, in the relevant sense, an emergency.

CONCLUSION: Appeal of accused allowed and a new trial ordered.

RATIONAL: The TJ was entitled to take into account whether the Appellant's contributory fault deprived him of the defense of necessity. In doing so, however, the TJ was required to apply the test as articulated in *Perka* and not add a fourth element. The TJ erried in applying a lesser standard.

ELEMENTS OF NECESSITY DEFENCE

1. An urgent situation of 'clear and imminent peril'.
2. No reasonable legal alternative 'to breaking the law'.
3. 'Proportionality' between the harm inflicted and the harm avoided.

R V LATIMER, 2001 1 SCR 3

FACTS: Accused charged with second degree murder in the death of his daughter. She had a severe form of cerebral palsy and was constantly in pain, so he killed her. Accused was convicted and sentenced.

ISSUES: Whether the TJ erred in not allowing the defense of necessity to go to the jury?

RULES: Three elements must be present for the defense of necessity: (1) Imminent peril or danger (based on the modified objective standard); (2) The absence of a reasonable legal alternative (based on the modified objective standard); (3) There must be a proportionality between the harm inflicted and the harm avoided (measured on the objective standard).

A defense should be left to the jury where there is an air of reality to it, meaning that there is sufficient evidence that, if believed, would allow a reasonable jury, properly charged and acting judicially, to conclude that the defense applied and acquit the accused.

CONCLUSION: Appeal dismissed; the TJ did not err in holding that the defense of necessity was not available.

RATIONAL: There was no air of reality to the three requirements of necessity. There was no imminent peril; the deceased's ongoing pain did not constitute an emergency. It was not reasonable for the accused to form the belief that further surgery did amount to imminent peril, particularly when better pain management was available. There was also no air of reality to the proposition that the accused had no reasonable legal alternative to kill his daughter.

R V HEIR, 2006 ABPC 312

FACTS: Accused is charged with driving a motor vehicle while being impaired by alcohol or drug. The wife testified that she accidentally had put the car into reverse, drove the car in reverse from their garage onto their neighbor's yard, and she was not under

the influence but, because she was scared, she left the scene and ran into the house. Her drunk husband, who was in the passenger seat, was left to deal with the mess and was ultimately charged.

ISSUES: Whether the accused can rely on the defense of necessity?

RULES: All of the portions of necessity are laid out. (1) necessity is an excuse rather than a justification and operates by virtue of this subsection; (2) the criterion is the moral involuntariness of the wrongful action; (3) this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure; (4) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity; (5) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle; (6) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law; (7) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril; (8) the defence cannot excuse the infliction of a greater harm so as to allow the actor to avert a lesser evil; and (9) where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

In short, the defence of necessity involves three essential elements: (1) Imminent peril or danger; (2) The absence of a reasonable legal alternative; and (3) Proportionality between the harm inflicted and the harm avoided.

The first two elements must be evaluated on a modified objective standard that involves an objective evaluation that takes into account the situation and characteristics of the particular accused person. The proportionality requirement must be assessed on an objective standard: *R. v. Latimer*, (2001) 1 S.C.R. 3, 150 C.C.C. (3d) 129, 39C.R. (5th) 1.

CONCLUSION: Accused acquitted due to the defense of necessity.

RATIONAL: Although unusual, the facts establish the grounds for the defense of necessity: there was an imminent peril (the vehicle backing out of the garage and going up on the lawn within two feet of the house), there was no other alternative for the accused's but to take control as his wife had left, and the harm of being impaired was less in proportion to the potential harm of the unmanned vehicle continuing uncontrolled into the neighbor's house or hitting someone.

WHEN IS DEFENCE OF NECESSITY AVAILABLE

MACMILLAN BLOEDEL LTD. V SIMPSON, 1994 89 CCC (3D) 217 BCCA

FACTS: Accused was part of a large number of people protesting the logging in Clayoquot Sound near Vancouver Island. Accused began to block road access to the logging area, which was in violation of injunctions which the logging company had obtained to prevent obstruction of its crews I the area. The accused sought to rely on necessity. Accused appealed conviction.

RULES: The defense of necessity cannot operate to avoid a peril that is lawfully authorized by law.

CONCLUSION: Appeal dismissed. The defense cannot be applied here because the accused had alternatives to breaking the law; they could have applied to have the injunction set aside.

ONUS OF PROOF

R V PERKA,

RULES: Where the accused places before the court sufficient evidence to raise the issues (air of reality), the onus is on the Crown to meet it BARD.

NECESSITY AS RELATED TO COMPULSION AND SELF-DEFENSE

R V RYAN,

RULES: The defenses of self-defense, necessity, and duress all arise under circumstances where a person is subjected to an external danger, and commits an act that would otherwise be criminal as a way of avoiding the harm the danger presents. There are differences:

Self-defense: the victim of the criminal act at issue is the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide. It is lawful to meet force with force. The attack-victim is the author of their own deserts. Self-defense is completely codified by the *Criminal Code* and parliament has established parameters. Self-defense is a justification.

Necessity/Duress: the victims of the otherwise criminal act are third parties, who are not themselves responsible for the threats or circumstances of necessity that motivated the accused's actions. The victim is generally an innocent third party. Duress is partly codified. With these two defenses, there is 'normative involuntariness', in other words – there is no 'legal way out'.

ALIBI

This defense is based simply upon the absence of an individual from the location of the crime; i.e., the individual was not involved. It has no restriction and can apply to any defense. It may arise in a number of ways: by the accused testifying, the accused/members of the family testifying, or simply where the accused makes a statement to the police.

It answers the question that the accused was somewhere else when the alleged attack occurred. There are some constitutional questions re: when it should be raised; some cases believe that it must be raised as soon as possible. If it isn't raised in a timely fashion, the court can draw an adverse inference; 'sufficient time' for the police to investigate.

THE DEFINITION OF ALIBI

REX V HAYNES, 1914 23 CCC 101 NSCA

RULES: When coming to the conclusion, a jury should take into consideration the accused's action in making false testimony that is, endeavouring to manufacture evidence to mislead the Court.

R V O'NEILL, 1973 22 CRNS 359

RULES: The word 'alibi' is not confined to the situation where the accused claims to have been elsewhere when the actual offence charged was committed. It may refer to a separate and particular ingredient of an offence, or it may refer to a claim to have been elsewhere when any particular event is alleged to have taken place.

HOW AND WHEN TO RAISE TO ALIBI

R V CLEGHORN, 1995 3 SCR 175

FACTS: Appellant was convicted of trafficking cocaine and his mother tried to provide alibi evidence by stating he was with her at 2:30, 3:00, and 3:15, which are the times the officer gave to her.

ISSUES: Whether the alibi defense raised by the accused at trial was properly disclosed to the Crown?

RULES: It is settled law that disclosure of a defense of alibi should meet two requirements: (1) It should be given in sufficient time to permit the authorities to investigate; and (2) It should be given with sufficient particularly to enable the authorities to meaningfully investigate.

Failure to give notice of alibi does not vitiate the defense, although it may result in a lessening of the weight to the trier of fact. Disclosure of the alibi might be made by a third party who was witness to it. Where disclosure occurs, it should include (a) that the accused was not present; (b) the accused's whereabouts at the time of the incident; and (c) witnesses to that.

Although there can be an adverse inference,

CONCLUSION: Appeal of accused dismissed.

RATIONAL: The TJ did not err in finding that the statement was do disjointed that he could not imagine how her statement could be considered as a disclosure of an alibi, let alone adequate disclosure of an alibi.

R V TOMLINSON, 2014 ONCA 158

FACTS: A masked gunman shot two men to death in a drug dealer's apartment: the drug dealer and the customer. Police arrested the accused a month later and, at trial, he claimed he was someplace else when the killing occurred and suggested the shooter was someone else. They were convicted and raise the appeal over what the judge instructed the jury with.

RULES: An alibi is a claim that a person was elsewhere when the alleged criminal conduct took place and, thus, it was impossible for him or her to have committed it. To constitute an alibi, the supportive evidence must be dispositive of the final issue of guilt or innocence of the accused.

An alibi is subject to the air of reality test. A TJ is under no obligation to use the term 'alibi' in jury instructions on the defense, provided that, when read as a whole, the instructions apprise the jury of the legal effect of the supportive evidence. Instructions on alibi must relate reasonable doubt to the evidence adduced in support of the alibi. The instructions on alibi should make it clear:

1. That there is no onus on the accused to prove an alibi;
2. That if the jury believes the alibi evidence, they must find the accused not guilty.
3. That even if the jury does not believe the alibi evidence, if they are left in a reasonable doubt by it, they must find the accused not guilty; and
4. That even if the alibi evidence does not raise a reasonable doubt about an accused's guilty, the jury must determine, on a balance of all the evidence, whether the Crown has proven the guilt of the accused BARD.

