8 Criminal Defences

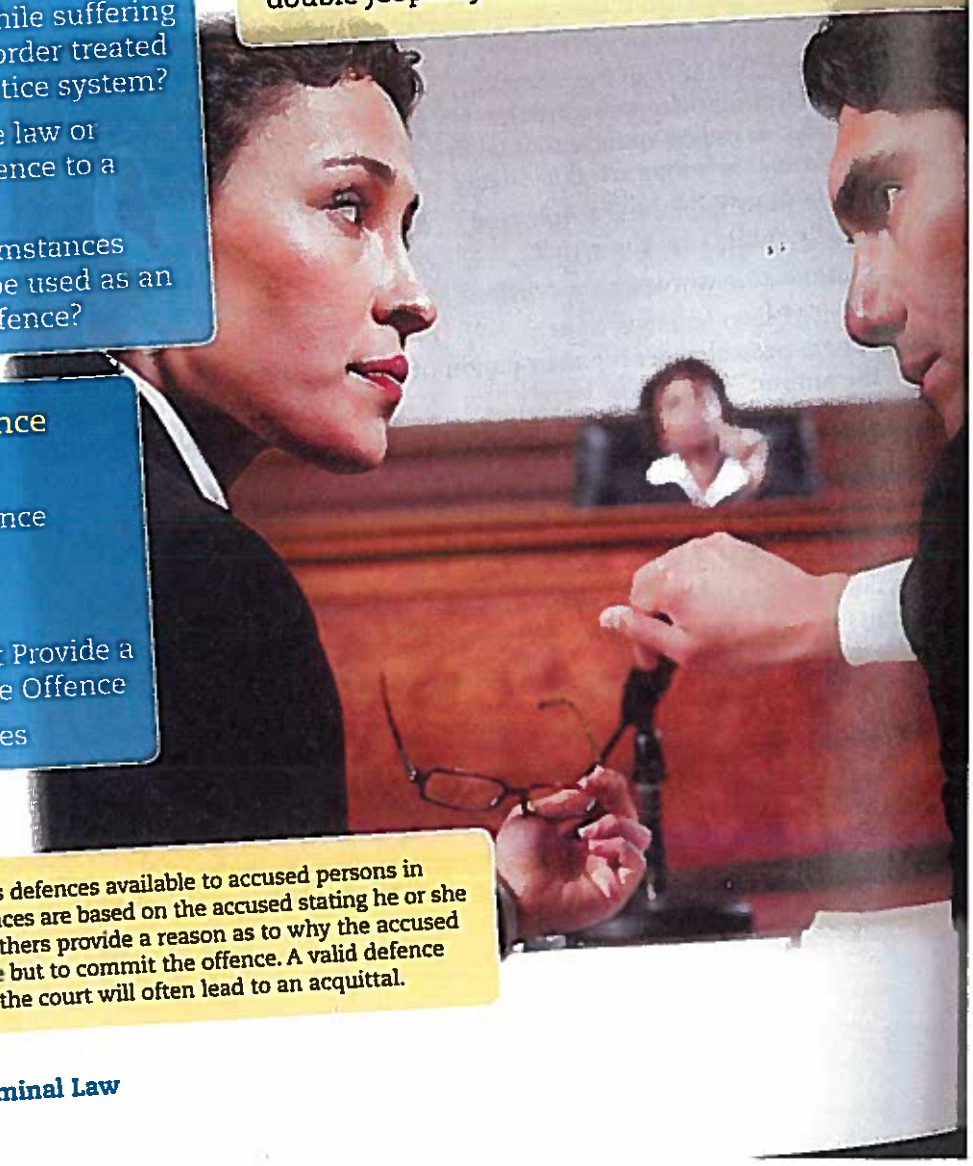
What You Should Know

- What types of defences are available to an accused person charged with a crime?
- Can some defences lead to a full acquittal?
- How are individuals who commit a crime while suffering from a mental disorder treated in the criminal justice system?
- Is ignorance of the law or intoxication a defence to a criminal act?
- Under what circumstances can provocation be used as an accepted legal defence?

Selected Key Terms

alibi
automatism
battered woman syndrome
defence
double jeopardy
duress
entrapment
not criminally responsible (NCR)
provocation
self-defence

Chapter at a Glance



There are numerous defences available to accused persons in Canada. Some defences are based on the accused stating he or she is innocent, while others provide a reason as to why the accused had no other choice but to commit the offence. A valid defence that is accepted by the court will often lead to an acquittal.

8.1 Introduction

As you learned in Chapter 4, a person accused of committing a crime is presumed innocent. The accused is found guilty *only* if the Crown can prove that the crime was actually committed *(actus reus)* and that the accused had the guilty mind *(mens rea)*. The accused can respond and present a defence to the charges. Accused persons can put forth three possible arguments:

- They can deny that they committed the act, disputing the *actus reus*.
- They can argue that they lacked the necessary criminal intent or guilty mind, disputing the *mens rea*.
- They can argue that they have a valid excuse for what happened while committing the act.

Some of these defences are defined within the *Criminal Code* (for example, the defence of mental disorder, which used to be called insanity). Other defences, like self-defence, are considered to be common law defences based on the British common law system.

Various defences are used in criminal law to prove that the accused is not guilty of the offence charged, or perhaps guilty of a lesser one. Several of these defences and the case law that supports them will be discussed in this chapter.

Did You Know?