Proper disclosure of an alibi has two components: (1) Adequacy, which relates to the sufficiency of the details provided; and (2) Disclosure should be sufficiently particular to enable the authorities to meaningfully investigate. Failure to provide timely and sufficient

notice of alibi does not vitiate the defense, but the trier of fact may draw an adverse inference. The adverse inference instruction is limited to the defense of alibi; adverse inference instructions on other issues may compromise an accused's pre-trial right to silence.

CONCLUSION: Appeal of accused dismissed.

RATIONAL: The evidence lacks the precision required of an alibi and was more like evidence of a limited opportunity to commit the offence. The time estimates proved are not dispositive of the issue of guilt or innocence as required of a true alibi. The instructions given were the functional equivalent of the traditional alibi instruction. The appellant did not support his alibi with his own testimony.

EVIDENCE OF ALIBI: THE FAILURE OF THE ACCUSED TO TESTIFY

R V TURCOTTE, 2005 SCC 50

FACTS: Accused went to police station and asked a car to be sent to the ranch where he lived, but he wouldn't tell them why. Police found 3 dead people. TJ charged the jury that, as to his silence, it was 'post-offence conduct' and an inference of guilt could be drawn. He claimed he didn't kill them, but instead that he found them. Jury convicted. CA set aside convictions and ordered a new trial.

RULES: The CL right to silence exists at all times against the state, whether or not the person asserting it is within power or control. Like the confessions rule, an accused's right to silence applies any time he or she interacts with a person in authority, whether detained or not.

CONCLUSION: Appeal of the Crown dismissed.

RATIONAL: A voluntary interaction with the police, even one initiated by an individual, does not constitute a waiver of the right to silence. The right to choose whether to speak is retained throughout the interaction.

R V NOBLE, 1997 1 SCR 847

FACTS: Manager caught two people trying to carjack cars in his parkade. He asked for their IDs and one handed over a driver's license. At trial, the manager could not identify the accused, but the TJ convicted based on the license and his silence. CA allowed accused's appeal and the Crown appealed.

RULES: There can be no independent weight given to an accused's silence because their silence is equal to their right against self-incrimination. Giving weight to an accused's silence violates the right to silence and the presumption of innocence under the *Charter*.

If an accused raises an alibi defense, then an adverse inference can be drawn about the credibility of the defense should the accused not testify and remain silent.

CONCLUSION: Crown's appeal dismissed.

RATIONAL: The TJ used the failure to testify as evidence going to ID, which permitted him to reach a belief in guilt BARD.

R V SHRUBSALL, 2000 188 NSR

RULES: In order for an adverse interference to be drawn about the credibility of the defense of an alibi, the accused must be the one who raises the defense of an alibi.

FABRICATION OF ALIBI

R V LALIBERTE, 2016 SCC 17

RULES: An instruction to the jury re: fabrication of an alibi must specify that the fabrication of an alibi supports an inference of *consciousness* of guilt, but no more than that. There must be other evidence independent of the finding that the alibi is false on the basis of which a reasonable jury could conclude that the alibi was deliberately fabricated and the accused was involved in that attempt to mislead the jury.

R V CLIFFORD, 2016 BCCA 336 - DISSENT

FACTS: Accused convicted of arson and mischief. The accused had been in a relationship with the victim's daughter, they broke up, but she had a child and the accused engaged in a lengthy legal battle with the family for custody of the child. He said he was going to 'get them'. There was evidence of where he had been at the time of the arson of their farm and he had lied to the RCMP of his whereabouts. The TJ convicted him.

RULES: A disbelieved alibi is not 'evidence' and disbelief in alibi evidence cannot provide, though circular reasoning, the foundation for an inference of guilt. It is only if there is other evidence that the alibi was deliberately fabricated and that the accused was attempting to mislead the finder of fact, that an inference of consciousness of guilt may be drawn – not from the failed alibi *per se*, but from the attempt to deceive.

CONCLUSION: Dissenting judge would allow accused's appeal.

RATIONAL: In this case, there was no other evidence of fabrication that would bring his statements into the exception to the general rule. It seems that the disbelieved alibi evidence was misused to buttress the case against the appellant and may well have played a key role in leading to a finding of guilt.

R V CLIFFORD, 2017 SCC 9

CONCLUSION: Appeal of accused dismissed.

ACCIDENT

If this can be found it results in a not guilty ruling and an acquittal. If the accused is acting in a criminally negligent fashion, then accident may not be relied upon.

GENERAL

R V KOLBE, 1974 27 CRNS 1 ABCA

FACTS: Kolbe was convicted of killing his wife and claimed that, when she aimed a pistol at him and he was struggling to get it away from her, it went off and killed her. There was some evidence that the gun had been twisted out of her hands. The accused appealed on the grounds that the TJ incorrectly charged the jury with respect to accidents.

RULES: The defense of accident is a good and valid one if the evidence indicates facts to substantiate such a defense. There is no onus on the accused to establish facts to make out the defense of accident, that is for the jury to determine whether the evidence indicates the facts that would establish it. The Crown just must adduce evidence that suggests a reasonable doubt to the defense.

CONCLUSION: Appeal dismissed; the TJ correctly charged the jury.

R V TENNANT & NACCARATO, 1975 7 OR (2D) 687 ONCA

FACTS: The victim, Johnson, struck out at Naccarato with a crutch, struck him on the right hand, causing him to lose his balance, at which time a gun discharged and struck Johnson, killing him. Neither accused had an intention to kill him, which they provided in evidence, and appeal on the basis that the TJ did not fairly put the defense of accident before the jury.

RULES: An unintentional act may raise the defense of accident, but the circumstances in which such accident occurs determines the question of liability for unlawful homicide and if such liability exists, whether the crime is murder or manslaughter.

If a death was caused by the accidental discharge of a gun in the commission of an unlawful act, and if the jury is satisfied BARD that the unlawful act was such as any reasonable person would inevitably realize much subject another to the risk of, at least, some harm, the death would amount to manslaughter.

If the jury is satisfied that the accused was engaged in a lawful purpose, or had a reasonable doubt in this regard, and this death was caused by an accidental discharge of a gun then, in the absence of proof of criminal neglegence, accident was a complete defense.

CONCLUSION: Appeal allowed.

RATIONAL: The TJ did not delineate the above issues, nor did he relate the evidence to those issues. If the accused was committing an unlawful act, and an accident occurred = not an accident. If the accused wasn't committing an unlawful act, and an accident occurred = can be an accident. We have to look at the context.

ENTRAPMENT

Usually occur in situations where the police are not able to get the relevant information from the accused. It's an attempt to get around s.10(b) and the right to silence.

Entrapment has nothing to do with the *mens rea* whatsoever. It has to do with conduct of the police. We start with the premise that it arises in three circumstances: (1) The police permits/allows the accused to commit an offence without reasonable suspicion; (2) Police engage in random virtue testing; and (3) The police have valid grounds to provide the accused with an opportunity to commit the offence and induce them to commit it.

These must be tempered by *Charter* values such as to avoid search and seizure.

GENERAL

R V AMATO, 1982 2 SCR 418

FACTS: Amato worked at a salon with Andre, who asked him for cocaine. Amato refused and said he didn't know anyone with cocaine. Shortly after, Andre's friend Don repeatedly asked Amato for cocaine, and Amato finally said he'd keep his eyes open. Don was actually a police informant who was informing the police of drug dealers to escape prosecution of possession of heroin. Amato had gotten cocaine from his ex-girlfriend 2-3 times and sold it to Don, but only because Don called him so many times he felt pressured to.

RULES: The elements of the defense of entrapment are:

1. An offence must be instigated, originated, or brought about by the police and the accused must be ensnared into the commission of that offence by the police conduct.
2. The purpose of the scheme must be to gain evidence for the prosecution of the accused for the very crime which has been so instigated.
3. The inducement may be but is not limited to deceit, fraud, trickery, or reward, and ordinarily but not necessarily will consist of calculated inveigling and persistent importuning.
    a. Did the law enforcement agency have a reasonable suspicion that the accused would commit the offence without inducement?

There are three available dispositions on a successful application of the defense of entrapment: (a) a dismissal of the accused on the charge; (b) an order quashing the charge; or (c) a stay of the prosecution.

The defense of entrapment is not available for all offences and is unavailable when causing or threatening bodily injury.

CONCLUSION: The defense of entrapment is a justifiable defense. Entrapment is available where there is an inability to form individual criminal intent. If the accused was subject to a threat of violence from a police plan, then there would be a finding of entrapment.