Judges in Canada are absolutely immune from any civil or criminal action for anything said or done in performing their duties. In other words, they cannot be sued or criminally charged for anything they do or say while performing their duties.

defence the accused's response to criminal charges

alibi a defence that the accused was not at the scene of the crime when it took place

8.2 The Alibi Defence

The best possible defence is an acceptable alibi that places the accused somewhere else at the time the offence occurred. For example, Roberto presents an alibi that he was with his friend Yanni at the time the crime took place. The Crown must try to disprove his defence (for example, that Yanni lied for his friend) in order to prove Roberto guilty of the crime. This is the only thing that the defence must disclose to the Crown prior to trial.

An alibi is often presented by the accused upon arrest in a statement made to the police. A full alibi defence includes three parts:

1. a statement indicating that the accused was not present at the location of the crime when it was committed
2. an explanation of the accused's whereabouts at that time
3. the names of any witnesses to the alibi

These parts are necessary if the accused wishes to raise this defence. For example, Ryan is arrested by police for breaking and entering into a neighbourhood home. He tells police that he was at hockey practice on the night in question, and his coach and teammates will confirm this. In this case, Ryan has met all three parts required by the alibi defence. However, if he were home alone that evening, his alibi would be incomplete, satisfying only the first two of the three parts.

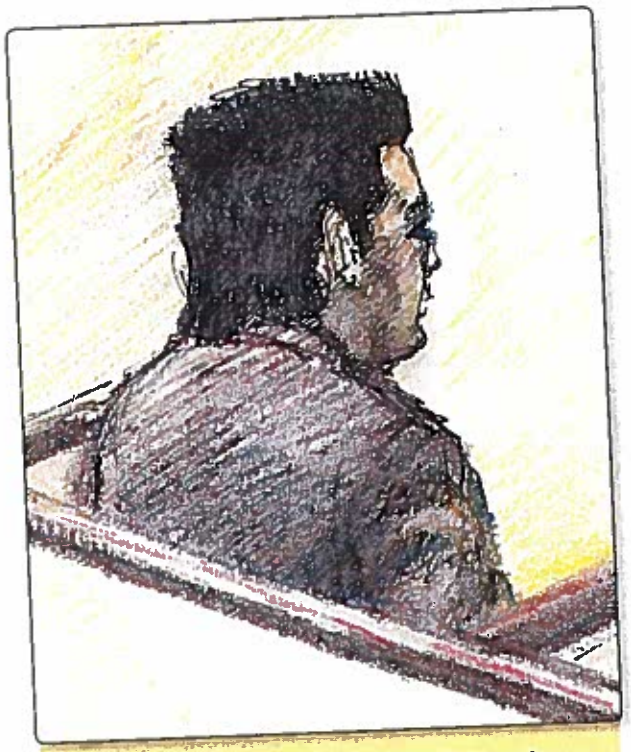
The alibi should be supplied early to allow the police and Crown to investigate it properly. Otherwise, it may seem suspicious in court. While the accused is not required to testify in his or her own defence, courts (judges and jury) generally expect an accused to testify and be cross-examined about the alibi. Of course, the Crown still maintains the burden of proving its case beyond a reasonable doubt.

The accused must give the name and address of any witness who can support an alibi. Police then investigate the alibi evidence to make sure that the alibi defence is believable. This involves interviewing the alibi witnesses provided by the accused.

Case

R. v. Maracle, 2006 CanLII 4152 (ON C.A.)

For more information, Go to Nelson Social Studies



This is a courtroom sketch of David Maracle. Maracle tried to use the alibi defence to escape a dangerous offender conviction for sexually assaulting a 14-year-old girl.

In May 1997, the complainant, a 14-year-old girl, was grabbed from behind by a man with a gun as she walked on a trail through a wooded park at 7:30 a.m. on her way to school. A cloth was placed over her eyes, which was then replaced by duct tape. She was brutally assaulted three times by her assailant. After the attack, the man duct-taped her wrists and drove off. The victim ripped the tape off her arms and eyes and sought help. She was taken to a hospital where she received medical attention.

In November 1999, David Maracle was convicted of sexual assault causing bodily harm, kidnapping, and carrying a gun for the purpose of committing the indictable offence of forcible confinement. In November 2000, the trial judge found Maracle to be a dangerous offender. The judge ordered him detained for an indeterminate period. Maracle appealed his conviction and sentence to the Ontario Court of Appeal.

The Crown's case had three parts. First, the victim offered some limited identification evidence, even though she never saw her assailant's face. Second, the Crown introduced evidence of a piece of duct tape with the appellant's fingerprint on it. Third, the Crown had DNA evidence in the form of a semen stain on the girl's T-shirt that matched Maracle's DNA profile.

The appellant's main defence was an alibi. In his testimony, he denied that he had ever met or seen the complainant prior to the trial. He also denied attacking her. His alibi was that he was at home on the morning of May 26, 1997. His sister, mother, and brother all supported his alibi.

Maracle further argued that the judge at trial had failed to instruct the jury properly about the "alibi defence" he had presented. He argued that the judge suggested the jury give less weight to the alibi since it was not disclosed to police and the Crown until April 1999, some time after the charges were laid.

In February 2006, the Ontario Court of Appeal ruled unanimously that there were substantial errors in the trial that affected the appellant's alibi defence. This made the trial unfair. They set aside the conviction and ordered a new trial.