RATIONAL: As long as it's consistent with the *Criminal Code*, new defenses are not allowed to be developed because lawmakers cannot possibly foresee all the circumstances and justifications. In recent years, the court has acknowledged certain defenses such as duress, necessity, and due diligence without considering state of the law before the current *Criminal Code*.

R V MACK, 1988 2 SCR 903

FACTS: Accused was charged with the possession of narcotics for the purpose of trafficking and he relied on the defense of entrapment. A police informer basically asked him repeatedly for drugs, took him to the woods where he made certain threats to him, and asked the accused to deliver him cocaine. When the accused did, he was arrested; the accused said he had feared the informer.

RULES: Entrapment arises either when the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting mala fides for dubious motives unrelated to the investigation and repression of crime or, having a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of the offence.

TEST: Whether the conduct of the police would have induced the average person in the position of the accused into committing the crime.

The defense of entrapment does not depend on the accused's culpability and an objective assessment of the conduct of the police is required. The pre-disposition of the accused is only relevant as a part of the determination of whether the provision of opportunity by the authorities to the accused to commit the offence was justified. There must be a sufficient connection between the past conduct of the accused and the provision of an opportunity.

To determine whether the police have employed means which go further than providing an opportunity, the court will consider:

1. The type of crime being investigated and the availability of other investigative techniques.
2. Whether an average person with both the strengths and weaknesses in the position of the accused would be induced into the commission of the crime.
3. The persistence and number of attempts made by the police before the accused agreed to commit the offence.
4. The type of inducement used by the police including deceit, fraud, trickery, or reward.
5. The timing of the police conduct.
6. Whether the police conduct involved an exploitation of human characteristics.
7. Whether the police appear to have exploited a particular vulnerability of the accused.
8. This list is non-exhaustive.

The question of unlawful involvement by the state in an investigation is one of law or mixed law and fact and is an issue resolved by the judge. Before a judge can consider a stay of proceedings, it must be absolutely clear that the Crown discharged its burden of proving BARD that the accused committed all the essential elements of the offence.

The burden of proof of entrapment is on the accused on a balance of probabilities.

CONCLUSION: Appeal of the accused allowed.

RATIONAL: The factors above, when considered, indicate that the police conduct was unacceptable and entrapment applied. The court emphasizes the need to preserve the purity of the administration of justice.

R V IMORO, 2010 ONCA 122

FACTS: Police received an anonymous tip that a man was selling drugs on the 12th floor of an apartment building. They investigated by having an undercover cop go to the apartment. The undercover cop met Imoro and said, "you can hook me up?" to which Imoro

answered yes. Imoro sold the undercover cop cocaine twice and was arrested. The TJ ruled that there was entrapment, excluded the evidence, and acquitted Imoro.

ISSUES: Did the TJ erred in law in finding that the respondent was entrapped by the police into committing drug trafficking offences?

RULES: In police efforts to investigate, deter, and repress crime, the police shouldn't be permitted to randomly test the virtue of citizens, or to offer citizens an opportunity to commit a crime without reasonable suspicion that they are already engaging in criminal activity.

Entrapment arises in two situations: when state authorities, acting without reasonable suspicion or for an improper purpose, provide a person with an opportunity to commit an offence; and second, even having reasonable suspicion or acting in the course of a good faith inquiry, the police go beyond providing an opportunity to commit a crime and actually induce the commission of an offence.

The judge should only consider the defense of entrapment after a finding of guilt.

CONCLUSION: Acquittals set aside and verdicts of guilty entered. The defense of entrapment was not found on the facts.

RATIONAL: The second scenario is not available on the evidence because the undercover police officer did induce the drug trafficking to occur. To find the first scenario, it must be established that the police provided an opportunity to commit an offence and that the police did so without reasonable suspicion. The police in this case did not provide Imoro with an opportunity to sell drug.

CENTRAL ASPECTS OF ENTRAPMENT DEFENSE

1. The offence is instigated, originated, or brought about by police.
2. Accused is ensnared into the commission of an offence by police conduct through deceit, fraud, trickery, or reward.
3. Police intend to gain evidence for prosecution of the accused for the very crime they instigated.
4. The scheme in all of the circumstances is so shockingly and outrageous as to bring the administration of justice into disrepute.

R V BOND, 1993 135 AR 329 CA

FACTS: A jury found Bond guilty of trafficking in cocaine, but Bond argued that the judge should stay the proceedings because the police's actions constituted entrapment. TJ disagreed and rejected the defense. Accused appeals the conviction.

RULES: Absent an error in principle or some other basis for concluding that the trial judge failed to properly consider all the evidence, the trial judge's failure to provide a step-by-step analysis of his thought process is not fatal to his decision.

Illegal conduct by the police during an investigation, while wholly relevant to the issue of abuse of the court's pricess, is not per se fatal to prosecutions which may follow. Frequently it will be, but situational police illegality happens.

CONCLUSION: Appeal from conviction is dismissed.

RATIONAL: No abuse of the court's processes occurred and the narrative of Bond's sale to the undercover police could not be suppressed by a judicial stay of proceedings.

LACK OF REASONABLE SUSPICION

R V AMATO,

RULE: At least one relevant circumstance in examining the character in law of the police conduct is whether the law enforcement agency had a reasonable suspicion that the accused would commit the offence without inducement. By itself and without more, the predisposition in fact of the accused is not relevant to the availability of the defense. On the other hand, where the true purpose of the police initiative is to put the enforcement officers in a position to obtain evidence of an offence when committed, absent other circumstances already noted, the concept of entrapment does not arise.

LIMITATIONS ON DEFENSE

ENTRAPMENT MUST INVOLVE STATE OR ITS AGENTS

R V MACK

FACTS: Suspected with murdering roommate. The police engaged in a Mr. Big operation.

RULES: Since the doctrine of entrapment is not dependent upon the accused's culpability, the focus should not be on the effect of the police conduct on the accused's state of mind. Rather, as far as possible an objective assessment of the conduct of the police and their agents is required.

Rules regarding Mr. Big operations:

1. They are presumptively inadmissible.
2. The state has to justify why the statement must be admitted.
3. The Crown must demonstrate that the PB outweighs the PE (which will be high in this case because any video admitted will be prejudicial).
4. The PV must be anchored to reality – does it match up with all the other evidence?

5. If the confession is out, any evidence re: Mr. Big sting is inadmissible too.
6. The court will scrutinize the police conduct.
7. Depending on the police conduct, there might be a stay of proceedings.

REVERSE STINGS

R V CAMPBELL, 1999 1 SCR 565

FACTS: Accused were charged with conspiracy to traffic cannabis and conspiracy to possess cannabis for the purpose of trafficking arising out of a reverse sting operation. The accused brought an application for stay on the basis that the police conduct was illegal. The Quebec Superior Court had given approval to the reverse sting operation and an officer specifically sought legal advice from the Department of Justice re: the legality of a reverse sting. TJ dismissed his stay application and CA dismissed.

RULES: Communication covered by solicitor-client privilege in an abuse of process proceeding could lead to the communication falling into an exception that requires its disclosure.

The police are not to be considered servants or agents of the government while conducting criminal investigations; they are answerable only to the law and cannot access the discretionary powers of the Crown.

CONCLUSION: Appeal is allowed to the extent of ordering a new trial on the issue of abuse of process.

MR BIG INVESTIGATIONS

R V HART, 2014 SCC 52

FACTS: At the end of a lengthy Mr. Big operation, the respondent confessed to murdering his two young daughters. He had killed them by nudging them into a lake and having them drown. At trial, his confessions were admitted into evidence. The CA ordered a new trial and excluded 2/3 confessions.

ISSUES: Did the RJ err in admitting the confessions made by the respondent during the Mr. Big operation? Did the TJ err in precluding the respondent from testifying with the public excluded from the courtroom?

RULES: Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility will be overcome where the Crown can establish that the probative value of the confession outweighs its prejudicial effect.

Where an accused establishes that an abuse of process has occurred, the court can fashion an appropriate remedy, including the exclusion of the confession or a stay of proceedings.

Solution to Mr. Big Operations:

1. Recognize a new common law rule of evidence; and
    a. Where the state recruits an accused into a criminal organization of its own making and seeks to elicit a confession from them, any confession should be treated as presumptively inadmissible.
    b. This presumption is overcome where the Crown establishes that the PV of the confession outweighs its PE.
    c. If the Crown is unable to demonstrate that the accused's confession is admissible, the rest of the evidence surrounding the Mr. Big operation becomes irrelevant and inadmissible.
2. Rely on a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct.

CONCLUSION: Appeal of Crown dismissed; 3/3 confessions should be excluded because their PV does not outweigh their PE.

RATIONAL: There are issues with Mr. Big operations because of the nature of the operations:

1. There is a lack of reliability of the confessions they produce. The potential for false confessions increases in proportion to the nature and extent of the inducements held out to the accused.
2. The accused's confession is invariably accompanied by prejudicial facts regarding the accused's character such as the fact that the accused wanted to join a criminal organization.
3. Mr. Big operations create a risk that the police will report to unacceptable tactics in their pursuit of a confession.

R V CAMPEAU, 2015 ABCA 2010

FACTS: Appellant challenges his conviction for manslaughter as a party to a robbery and killing that occurred. TJ convicted. The basis for his conviction was a videotaped confession (using a Mr. Big operation) of the principle of the offence, which implicated the accused in the robbery and killing.

RULES: An accused has no right to expect that a criminal associate might not implicate him to the police, knowingly or unknowingly. Witness evidence from a third party does not qualify as a Mr. Big operation.

The basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue. The question thereafter is one of weight.

CONCLUSION: Appeal dismissed; the evidenced considered by the TJ was admissible, and the verdict reached was reasonable.

R V MAGOON, 2016 ABCA 412

FACTS: Appellants were charged with first degree murder, but convicted of second degree after a 6-year-old girl died in hospital as a result of severe injuries after spending a week in the custody of her father and his common-law-partner, Magoon. The evidence included statements made by the appellants during a "Mr. Big" type operation.

RULES: In assessing the probative value of confessions made during Mr. Big operations, it's important to consider the circumstances in which the statements were made. Moral and reasoning prejudice is lower in a judge alone trial involving a Mr. Big operation.

CONCLUSION: Appeal of Ms. Magoon dismissed.

RATIONAL: The TJ conducted a careful review of the operation and properly weighed the prejudicial effect and probative value of Magoon's statement. Her confession held sufficient markers of reliability to overcome the PE and the statements should be included.

ENTRAPMENT AND TERRORISM OFFENCES

R V NUTTALL, 2016 BCSC 1401

FACTS: Accused was convicted by jury of terrorism charges arising from the planting of explosive devices on the grounds of the Legislature in Victoria in 2013. The accused sought a stay of proceedings due to the conduct of the RCMP during its undercover investigation.

RULES: Entrapment may occur in two ways: (1) authorities provide a person with an opportunity to commit an offence without a reasonable suspicion that he or she is already engaged in such criminal activity; or (2) although having a reasonable suspicison, authorities go further than providing an opportunity to commit the offence and induce its commission.

When the court evaluates the police conduct against the standards expected by reasonable, well-informed members of our community, it must balance the competing social interest of repressing criminal activity. In seeking to strike the proper balance, the court must look to the key elements of fairness and justice accepted as part of our legal system.

There must be a reasonable suspicion that the accused were already engaged in the type of criminal activity at that time; there must be a temporal connection to establish reasonable suspicion and events that are too remote cannot justify the objective test.

Virtue-testing means the police have presented an opportunity to commit a crime without having a reasonable suspicion that the target is already engaged in the crime, and that suspicion cannot be based on propensity alone.

CONCLUSION: Appeal allowed and a stay of proceedings entered.

RATIONAL: There was little objective evidence to support a reasonable suspicion that the accused was already engaged in criminal activity related to terrorism. The accused demonstrated himself to be marginalized, isolated, and an extremist jihadist, but not motivated to act on his belief and not capable of taking steps to accomplish acts of violence in support of that belief.

It is clear from the evidence that the RCMP offered the accused an opportunity to commit a terrorist offence without a reasonable suspicion that the accused was already engaged in a criminal activity. The RCMP therefore entrapped the accused into committing the offences of which they were found guilty.

OFFICIALLY INDUCED ERROR

EXCEPTIONS TO S.19 OF THE CODE

R V CANCOIL THERMAL CORPORATION, 1986 27 CCC (3D) 295

RULES: The defense of officially induced error of law exists where the accused, having adverted to the possibility of illegality, is led to believe, by the erroneous advice of an official, that he is not acting illegally. Such a defense is available to alleged violation of a regulatory statute where the accused has reasonably relied upon the erroneous legal opinion or advice or an official who is responsible for the administration or enforcement of the particular law.

In order for the accused to successfully raise the defense, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend on several factors including:

- The efforts he made to ascertain the proper law.
- The complexity of obscurity of the law.
- The position of the official who gave the advice.
- The clarity, definitiveness, and reasonableness of the advice given.

R V JORGENSEN, 1995 4 SCR 55

FACTS: The accused was selling pornographic videos in his adult film store that were deemed to be ‘obscene’ by undercover police who viewed them. Specifically of interest were ‘Bung Ho Babes’, ‘Made in Hollywood’, and ‘Dr. Butts’, all of which features women’s

buttocks being spanked. He was charged with 'knowingly selling obscene material' under s.163(2)(a) and was convicted at trial. CA upheld the conviction.

ISSUES: Does s.163(2)(a) of the *Code* require that the retailer have knowledge of the specific acts that make the material obscene in law, or is it sufficient to show that they had a general knowledge that the materials dealt with the exploitation of sex?

RULES: To be successfully with an Officially Induced Error of Law, the accused must show:

1. The error was in fact an error of law, or mixed law and fact, and not simply an error of fact;
2. The accused considered the legal consequences of his or her actions before proceeding;
3. The advice obtained considering the legality of the actions must have come from an appropriate official – generally, government officials involved in the administration of law will suffice;
4. The advice must have been reasonable in the circumstances – generally, proving that an appropriate official gave the advice will satisfy this step;
5. The advice must have been erroneous, but the accused does not need to prove this; and
6. The accused must have relied upon the advice when doing the action(s).

Officially Induced Error of Law will only function as an excuse and will not function as a full defense. It can only be raised after the Crown has proven all of the necessary elements of the offences and, if successful, does not result in an acquittal, but only a stay in proceedings.

CONCLUSION: Appeal of the accused allowed.

RATIONAL: 'Knowingly' with respect to the provision means that the retailer must have specific knowledge of the acts that are lawfully deemed to be 'obscene' in order to satisfy the *mens rea* requirements of the offence. It does not matter if the retailer thinks the contents of the film are obscene, as long as he has knowledge of the specific instances that are legally obscene. This is not present in this case. The fact that he knew the movies had been approved by a film review board, although not conclusive evidence of his innocence, helps his case.

LEVIS (CITY) V TETREAULT, 2006 SCC 12

FACTS: Tetreault was charged with driving a vehicle without a valid driver's license. He raised the defense of due diligence – he claims he was unaware that the date on his license was an expiration date.

ISSUES: Is the defense of officially induced error available? What is the scope and applicability?

RULE: In order for the defense of officially induced error to be available, the accused must prove:

1. Error of the law or mixed law and fact;
2. Defendant considered the legal consequences of his actions;
3. The advice obtained came from the appropriate official/authorized representative of the state;
4. The advice obtained was reasonable;
5. The advice obtained was erroneous; and
6. The defendant relied on the advice in committing the act.

CONCLUSION: Appeal allowed and convictions and fines entered.

RATIONAL: The respondent was aware of the date of his license and should have been concerned when he did not receive notice. The issue raised relates to an error in admin practices. The accused remained passive instead of discovering the legal obligations to pay. The offence is a strict liability offence; a defense of due diligence is not established. It cannot be from someone like a lawyer or a judge, but the Minister of Land Titles, ect.

ELEMENTS OF THE DEFENSE

1. The accused's error is one of law, not fact.
2. There must be proof of actual consideration of the legal consequences.
3. Advice came from an appropriate official.
4. The advice must be shown to be erroneous, but apparently legal.
5. There must be proof of actual reliance on the advice.

SCOPE OF THE DEFENCE

R V STUCKY, 2009 ONCA 151

FACTS: The accused operated a direct mail business in Ontario that sold lottery tickets/merch only to persons outside of Canada. He was charged with making false or misleading representations to the public. The charges pertained to four direct mail promotions sent outside of Canada; the TJ acquitted because he held the phrase 'to the public' meant 'to the Canadian public' and none of the mailings were made to persons in Canada. The Crown objects to the TJ finding of 'to the public'. 4/6 offences occurred when the offence was a strict liability offence. The accused claims he obtained erroneous legal advice and followed the advice.

RULES: Reliance on a lawyer's advice is a mistake of law, which affords no defense to the commission of an offence. Mistake of fact is the ignorance of fact and exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief as to the true state of the matter. Mistake of law exists when the mistakes relates, not to the actual facts, but rather to their legal effect.

CONCLUSION: Appeal allowed and a new trial ordered.

RATIONAL: Based on jurisprudence, the meaning of 'the public' was not restricted to the Canadian public where there was a real and substantial link or connection between the offence and Canada. It is clear that, in this case, the accused's actions were not undertaken based on any misapprehension of the facts, as he knew the content and make-up of each promotion, but, rather, in reliance on his lawyer's opinion of the publications and/or representations. That is a mistake as to the legal significance and, accordingly, a mistake of law.