For Discussion

1. Identify the three parts of the alibi defence presented at trial.
2. Why did the Ontario Court of Appeal order a new trial?
3. The trial judge asked the jury to consider whether "the alibi was disclosed in sufficient time for meaningful or effective investigation." What did he mean?
4. Do you agree with the decision in this case? Explain.

Review Your Understanding

1. What is a defence?
2. What are three arguments for a valid defence to a crime?
3. Explain the alibi defence and how it works.
4. What three conditions are required for the alibi defence to be accepted?
5. Why must the alibi defence be disclosed to the Crown at the earliest opportunity?

8.3 Automatism

automatism involuntary action by someone who is in a state of impaired consciousness, without control over his or her actions; insane automatism is caused by a disease of the mind

The automatism defence is not mentioned in the *Criminal Code*. It has developed over time through common law case precedent. Automatism is defined as automatic functioning without conscious effort or control. In other words, an individual has no control over his or her actions, but is still capable of committing an act (for example, breathing and blinking). At law, there are two types of automatism: non-insane (non-mental-disorder) automatism, and insane (mental disorder) automatism. Both rely upon expert psychiatric evidence. Insane automatism is caused by a "disease of the mind." Non-insane automatism is linked to external factors like sleepwalking. With an automatism defence, the judge must first decide whether a condition exists that will likely present a recurring danger to the public. People with a mental health disability who hear voices telling them to do things against their will would be considered dangerous to others and to themselves. If the judge determines that there is no recurring danger, the case will proceed as a non-insane offence.

Non-Insane Automatism Defence

Non-insane automatism is sometimes called "temporary insanity." Canadian courts have recognized that this state may be the result of the following: a physical blow, physical ailments such as a stroke, hypoglycemia (low blood sugar), sleepwalking (see the *R. v. Parks* case in Chapter 4, pages 124–125), intoxication, or severe psychological trauma. Based on expert testimony, if a judge accepts this defence, the result would be a complete acquittal.

This defence has been used in numerous cases throughout Canadian legal history. For example, in *R. v. Bleta*, 1965, the Supreme Court acquitted Karafil Bleta, who used non-insane automatism as a defence to a murder charge. In this case, Bleta had suffered a serious blow to his head, and while still dazed and confused, stabbed a man with a knife, killing him. Bleta's defence was supported by expert psychiatric evidence presented in court.

In *R. v. Stone*, 1999, the Supreme Court felt it needed to clarify when this defence could be used. The court was concerned that automatism could easily be faked. In *R. v. Stone*, the accused admitted stabbing his wife 47 times. However, he claimed to have done it while in an "automatistic" state brought on by his wife's insulting words. The Supreme Court rejected this defence. It indicated that the burden of proof rests entirely on the accused. The evidence presented to support the defence must be significant.

In April 2002, R.E.M. guitarist Peter Buck was cleared on charges of attacking British Airways staff in an alleged air-rage incident. Buck's lawyers successfully argued that a combination of taking a sleeping pill and drinking "small amounts" of wine had caused Buck to enter a state of non-insane automatism. Buck had not intended to commit an offence.

Case

R. v. Luedecke, 2008 ONCA 716 (CanLII)

For more information, Go to Nelson Social Studies

Jan Luedecke claimed he was suffering from "sexsomnia" when he sexually assaulted a woman at a Toronto party such as this one.

In July 2003, the victim was attending a party in Toronto with a few of her friends. She arrived at about 7:00 p.m., and there were approximately 50 to 60 people present. Over the course of the evening, she had several drinks. At about 2:00 a.m. the following morning, feeling tired, she sat down on a couch and fell asleep, but was abruptly awakened to find a man on top of her having sexual relations with her. Her underwear had been removed and her skirt had been lifted up. She pushed the man onto the floor and proceeded to Women's College Hospital, where she was treated.

Luedecke had spent the evening before the party drinking alcohol and consuming magic mushrooms at a friend's cottage. The next day he drove back to Toronto, arriving at the party around 7:30 p.m. During the evening he drank 8 to 12 beers and several other alcoholic drinks. After having been awake for over 22 hours, he fell asleep at the opposite end of the same couch as the complainant. His next recollection was being pushed by a woman off the couch onto the floor. He testified that he was completely dazed and in shock.

At trial, Luedecke argued the non-insane automatism defence, asserting that his conduct was not the exercise of his conscious will. An expert on sleep disorders testified that Luedecke was acting without logic or reason when he committed the offence. He gave evidence that Luedecke was sleepwalking (somnambulism). The expert concluded that Luedecke was suffering from "sexsomnia" at the time of the offence. This is a term used to describe the occurrence of sexual behaviour during sleepwalking. There had also been other similar incidents in the past with girlfriends.

The defence attorney argued that Luedecke should be found not criminally responsible (NCR) as a result of a mental disorder (see page 267 for an explanation of NCR). However, in November 2005, the trial judge stated that while this was a rare case, he was satisfied that at the time of the incident, the defendant was in a state of non-insane automatism and that his conduct was not voluntary. He concluded that the evidence did not fit the definition of a disease of the mind. Luedecke was therefore acquitted. The Crown appealed, and the Ontario Court of Appeal heard the appeal in February 2008. In a 3–0 judgment in October 2008, the appellate court overturned Luedecke's acquittal and ordered a new trial. However, the new trial should focus only on whether he is not guilty or "not criminally responsible" on account of having a mental disorder that requires treatment in the mental health system.