FULLOWKA V PINKERTON'S OF CANADA INC., 2010 SCC 5

FACTS: A strike began at the Giant Mine; the employee's bargaining agent Local 4 and the mine owner, Royal, had reached an agreement, but it was rejected by Local's membership. The strike quickly turned violent and Pinkerton had to employ 52 guards on site. It escalated to the point where a picketer set off a bomb that killed 9 people and the survivors sued Royal and Pinkerton's for failing to prevent the murders. Prior to the explosion, the mine director sought legal advice about whether he could order the mine to be closed and it was determined that he did not have the authority to make an order to close the mine and, if he did, it would be appealed.

The TJ decided against them on the basis that they should have overrode the advice given to them and closed the mine. The CA dismissed the appeal.

RULES: It will rarely be negligent for officials to refrain from taking discretionary actions that they have been advised by counsel, whose competence and good faith in giving the advice they have no reason to doubt, are beyond their statutory authority.

CONCLUSION: The TJ erred in law by rejecting the relevance and legal effect of good faith reliance on legal advice received by officials about the scope of their statutory powers.

R V PEA, 2008 93 OR (3D) 37 ONTCA

FACTS: Accused was charged with drinking and driving. He spoke privately to a duty counsel, who told him not to give any breath samples and to 'reject the police request to do anything', so the applicant refused to give any further breath samples. He was then charged with refusing to provide a breath sample. He sought a stay of proceedings based on the defense of officially induced error.

ISSUES: Is duty counsel a government official for the purpose of the defense?

RULES: A 'government official' is an authorized representative of the state – one with the power to speak on behalf of the government. Duty counsel is not an authorized representative of the state. Assessment of whether an individual is a representative of the state requires a subjective assessment *and* an objective determination.

CONCLUSION: Appeal dismissed.
RATIONAL: If reliance on advice from duty counsel could constitute officially induced error, then detainees who speak to duty counsel will have available a defense that is unavailable to those who speak to privately retained lawyers.

R V BEDARD, 2017 SCC 4

FACTS: Two wildlife and fisheries officers found Mr. Murray contravened the Fisheries Act by catching too many fish. Murray left the scene, but the officers retrieved his contact information, called him, and Murray told them that if they wanted to ID him, they would need to come to his house. The officers sought advice from their colleague, who told them that if he would not ID himself, they could arrest him in his home. They attempted to arrest him twice, but their presence within the home became illegal after Murray had asked them to leave. Due to the fact that it was illegal for them to be there, they had actually assaulted Murray.

RULES: Government officials cannot raise the defense of officially induced error of law in relation to the performance of their duties.

CONCLUSION: The conditions in which the defense is available is not met in this case. Appeal of Murray dismissed.

CAN GOVERNMENT OFFICIALS RELY ON THEIR OWN OFFICIALLY INDUCED ERRORS?

No, government officials cannot rely on their own officially induced errors.

RELATIONSHIP OF THE DEFENSE TO HONEST BUT MISTAKEN BELIEF

R V FORSTER, 1992 1 SCR 339

FACTS: Accused was a member of the armed forces and was charged with being absent without leave. She was ordered to report to a new posting, but refused to do so, and attempted to tender her resignation. At trial, she argued that she honestly believed that she had resigned from the force and, therefore, she did not have the *mens rea* of the offence of being absent without leave. She was convicted and the CA upheld.

CONCLUSION: Appeal allowed and a new trial ordered.

DE MINIMUS NON CURAT LEX

DEVELOPMENT OF THE DOCTRINE

BEAVER V THE QUEEN, 1959 118 CCC 129

FACTS: Beaver sold a package that contained diacetylmorphine (heroine) to an undercover cop. He didn't possess the package, but he was a party to the sale. He testified that he had no knowledge that the contents were drugs; he believed it was powdered milk. He was charged under the *Opium and Narcotic Drug Act* for possession and selling a prohibited substance.

ISSUES: To be convicted for possession & selling a prohibited substance, does the accused have to know what they have? Is there a fault element?

RULES: A crime of possession of a forbidden substance (true crime) requires knowledge of the character of the substance. A crime of selling a forbidden substance does not require knowledge of the character of the substance (based on how the provision is written). There is a common law presumption for true crimes, they are subjective.

CONCLUSION: The conviction of possession is quashed, but the charge of selling is affirmed.

RATIONAL: This is a true crime and, therefore, there is a presumption of subjective *mens rea*; these aren't regulatory offences because they're not regulating the safety of an industry. As a result, because he did not think/know the substance was heroin, he should not be convicted. However, with selling, he intended to sell a drug (he doesn't have to offer to sell THE drug, just a 'substance represented or held out by such person to be a drug').

AVAILABILITY OF THE DEFENSE

R V HINCHEY, 1996 3 SCR 1128

FACTS: Accused charged with corruption, which makes it an offence for an official or employee of the government to accept from a person who has dealing with the government, a benefit of any kind directly or indirectly, by himself or through a member of his family, unless he has the consent of the head of the branch of the government that employs him. The accused was an engineer with the provincial government and his wife was employed as a flag person through someone the accused had a business relationship with. She received cheques for 20 weeks despite not ever working. They were convicted of fraud and corruption. CA disallowed their appeal for corruption, but allowed their appeal for fraud.

RULES: In instances where an interpretation of a provision would trap trivial and unintended violations, the principle of de minimis non curat lex, 'the law does not concern itself with trifles' could be utilized. This type of solution occurs in cases where an accused has 'technically' violated a Code section.

CONCLUSION: Appeal of corruption conviction allowed and a new trial ordered.

CANADIAN FOUNDATION FOR CHILDREN, YOUTH, AND THE LAW V ATTORNEY GENERAL

RULES: The principle of de minimis non curat lex is available to judges and is a common law defense preserved by s.8(3) of the *Code*. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked. The defense occurs when there is a technical commission of the *actus reus* and the conduct falls within the words of the offence, but is too trivial to fall within the range of wrongs which the description was designed to cover.

RATIONAL: Justifications for de minimis excuse are that: (1) it reserves the application of the criminal law to serious misconduct; (2) it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial conduct; and (3) it saves courts from being swamped by an enormous number of trivial cases.

R V SMITHERS, 1978 1 SCR 506

FACTS: Smithers and deceased playing against each other in a hockey game. Game was rough, deceased made racial insults directed at Smithers, who is black. Smithers threw two punches to deceased's head and kicked him hard in the stomach. Deceased stumbled back, fell to the ground, and died from aspiration on his own vomit. Dr. testified spontaneous aspiration is rare and unusual in a young teen; it's not completely clear if the assault lead to this.

ISSUES: Did the kick **cause** the vomiting which directly or indirectly lead to death?

RULES: Standard of causation: act is a *contributing cause of death outside the de minimis range* to prove manslaughter. The only intention the Crown needed to prove was the intention of the act that caused death.

CONCLUSION: Appeal dismissed.

RATIONAL: **SMITHERS:** that the malfunctioning epiglottis caused the death; not his kick & therefore he would be not guilty.
CROWN: burden of proving factual causation BARD that the kick was a contributing cause of death outside *de minimis* range. The death may have been unexpected, and the physical reactions of the victim unforeseen, but that does not relieve the appellant.

R V NETTE, 2001 SCC 78

FACTS: Accused charged with first degree murder under **s.231(5)**. 95-year-old widow had been robbed; house was entered + legs and hands bound + head wrapped + left for 24-48 hours. Died due to asphyxiation. At trial, convicted of second degree murder. Appealed on the basis the jury was not properly instructed as to test for causation of manslaughter.

ISSUES: Did the accused's actions cause the death?
RULES: Standard of causation for homicide offences: significant contributing cause.

CONCLUSION: Appeal dismissed; accused guilty of second degree murder.

RATIONAL: If the accused intended to kill (satisfies *mens rea*) then the causation element is addressed, as there would typically be no argument that intent + action did not = causation.
NETTE: trial judge erred in explanation of causation: used 'beyond trivial', but should have used 'significant cause'.
COURT: Expand the ambit of *Smithers*, to look at the fault requirement first and not causation. We will now phrase the standard of causation in positive terms using 'significant contributing cause'. The greater the stigma and punishment, the higher the threshold for moral blameworthiness.

NOTES: We're still applying the *Smithers* standard (act is a *contributing cause of death outside the de minimis range* to prove manslaughter), we are just changing the language (act is a significant contributing cause).

PRANK

Prank is the absence of criminal intent.

R V KERR, 1965 4 CCC 37 MBCA

FACTS: Accused was celebrating a victory in a dog championship competition. The accused and two others, drunk, went to the airport and carried around an airport ashtray, which was the floor type and several feet in height. The cleaner who saw them thought they'd leave the ashtray somewhere as a prank, but the RCMP found it on the accused's lawn the next morning. He was charged with theft.

RULES: When all the circumstances of a case are considered, it may be deemed that an event was an ill-considered prank and that the elements of intent and animus furandi were completely absent.

CONCLUSION: Appeal of accused allowed, set aside the conviction and sentence, and allow acquittals to be entered.

RATIONAL: The accused in this case lacked a clear intention of theft. He would have not normally taken the ashtray, but he was highly intoxicated and thought it would be funny to walk out with it.

R V SMITH, 1989 74 NFLD & PEIR 28

FACTS: Accused had been charged with stealing a clock belonging to the Royal Canadian Legion. He declared openly to a number of individuals that he was going to take the clock, which he did, and kept it at his mother's house for 9 days before the police came for it. He said he intended to take the clock only as a joke. He was acquitted, but the Crown appealed. The crime of theft requires a fraudulent intent.

RULES: Whether a taking of another's property is done fraudulently or not is a question of fact and dependent on the case at hand.

CONCLUSION: Appeal should be dismissed; this was a prank that did not amount to theft.

RATIONAL: The TJ found, as a question of fact, that the respondent's conduct in taking the clock from the Legion was a prank intended to be a joke, without any intention to keep it. The evidence before him supported such a finding.

DOUBLE JEOPARDY/RES JUDICATA/KIENAPPLE

RES JUDICATA – DOUBLE JEOPARDY

R V KIENAPPLE, 1974 15 CCC (2D) 524

FACTS: Accused was charged with rape and unlawful sexual intercourse with a female under 14 years. He was convicted of both despite it being the same girl and CA dismissed his appeal.

RULES: There cannot be multiple convictions from the same delict against the same victim through the broader common law defense of res judicata. The relevant inquiry is to whether the same cause or matter is comprehended by two or more offences.

CONCLUSION: Appeal allowed.

R V PRINCE, 1986 2 SCR 480

FACTS: Prince stabbed a victim who was pregnant; she lived, but the baby was born and lived for 19 minutes before it died. Prince was convicted of causing bodily harm in respect of the injured victim.

ISSUES: Whether Prince may also be tried for manslaughter with respect to the death of the baby?

RULES: The relevant inquiry so far as res judicata is concerned is whether the same cause of matter (rather than the same offence) is comprehended by two or more offences. If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of the rule against multiple convictions.

To establish if there is the defense of res judicata:

1. There must be a factual nexus between the charges – Does the same act of the accused ground each of the charges?
    a. Consider: remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events, and whether the accused's actions were related to each other by a common objective.
2. Is there an adequate relationship between the offences themselves?

It must also be considered if there is a common element in both offences. If there is, the acts of the accused caused by his acting can only be used once. Any acts not previously adjudicated remain, but detached from the now adjudicated other acts.

There are 3 ways in which legal correspondence can be found: (1) an element may be a particularization of another element (should not render Kienapple inapplicable); (2) there may be multiple ways of proving a single delict; and (3) where a particular element can be satisfied by proof of a different nature.

In so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims.

CONCLUSION: Decided against the accused; the Kienapple principle does not apply.

RATIONAL: The requirement of a sufficient factual nexus is satisfied in this case; a single act of the accused grounds both charges. There isn't a sufficient correspondence between the two offences to sustain the operation of the rule against multiple convictions because one offence contains as an essential ingredient the causing of bodily harm and the other requires proof of the death; these two elements cannot be subsumed into the other.

R V FRIESEN, 2002 SKCA 32

FACTS: Accused was charged with living on the avails of prostitution of another person (s.212), possession of property obtained by crime (s.354), and using, disposing, or dealing with property or its proceeds with intent to conceal or convert it (s.462.31). TJ convicted

of the property charges, but acquitted her on the other counts because the avails of prostitution charge could not generate property obtained by crime or proceeds to which the property charges could apply; if he convicted the accused, he would have had to stay the convictions due to the rule against multiple convictions.

RULES: To invoke the principle against multiple convictions, there has to be a relationship of sufficient proximity as between the facts and as between the elements of the offence in issue. The operation of this common law principle could be precluded by Parliament.

CONCLUSION: Leave to appeal dismissed on the basis that she had done so well since she was sentenced.

RATIONAL: The TJ viewed the facts underlying the s.212 offence and s.354 offence as the commission of continuous offences that overlapped in time and place, that contained essentially no distinguishing features, and amounts to a single course of wrongdoing. This was a defensible view of the facts; the TJ was also of the view the elements of the latter offence were so similar to the former as to leave little in the way of additional and distinguishing elements relating to the latter. However, by snacking s.462, Parliament expressly provided for multiple convictions for offences under s.212 and s.462.

R V BASILIO, 2003 175 CCC (3D) 440 ONCA

FACTS: Accused was convicted of aggravated assault, assault with a weapon, possession of a weapon for a purpose dangerous, and common assault arising out of a bar room brawl. The charges arose out of a brawl that occurred at a pub where Basilio was accused of stabbing his friend, who required 27 stitches and would have died had not it been for medical intervention.

RULES: Multiple convictions should be barred where there is a sufficient factual and legal nexus between counts. To analyze the legal nexus requirement, one must determine whether the elements of the two charges are sufficiently similar and whether the lesser offence contains distinct or additional elements.

CONCLUSION: The principle against multiple conviction applies to aggravated assault and assault with a weapon.

RATIONAL: In this case, there is no sufficient factual nexus between the events surrounding the possession of a weapon for a purpose dangerous and that of assault. The same act did not ground each charge. The Crown concedes that there is a factual nexus between the assault charges, but that they do not have a requisite legal nexus. The court determines there was a sufficient legal similarity between the offences. The same delict underlies both charges: the wounding in the charge of aggravated assault was inflicted through the use of the knife to stab the victim. IT is the same wrongful use of a knife that underlies the charge of assault with a weapon. The same wrong, therefore, underlies both charges.

DOUBLE JEOPARDY CONCEPTS

1. Rule in *Kienapple* – multiple convictions.
2. Issue Estoppel.
3. *Autrefois acquit* ss.607-610 of the *Code*.
4. *Aurefois convict* ss.607-610 of the *Code*.
5. Rule against inconsistent verdicts.
6. Abuse of process.
7. *Charter of Rights,* s.11(b).
8. *Charter of Rights,* s.7.

PARTIES TO AN OFFENCE

SECTION 21(1)

R V DUNLOP AND SYLVESTER, 1979 47 CCC (2D)

FACTS: The victim was raped by a group of 18 members of a motorcycle gang. The victim identified the accused as two of the people that raped her, but both denied the assault and claimed that they were just delivering beer when they observed a woman having sex with men.

ISSUES: Whether mere presence is sufficient to satisfy the offence of aiding and abetting? What is the scope of the offence?

RULE: Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement.
CONCLUSION: Appeals of the two accused allowed; acquittals entered.

RATIONAL: Encouragement is willful and an intentional act which facilitates the commission of an offence, an act which prevents, hinders, or interferes with a victim escaping, or an assistance of the principal. There is a distinction between presence with prior knowledge and accidental presence. There is no evidence to suggest the two accused were there for more than mere presence and passive conduct; no evidence exists to show the accused had prior knowledge of the intent to rape.

NOTES:

- The victim could not actually identify if either Dunlop or Sylvester actually raped her; the jury here wasn't convinced BARD that they were the rapists. Therefore, they could not be convicted of the rape itself.
- **s.21(2):** was not able to be found because the Crown could not prove that D&S were there with a common unlawful intention to engage in the sexual assault.
- **s.21(b)/(c):** the Crown could not prove that their act of being there facilitated the commission of a crime (like preventing her from escaping, ect). Merely being there by accident is not enough, you have to have prior knowledge that a rape was going to be committed.

R V ADAMS & WALTZ, 1989 49 CCC (3D) 100 ONCA

RULES: To render an accused liable as a party to an attempted murder, it is not sufficient that it be shown merely that the accused knew that the principle offender intended to commit some act of violence; a party must have the knowledge of the essential nature of the offence to be committed by the principle. Therefore, on a charge of attempted murder, the accused could not be coveted unless he knew the principle had an intention to kill.

R V JACKSON, 2007 3 SCR 514

FACTS: Accused was convicted at trial for having illegally produced pot. His conviction was affirmed by the CA.

ISSUES: Did the accused's conviction amount to an unreasonable verdict within the meaning of s.686 of the *Criminal Code*?

RULES: The onus is on the accused to persuade the trier of fact that no properly instructed jury, acting judicially, could reasonably have found him guilty.

CONCLUSION: Appeal dismissed.