For Discussion

1. Why did Luedecke present the defence of non-insane automatism in this case?
2. Summarize the sleep expert's evidence in this case.
3. Why do you think the Crown attorney argued that Luedecke should be found not criminally responsible as a result of a mental disorder? Explain.
4. How could this defence be dangerous for women? Do you agree with the final decision in the case? Explain.

Insane Automatism Defence

More and more people with a mental health disability are ending up in the criminal court system. This has forced the various players to reconsider how best to deal with individuals with mental disorders who commit crimes.

not criminally responsible (NCR) not criminally responsible because of a disease of the mind

In 1992, Parliament made changes to the *Criminal Code* to deal with accused persons with mental disorders. It passed Bill C-30, which created a special section within the *Criminal Code*. Since then, several important cases have come before the courts. These judgments helped establish some clear guidelines on how mental disorder defences should be handled.

A mental disorder, or a disease of the mind, is defined in section 16 of the *Criminal Code*. It states that an individual is **not criminally responsible** (NCR) for a criminal offence providing the following:

- At the time that the act was committed, he or she was suffering from a mental disorder.
- The mental disorder made the individual incapable of appreciating the nature of the act or knowing that the act was wrong.

The government has realized that offenders who suffer from mental disorders need to be treated fairly by the criminal system. The Canadian Mental Health Association (CMHA) Mental Health Court Support and Diversion Program provides services to people diverted to the Mental Health Court. These services include helping court clients find the mental health and support services they need and offering information and support to them and their families and loved ones. Staff members of the Court Diversion Program are shown here.

For example, a person with paranoid schizophrenia may assault someone she or he incorrectly thinks is a threat. In this case, the person with this condition is incapable of understanding that what she or he did was wrong. Under the law, such a person would be considered NCR (not criminally responsible). The NCR defence can be raised by either the accused or the Crown, and whichever party raises the defence incurs the burden of proof. In other words, whoever claims an accused is NCR must be able to prove it in a court.

Prior to an NCR case moving forward, the courts must first determine if the accused is fit to stand trial. A fitness hearing can assess the answers to the following three questions:

1. Does the accused understand the nature of the proceedings? (Does the accused understand that he or she is in court and being tried for having committed an offence?)
2. Does the accused understand the possible consequences of the proceedings? (Is the accused aware that she or he can be sent to jail or to a psychiatric facility?)
3. Can the accused communicate with his or her lawyer?

Did You Know?

The laws in Canada governing insane automatism date back to the 1843 decision of the British House of Lords in the *M'Naghten's Case*. In that case, the accused Daniel M'Naghten, was found not guilty by reason of insanity (mental disorder) after having murdered the prime minister's secretary.

Did You Know?

In the case of *R. v. Newby*, 1991, the accused unsuccessfully used the defence of chronic fatigue syndrome against charges of fraud worth $870 000. The court rejected his defence, found him guilty, and gave him a suspended sentence.

A trial cannot proceed until an accused is deemed to be fit. An accused found to be "unfit" will be sent back to jail or, more often, to a psychiatric hospital until she or he is found to be fit and can then be brought back to court.

Once a person proceeds to trial and is determined to have been suffering from a "disease of the mind" at the time the offence was committed, they are seen as NCR under the law. A trial judge or a provincial review board will then decide the sentence. This board will have to determine whether or not the accused continues to pose a significant threat to public safety. If the accused does not pose such a threat, he or she would be discharged back into society. If the accused does pose a continued threat, she or he will be sent to a psychiatric facility to undergo medical and clinical treatment. The case will be reviewed annually to determine whether the accused continues to pose a "significant risk" (dangerous to society).

You Be the Judge

Winko v. British Columbia (Forensic Psychiatric Institute), 1999 CanLII 694 (S.C.C.)

Go to Nelson Social Studies

In July 1983, Joseph Winko was arrested for attacking two pedestrians on the street with a knife and stabbing one of them behind the ear. Prior to this incident, he had been hearing voices urging him to harm passing pedestrians. Winko was charged and taken to a psychiatric hospital for treatment. He was eventually charged with aggravated assault, assault with a weapon, and possession of a weapon for purposes dangerous to the public peace. In 1984, he was tried and found not criminally responsible (NCR).

From the time of his NCR verdict until his release, Winko was held at a forensic hospital where he was considered institutionalized. In August 1990, he was released into the Vancouver community with a number of conditions. One of these conditions included reporting to a doctor on a regular basis and taking his medications. In September 1994, he missed a medication injection for the second time. This led to a recurrence of the voices he was hearing at the time of the original offence. Despite occasional breaks from medication, he had never been physically aggressive to anyone since the original offences in 1983.

A three-member panel of the review board of British Columbia considered Winko's status in May 1995, granting him a conditional discharge. He was released from the hospital under certain conditions. He remained under a court order because the board thought that he was generally harmless. However, the board believed that Winko could become a significant risk to public safety in "certain circumstances." The board suggested that a conditional discharge would best ensure the safety of the public. In July 1996, a majority of the British Columbia Court of Appeal upheld the review board's decision to grant Winko a conditional discharge. Winko further appealed to the Supreme Court. In June 1999, in a unanimous 9–0 decision, the court dismissed the appeal. In its decision, the court made it clear that the review board is required to determine whether the NCR accused is a "significant threat to the safety of the public." In other words, is that person a real risk to do harm to members of the public? If the accused does not pose such a threat, he or she would be *absolutely* discharged. In this case, the board had decided that Winko continued to be a significant threat.