RATIONAL: The accused tried to argue that his presence at the grow site did not mean he was culpable for the crime because he was not engaged in an illegal activity. The court did not agree in this case because he was found, sleeping, in a tent with a bunch of grow material including fertilizer.

R V MERCER, 2005 BCCA 144

FACTS: A break-in occurred where a victim, who was 82, died of a severe head injury inflicted during the break-in. Mercer claimed it was his accomplice who had committed the act and he tried to stop him from continuing the assault. The Crown based its theory on either Mercer being the sole perpetrator of the murder or, alternatively, that he aided and abetted his accomplice in doing it.

RULES: It is appropriate, where an accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, to direct the jury with respect to the provisions of s.21 of the *Code*, even though the identity of the other participant(s) is unknown, and even though the precise part played by each participant may be uncertain.

The jury is not bound by the theory of the Crown in its consideration of the evidence.

CONCLUSION: Appeal allowed and a new trial ordered.

RATIONAL: There was evidence to leave with the jury the theory, in the alternative to the main position that he acted alone, that both men participated in the beating. But in that case, the appellant would be criminally liable as a co-principle under s.21(1)(a). The jury needed to know that it was not necessary to determine the precise role each played in the offence. The circumstantial evidence that the appellant was in direct physical contact with the victim makes him a principle or co-principle and not a party under s.21(1)(b) or (c); a charge in this regard amounts to a serious error of law.

R V BRISCOE, 2010 SCC 13

FACTS: Briscoe was charged with kidnapping, aggravated assault, and 1st degree murder. He had been part of a group of 5 men who lured a 13-year-old girl to a secluded area where she was raped and killed.

ISSUES: What is the actus reus and mens rea for aiding and abetting?

RULE: **Actus Reus of aiding or abetting:** omitting or doing something that assists or encourages the perpetrator to commit the offence.
Mens Rea of aiding or abetting:

1. Intent to assist or abet in the commission of the crime; or
2. Knowledge that the perpetrator intends to commit the crime.

***rule as per first term:** Willful blindness can substitute for actual knowledge, imputed knowledge, whenever knowledge is a component of the MR. Willful blindness is not simply a failure to inquire, but is deliberate ignorance. It requires in effect a finding that the defendant intended to cheat the administration of justice.

CONCLUSION: New trial ordered because the jury was not instructed re: willful blindness, but the accused was ultimately convicted.

RATIONAL: 'Party' means to have knowledge of the perpetrator's intent to commit the crime. You don't have to share the intent to commit it, only the intent to assist. Briscoe had a 'strong suspicion that someone would be killed' and he may have been willfully blind. He deliberately did not inquire into what the group intended to do because he did not want to know.

R V VU, 2012 SCC 40

FACTS: M was abducted and held for 8 days in three different houses. The accused was convicted of unlawful confinement and actuitted of kidnapping because there was insufficient evidence linking him to the kidnapping. CA held the appellant was liable as a party to the kidnap and substituted a conviction. The accused appealed.

RULES: Where an accused, with the knowledge of the principal's intention to see a continuing offense through to its completion, does (or omits to do) something, with the intention of aiding or abetting the commission of the ongoing offence, party liability is established.

CONCLUSION: Appeal should be dismissed.

RATIONAL: Kidnapping is a continuing offence that includes the victim's ensuing confinement. So long as the victim of the kidnapping remains unlawfully confined, the crime continues. When the accused became aware of the victim and knew that he had remained confined against his will, he chose thereafter to take part in the kidnapping enterprise.

R V JR

RULES: A circumstance under which a person can be found liable as a party to the offence of conspiracy is the Narrow Approach, which limits such liability to aiding or abetting the formation of the agreement. Party liability is limited to cases where the accused aids or abets a new member to join a pre-existing agreement.

A person becomes party to an offence if he aids or abets a principle in the commission of the offence. It follows that party liability to a conspiracy is made out where the accused aids or abets the *actus reus* of conspiracy, namely, the conspirators' act of agreeing.

WITNESSES

R V GAUTHIER, 2013 SCC 32

FACTS: Gauthier is charged with being a party with her spouse to the murder of their three children. Both had severe financial troubles and she became aware of a murder-suicide pact her husband had drafted. She confronted him and he abandoned the idea. The husband drugged their drinks. She called an ambulance, slit her wrists, and confessed to there being a pact.

ISSUES: What is the application of the defense of abandonment in the context of the form of participation in a crime provided for in **s.21(2)**?

RULE: **Test for allowing the defense of abandonment:**

1. Intention to abandon or withdraw from the unlawful purpose;
2. Timely communication of this abandonment from the person in question to those who wish to continue;
3. Unequivocal notice communicated to those who continue to participate in the common purpose; and
4. The accused took reasonable steps (proportionate to participation) either to neutralize or cancel out the effect of their participation.

The defense of abandonment is not available to the principle, but it can be available to accessories.

CONCLUSION: Appeal was allowed and a new trial was ordered based on the test.

RATIONAL: This test applies to **s.21(2)** where there is a promise to carry out a common unlawful purpose. Also applies to aiders and abettors who do more than promise support, they perform concrete acts to help the principal. Mere communication of an intention to cease participation is not enough and there is an emphasis on #4.

R V BIRD, 2009 SCC 60

CONCLUSION: There was no air of reality to the defense of abandonment. Appeal allowed and the conviction for manslaughter is set aside. Conviction for first degree murder is entered.

R V SRB, 2009 ABCA 45

FACTS: The accused was a party to a plan to kill someone. In furtherance of that plan, the accused participated in the kidnapping of the victim, carried a wrench that was hidden in their sleeve, was in the car to the fairway, struck the victim with the wrench, and held her arms down while she was being sexually assaulted on the fairway. She did leave before the killing took place by indicating that she did not want to see it.

RULES: Abandonment requires a change of intention of the part of the accused and, where practical and reasonable, a timely communication of the accused's intention to abandon the common unlawful purpose; the communication need not be verbal, but it must be unequivocal. Something more than a physical change of place is required.

CONCLUSION: The accused was a party to the murder of the victim and, therefore, the appeal is allowed, manslaughter conviction is substituted for a conviction of first degree murder.

RATIONAL: Her reason for leaving before the killing cannot support a change in intention. Moreover, the evidence is incapable of supporting the conclusion that the accused unequivocally communicated to the others that she intended to abandon the plan to kill. There is, therefore, no evidence to support a defense of abandonment in this case.

COUNSELLING AN OFFENCE

This does not depend on an offence being committed; we are criminalizing an intent for the crime to be committed.

R V GLUBISZ, 1979 47 CCC (2D) 232

FACTS: Accused was charged with 'unlawfully procuring another person to commit an indictable offence, first degree murder, which offence was not committed..' contrary to s.422 of the *Criminal Code*. The accused attempted to have someone kill his former wife, who had been an undercover cop, and paid $2,000.00 for it. The accused was convicted and appealed.

RULES: The fact that the accused was thwarted from having the act completed does not mean that his actions did not constitute the meaning of procuring within the *Criminal Code*. "To procure" means 'to produce by endeavour'.

CONCLUSION: Appeal should be dismissed.

RATIONAL: The acceptance by the accused of the officer's offer, together with the promise to pay $2,000 if he did so, amounted to procuring not only in the generally understood use of the word, but within the dictionary definition because the promise to pay was the inducing or persuading factor which completed the illegal bargain.

R V GORDON & GORDON, 1937 79 CCC 315 SKCA

FACTS: Evidence establishes that both accused counselled Tasker to burn the stores of two of their competitors in business. On one occasion, the accused went so far as to offer him gasoline and certain tools to do the job ASAP. No offence was committed by Tasker, as he made no attempts to carry out the wishes of the accused.

RULES: Under s.72, a person who merely counsels cannot be said to have attempted to commit an offence that was counselled for his intention is not to commit it, but to have some other person do it and, until that other person commits the offence or attempts to commit it, the person who incites cannot, in the absence of some special provision, be guilty of the offence counselled or of an attempt to commit

it. In order to constitute an attempt, there must be some act done with intent to commit the crime and forming a part of a series of acts which would constitute its real commission if not interrupted.

The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think all acts towards committing a misdemeanor indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.

The difference between attempt and counselling: attempt is something that you try to do yourself whereas counseling is something that you are trying to convince someone else to do, which is the 'act'.

CONCLUSION: The accused's conviction for an attempt is quashed, but he must be convicted of counselling the commission of arson.

RATIONAL: There was no attempt either on the part of Tasker or on the part of the accused to commit the crime of arson. Tasker, at no time, according to evidence, performed any act which was a step in the commission of an offence.