- Do you agree with the ruling in this case? Should the courts be able to decide how long an NCR accused remains institutionalized, or should there be a maximum amount of time put in place, much like regular sentencing? Explain.

Agents of Change

The Toronto Mental Health Court—Decriminalizing People with a Mental Health Disability

During the mid-1990s, officials noticed a significant increase in the number of accused persons suffering from mental disorders who were appearing in court. Most were charged with relatively minor offences. It became clear that the regular criminal courts were not equipped to handle these cases. There were delays and inefficiencies in dealing with preliminary issues such as fitness hearings. For the most part, other options for people with a mental health disability were not being fully explored. The accused would often spend several weeks (if not months) in jail waiting for a trial date to be set or for the matter to be resolved.

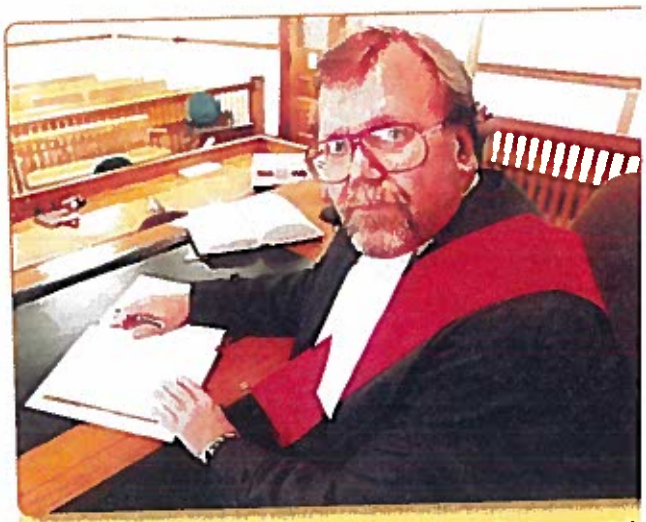
As well, mentally disordered accused persons were returning to court at an alarming rate because of repeated trouble with the law. In August 1997, this growing problem was brought to the attention of the justice officials. It was proposed that a court be set up to specifically accommodate mentally disordered accused persons. The Mental Health Court was opened in May 1998. It was the first in Canada and one of the first in the world. It was the only one (to date) to address the complex issues involved in dealing with mentally disordered accused persons.

The two primary objectives of the Mental Health Court are to do the following:

1. Deal with pre-trial issues of fitness hearings quickly and efficiently.
2. Try to slow down the "revolving door" of patients with a mental health disability returning to court for minor offences.

The court has also taken on the broader mandate of accommodating mentally disordered accused persons during NCR hearings and disposition hearings.

The Mental Health Court is staffed by two permanent Assistant Crown attorneys for the prosecution and two legal aid lawyers for the defence. There are nine social workers attached to the court. Every day, a psychiatrist attends to perform assessments on any individuals appearing before the court.



Justice Edward Ormston (shown here) was instrumental in making changes to the court system in the area of mental health. The Toronto Mental Health Court has a courtroom devoted to hearing mental health cases, as well as a designated judge. On May 11, 2008, the Mental Health Court in Toronto celebrated a decade of working on behalf of the mentally disordered accused.

The Mental Health Court assists with discharges of accused persons into the community. Staff try to ensure that when an accused leaves the court, he or she has a basic "survival kit." This kit includes identification, a place to live, community psychiatric follow-up, social assistance, and clothing.

For Discussion

1. Identify the reasons why the Toronto Mental Health Court was established.
2. What are the objectives of the court?
3. Do you think that more communities should establish similar courts? Explain.
4. Do you think mental health courts are a good idea? Why or why not?

Review Your Understanding

1. What is the definition of automatism?
2. How are insane automatism and non-insane automatism different?
3. In 1992, Parliament amended the *Criminal Code* (passed Bill C-30). What was the significance of this change?
4. What are the conditions necessary for an NCR ruling?
5. What is the purpose of a "fitness to stand trial" hearing?

8.4 Intoxication

In Chapter 4, you learned the importance of intention. If Christina killed Silvana in front of witnesses, then the act is an established fact. The next step is to ask why Christina did it. Did she intend to kill Silvana, or was it an accident or something in between? Did Christina understand the consequences of her act? If not, she cannot be held criminally responsible. In another example, Janik strikes Fred out of anger. Janik has committed assault, a general intent offence. However, if Janik strikes Fred with the intention to kill him, but only injures him instead, that is aggravated assault. The difference lies in the fact that it is a specific intent offence because the assailant had another criminal purpose in mind (murder) when assaulting the person.

The defence of intoxication argues that the accused did not have the necessary *mens rea* to be guilty of the crime.

To use intoxication as a defence, the accused must show that he or she did not have the required intent *(mens rea)* at the time that the offence was committed. Any intoxicated person who was unable to form specific intent before striking someone cannot be found guilty of aggravated assault, a specific intent offence. He or she can, however, be found guilty of assault, a general intent offence. All that needs to be proved is that the intoxicated person did strike someone (the *actus reus*). Similarly, a person charged with murder can use the defence of intoxication. If successful, this will lower the conviction from murder (a specific intent offence) to manslaughter (a general intent offence). A judge or jury must decide whether or not the accused understood the consequences of

his or her action. In other words, did the accused lack the intent or *mens rea*? If the judge and jury decide that the accused could not foresee the consequences of his or her action, then the accused cannot be found guilty of a specific intent offence.

The role of intoxication in assault and sexual assault cases was discussed in Chapter 7. The law addressing whether intoxication can be a defence was clarified in *R. v. Daviault*, 1994, below. The Supreme Court held that drunkenness could be a defence in a sexual assault case if there is reasonable doubt that the accused could understand the consequences of his actions. In other words, Daviault was not responsible for his actions because he was drunk. This controversial ruling outraged many Canadians. As a result, the *Criminal Code* was changed in 1995 to clarify the issue. Under the new section of the *Criminal Code* (section 33.1), drunkenness is no longer a defence for general intent offences. A drunken person is considered to be criminally at fault if he or she, say, attacks another person, as in the case of an assault or sexual assault.

Did You Know?

RIDE (Reduce Impaired Driving Everywhere) involves police spot checks. Vehicles are stopped and drivers are checked for impairment. In 2007, police in Ontario checked 505 000 cars, boats, and snowmobiles, compared with 616 000 checks in 2001. Although the total number of spot checks in Ontario dropped, provincial funding for RIDE checks is on the rise. It has doubled since 2001 to $2.4 million.

Case

R. v. Daviault, 1994 CanLII 61 (S.C.C.)

For more information, Go to Nelson Social Studies

Henri Daviault was a chronic alcoholic. Ruth Dumais, the victim, was a 65-year-old woman who was partially paralyzed and confined to a wheelchair. In May 1989, Dumais asked Daviault to deliver some alcohol to her. He arrived at Dumais's residence with a 1.1 litre (40-ounce) bottle of brandy. Dumais consumed half a glass of the brandy before falling asleep in her wheelchair. While she slept, Daviault consumed the rest of the bottle. During the night, Daviault wheeled Dumais into the bedroom, threw her on the bed, and sexually assaulted her. Daviault was later charged with sexual assault.

At trial, Daviault testified that prior to being at the complainant's residence, he had consumed seven or eight bottles of beer at a bar. At trial, the defence called a pharmacologist as an expert witness. He suggested that by consuming seven or eight beers and more than a litre (35 ounces) of brandy, Daviault may have experienced "l'amnesie-automatisme," otherwise known as a blackout. In such a state, Daviault's brain would not have functioned normally since he essentially had lost contact with reality. The trial judge found that the accused had committed the offence as described by the complainant. However, he then stated that Daviault should be acquitted because there was a reasonable doubt as to whether the accused, because of his extreme intoxication, had possessed the minimal intent necessary to commit the offence of sexual assault. When Daviault was found not guilty, the Crown appealed. The court of appeal did not allow the intoxication defence, and Daviault was found guilty. He appealed to the Supreme Court of Canada. In September 1994 in a 6–3 decision, the court allowed the appeal and ordered a new trial. The new trial never took place.

For Discussion

1. Why was Daviault found not guilty at trial?
2. Summarize in your own words the evidence given at trial by the pharmacologist.
3. Justice Sopinka of the Supreme Court said the following in his minority decision: "Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community." What did he mean by this statement?
4. Do you agree with the decision in the case? Why or why not?

The Carter Defence

As you learned in Chapter 7, it is a criminal offence to drink and drive. Being impaired is defined as having a blood–alcohol level (BAC) above the legal limit. The limit is 80 milligrams of alcohol in 100 millimetres of blood. It is measured by having the driver take a Breathalyzer test, which is given by a licensed technician (most often a police officer). The courts have accepted a defence to drinking and driving based on the accused presenting evidence to the contrary. This is dubbed the "Carter defence," or the "two-beer defence." It recognizes that machines, and the police officers who operate them, sometimes make mistakes.

evidence to the contrary
evidence that disputes the evidence put forth by the Crown

The Carter defence, also known as the "two-beer defence," was used by persons who failed a Breathalyzer test but argued that the test was invalid. It is no longer an acceptable defence in Canada.

In 1985, the Ontario Court of Appeal heard the case of *R. v. Carter*. Breathalyzer tests showed Carter's blood–alcohol level to be at 200 milligrams in 100 millilitres of blood. That was well above the legal limit of 80. Carter provided evidence that he had consumed only two beers before being pulled over by police. Based on this information, an expert calculated that Carter's blood–alcohol concentration should have been below the legal limit. This information represented evidence to the contrary. It disputed the results of the Breathalyzer. Carter was acquitted of his drinking and driving charge.

On July 2, 2008, the *Criminal Code* was changed so that Breathalyzer results could not be questioned. The only exceptions are if there is evidence that the machine did not work properly. Another possibility is if the defence can raise doubt as to whether the machine was operated properly.