R V HAMILTON, 2005 SCC 47

FACTS: Hamilton offered for sale, though the internet, access to a 'credit card number generator' for fraudulent purposes. He also offered for sale bomb recipes and information on how to commit burglaries. Hamilton was charged with counselling the commission of indictable offences that were not in fact committed. The TJ acquitted him on four counts. The Crown appeals on the ground that the TJ erred as to the *mens rea* of counselling.

ISSUES: Is it necessary to prove that the person who counselled the offence intended that it be committed?

RULES: Counselling or procuring is a substantive offence, whether or not the felony was subsequently committed. The *actus reus* for counselling will be established where the materials or statements made or transmitted by the accused actively induce or advocate and do not merely describe the commission of the offence.

In terms of the *mes rea*, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct.

CONCLUSION: Crown's appeal allowed and a new trial ordered.

RATIONAL: The TJ's conclusion that Hamilton did not intend to induce the recipients to use those number is incompatible with the plain meaning of the 'teaser' e-mail and with her other findings of fact, including her finding that Hamilton well understood that use of the generated numbers was illegal. Her assertion that 'his motivation was monetary' immediately after her reference to these facts demonstrates an error of law as to the *mens rea* for counselling the commission of a crime, and warrants a new trial.

BY OMISSION

R V ELDER, 1925 44 CCC 75

FACTS: The accused was responsible for attending and giving treatment to Watson's daughter, who suffered from a serious illness which was ascertained to be diphtheria. The daughter had complained of a headache that morning and the mother pleaded with the accused to use Christian Science (prayer) to fix her; the accused had claimed that he was an expert. A Dr. had told them that, if she didn't take the anti-toxin, she would die; the father and mother refrained from administering it based on their faith. The accused, Elder, was charged with actively aiding, abetting, counselling, and procuring.

RULES: Conscientious objection to medical treatment because of a belief in the doctrines of the sect known as Christian Scientists is not a lawful excuse for omitting to provide medicines and medical aid.

CONCLUSION: Conviction of the accused quashed.

RATIONAL: Elder did not visit the child until Sunday when he came to their home. He was in in the room for 2 minutes because the treatment he gave as 'absent' treatment in the form of a prayer. He didn't prescribe any medicine or medical treatment. There was no evidence that he advised the parents not to call in a physician. On Monday, Elder had transferred the case to Robb, so there was nothing further implicating him in counselling he Watson's from abstaining from providing proper medical treatment to the child.

ACCESSORIES AFTER AN OFFENCES

S.23 OF THE CODE

Accused has to have knowledge of the offence and they have to assist. The principle person does not have to be convicted for them to be an assessor after the fact.

YOUNG V THE KING, 1950 98 CCC 195

FACTS: A police constable was murdered and the accused's sister and three other people, including the accused, set out from Montreal to Sheenboro, in the middle of the night, to visit the murderer's mother, to tell her what had transpired. They were informed that the police were looking for them and the accused offered to hide them.

RULES: Anything done which goes beyond a mere omission to aid in the apprehension of an offender is sufficient. S.71 makes it an offence to receive, comfort, or assit any one who has committed a crime in order to enable him to escape; There are three elements of the offence: knowledge that a crime has been committed, the desire to help the delinquent escape, and a positive act or omission to aid him in making his escape.

CONCLUSION: Appeal dismissed.
RATIONAL: There is no doubt that the accused intended to assist the murderer to avoid apprehension. His offer to hide them was not accepted, but the information he gave them re: that they were known to the police, and that the police had their license plate number, falls within the meeting of 'assist anyone to escape' within the charge.

R V SHALAAN; S(FJ), 1997 159 NSR (2D) 285

FACTS: The accused was charged with first degree and accessory after the fact for a murder committed by her brother. They both participated in the murder and, after the murder, the accused received, comforted, and assisted her brother in orchestrating a discover of the body and providing him with a false alibi. He had been acquitted of the murder and the accused acquitted of being an accessory.

ISSUES: Can the accused be convicted as an accessory after the fact to murder where the principle offender has been acquitted of the offence?

RULES: It is not necessary to consider whether an accessory after the fact can be indicted and convicted, if the principle offender has been acquitted, after a trial on the merits, of the offence with respect to which the accessoryship is alleged. The conviction of a secondary party does not require the conviction of the principal, but secondary liability does require that there *be* a principal. It is immaterial that the principal lacks the requisite culpability for the offence because secondary liability has its own standards of culpability.

CONCLUSION: Appeal of the Crown allowed, acquittal set aside, conviction entered.

CONSPIRACY TO COMMIT AN OFFENCE

S.465 OF THE CODE

R V COTRONI PAPALIA V THE QUEEN, 1979 2 SCR

FACTS: Appeal of Papalia from conviction on a charge of conspiring to have possession of extorted funds. Crown appeals acquittal of Cotroni of the same charge.

RULES: The essence of criminal conspiracy is proof of agreement and that agreement itself must be the gist of the offence. The acus reus is the fact of agreement. As long as there is a continuing overall, dominant plan, there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy.

Whether the 'acts of the accused were done in pursuance of a criminal purpose' = it is not enough that two or more persons pursued the same unlawful object at the same time/place, it is necessary to show a meeting of the minds, a consensus to affect an unlawful purpose. There must be evidence BARD that the alleged conspirators acted in concert in pursuit of a common goal.

CONCLUSION: Appeal of Papalia dismissed and appeal of the Crown re: Cotroni dismissed.

RATIONAL: There is no evidence of an agreement between the four alleged conspirators; there was not the common purpose of a single enterprise, but rather the several purposes of two separate adventures. A common desire to have money cannot create a conspiracy in the absence of a meeting of the minds.

The offence cannot be set up as, or confused with, the object of the conspiracy. One must look to the facts to find the object. When this is done, it is obvious that, while Swartz and Paplia, on the one hand, and Cotroni and Violi, on the other, may be said to have been pursuing the same end/object, they were doing so independently and not in pursuance of a criminal purpose held I common.

The evidence shows that there existed two conspiracies: the first one involved Papalia and Swartz and its purpose was to have possession of extorted funds; the second one involved Cotroni and Violi and its purpose was to acquire and consequently to have possession of part of the same extorted funds. In the case of Papalia, there was evidence to go to the jury that he and Swartz conspired as charged and Papalia was properly convicted. The only evidence against Cotroni was a conspiracy not covered in the indictment.

R V ROWBOTHAM/ROBIN, 1992 76 CCC (3D) 542

FACTS: Two accused were charged with conspiracy to traffic in a narcotic in Toronto and Austin. The evidence indicated that the accused met with a police agent and agreed to supply them with pot. The accused insisted that the pot be delivered in Texas and that

payment be in Texas. The TJ acquitted because no evidence has been offered to prove that trafficking in a narcotic is an offence under the law of Texas.

RULES: Evidence can be used to establish a sufficient and real substantial link with Canada, and there is no requirement of international comity that would dictate that Canada refrain from exercising jurisdiction.

CONCLUSION: Appeal allowed and a new trial ordered.

RATIONAL: s.465(3) provides, 'every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place, shall be deemed to have conspired to do that thing in Canada'. There was evidence in this case that the conspiracy took place in Canada, including all the planning and preparatory acts regarding the sale.

R V ROWBOTHAM/ROBIN, 1994 SCC 463

RULES: The substantive offence, which is the subject of the conspiracy, has to have a real and substantial connection to Canada.

CONCLUSION: Appeals of the accuseds are dismissed; the TJ erred in directing an acquittal.

RATIONAL: There is evidence which, if accepted, establishes that the offences of trafficking alleged here have a real and substantial connection to Canada.

R V JR, 2013 SCC 12

FACTS: A youth learned that his friend and her sister were planning to murder their mother by plying her with alcohol and drowning her. This plan was executed and the sisters were convicted for. The police found an MSN chat where the youth, in talking to the friend and sister, indicated they should give the mother codeine pills and alcohol as well as planned to meet them after for their alibi. The TJ instructed the jury that J could be convicted of conspiracy to commit murder. CA dismissed appeal from the conviction of the youth.

RULES: A circumstance under which a person can be found liable as a party to the offence of conspiracy is the Narrow Approach, which limits such liability to aiding or abetting the formation of the agreement. Party liability is limited to cases where the accused aids or abets a new member to join a pre-existing agreement.

A person becomes party to an offence if he aids or abets a principle in the commission of the offence. It follows that party liability to a conspiracy is made out where the accused aids or abets the *actus reus* of conspiracy, namely, the conspirators' act of agreeing.

CONCLUSION: Appeal dismissed.

RATIONAL: Party liability should not have been put to the jury; there is no evidence that the youth aided or abetted the initial formation of the agreement between the friend and the sister to murder their mother, or aided or encouraged a new member to join the existing conspiracy. The TJ's error, however, could not have possible affected the verdict.