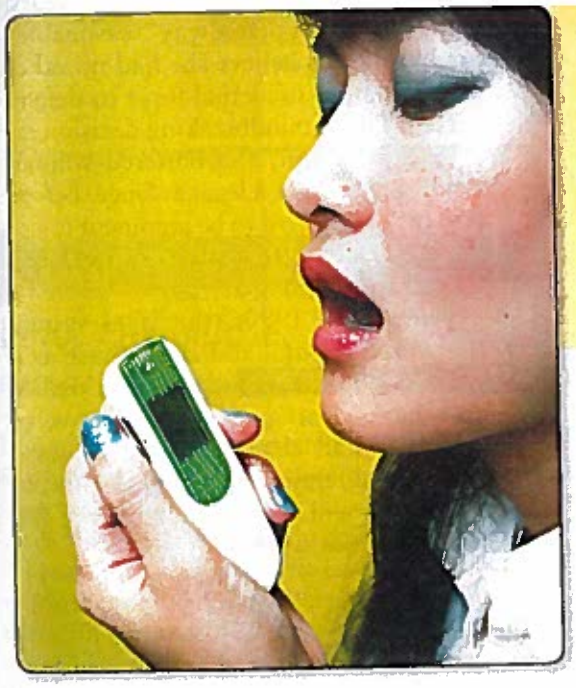
You Be the Judge

R. v. Gibson, 2008 SCC 16 (CanLII)

For more information, Go to Nelson Social Studies

In April 2008, in a 7–2 judgment, the Supreme Court upheld the conviction of Robin Gibson and Martin MacDonald. They had failed to convince the court that their charges should be dropped because they did not drink enough to be under the influence, despite failing a Breathalyzer test. The Supreme Court concluded that allowing experts to estimate blood-alcohol concentration is too unreliable. It further concluded that the effects of alcohol vary from person to person and from time to time. The testimony is based on how many drinks an accused person claims to have consumed. As such, the court concluded that the only reliable evidence in such cases is the Breathalyzer test.

- What does this decision say about the future of the Carter defence? Do you agree with this decision? Why or why not?



Today, breath analysis is the most common method of testing for blood-alcohol level. A personal pocket-sized breathalyzer is a reliable device that you blow into to measure the level of alcohol in your blood to test for impairment.

Did You Know?

In roadside spot checks, police stop random cars. They question drivers in order to determine their sobriety. If the police feel that a driver has been drinking, the officer may request a roadside Breathalyzer test. The roadside spot checks are usually set up on major roadways and off-ramps of highways. They normally occur mor often during holidays.

Review Your Understanding

1. What is the difference between general and specific intent offences?
2. How does the defence of intoxication work? What must be proved?
3. Explain the changes to the law as a result of the *Daviault* case.
4. How does the Carter defence work?
5. Recent case law and new legislation have made the Carter defence invalid. Why do you think these changes were made? Do you agree with the new rules? Explain.

Activity

To learn more about battered woman syndrome,

Go to Nelson Social Studies

8.5 Defences That Provide a Reason for the Offence

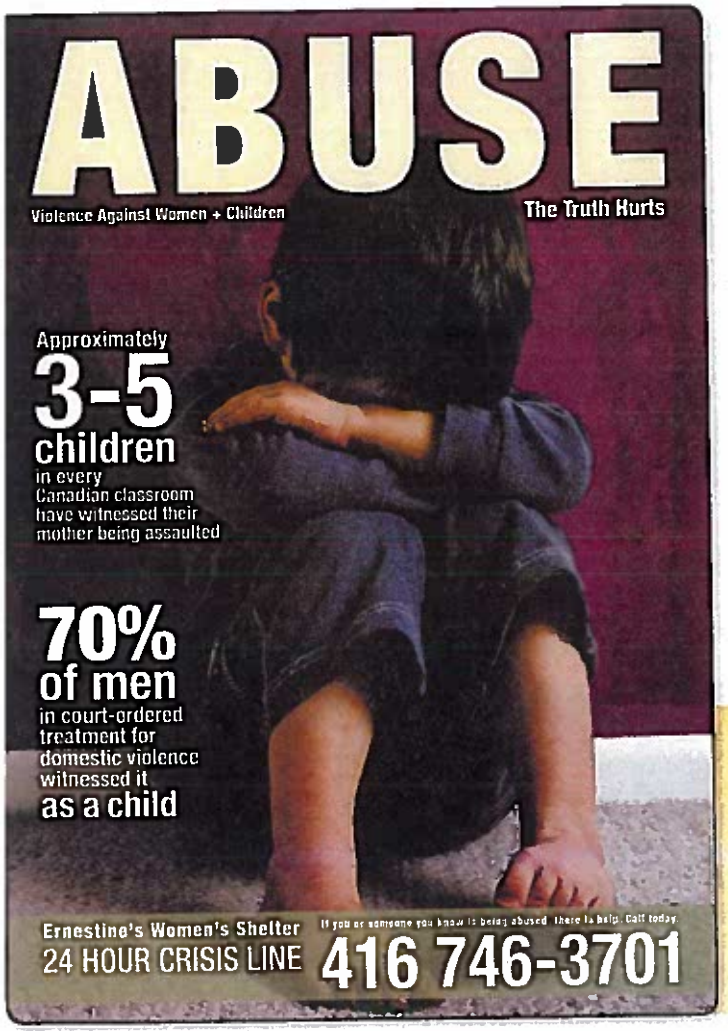
There are several ways accused persons can defend themselves. One is by providing a reason why the offence was committed. In these cases, the accused are not denying that an offence took place. Instead they are providing an explanation about why they felt they had no other option but to act as they did (commit the offence).

Battered Woman Syndrome

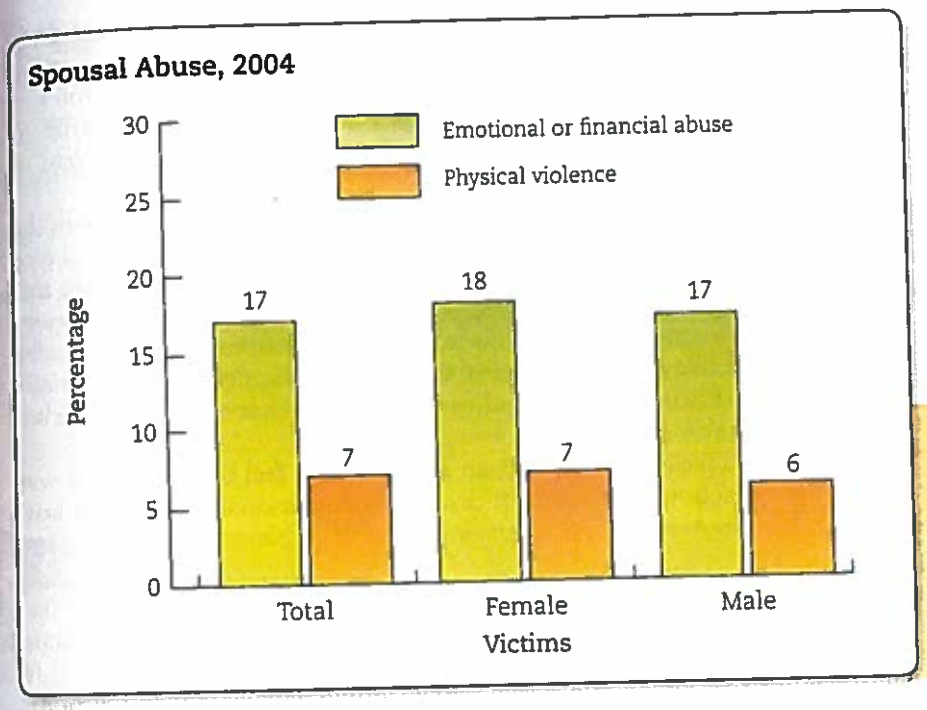
battered woman syndrome a psychological condition caused by severe domestic violence

The Supreme Court first recognized prolonged abuse as a defence in *R. v. Lavallee*, 1990, when it upheld a jury's acquittal of Angelique Lavallee. Lavallee shot her partner in the back of the head as he left a room one evening. He had told her that he was going to come back and kill her later that night, and she believed him. He had physically abused her for many years. The court found that it was "reasonable" for Lavallee to believe she had no other choice than to use lethal force to defend herself. This groundbreaking decision set a legal precedent, and **battered woman syndrome** became a legal defence. Before this, the danger had to be imminent to use the defence of self-defence (for example, a knife was coming at you).

During the 1990s, the legal system recognized spousal and child abuse as a serious and widespread problem. Police now have clear guidelines on how to deal with and charge abusive spouses. In some communities, police officers themselves will charge the abuser if the abused spouse will not do so.



This poster from Ernestine's Women's Shelter in Toronto is one of many efforts by the shelter to raise public awareness about the realities of violence against women and children. Ernestine's Sharlene Tygesen said, "It's important that we address this issue in the public realm. If we can't address it in public, how can we end it in private?"



Emotional and financial abuse is 2.5 times more common in spousal relationships than physical violence. Research shows that emotional abuse and/or controlling behaviour often lead to physical violence.

Case

R. v. Graveline, 2006 SCC 16 (CanLII)

For more information, Go to Nelson Social Studies

In August 1999, at approximately 10:50 p.m., Rita Graveline fatally shot her sleeping husband, Michael, with a rifle. At the time of the shooting, the couple were both 51 years old. They had been married for 32 years and had two children. From the beginning of their marriage, Michael Graveline abused his wife. This abuse included humiliating insults and degrading behaviour. At times, the abuse became physical, with threats and attacks.

Rita Graveline was charged with second-degree murder. Her defence at trial was that she had acted in a state of non-insane automatism, as she used the new Lavallee battered woman syndrome defence. The jury acquitted her, but the Crown appealed. The Québec Court of Appeal set aside the acquittal and ordered a new trial. However, Graveline appealed to the Supreme Court. On April 27, 2006, in a 6–1 decision, the court allowed her appeal and restored the acquittal verdict.

For Discussion

1. Why did Graveline argue that she had acted in a state of non-insane automatism?
2. Summarize the evidence given at trial to support her defence of battered woman syndrome.
3. The defence experts concluded that Graveline had acted in a state of automatism brought on shortly before the shooting by her traumatic relationship with her husband and the surrounding circumstances. The Crown agreed that the appellant's amnesia was genuine but argued that it followed rather than preceded the shooting. Why would the Crown make such an argument?
4. How has this case furthered the rights of abused women? Do you agree with the decision in this case? Explain.

Self-Defence

self-defence the legal use of reasonable force in order to defend oneself

At law, you are allowed to defend yourself and your property, but you can only use "necessary" and "reasonable" force. The *Criminal Code* tries to define every circumstance where self-defence might occur and the intent of those involved.

The Alberta Court of Appeal gave a clear definition of self-defence in the case of *R. v. Kong*, 2005. Simply stated, a person sometimes has no choice but to use force (even deadly force) to defend himself or herself. When this happens, the person acting in self-defence is considered not criminally responsible. In other words, self-defence is justified for what would otherwise be an unlawful act of assault. The theory surrounding this defence is essentially that the accused is in the right, and the victim got what he or she deserved in being reasonably repelled.

To be able to plead self-defence, an accused must feel that the threat was real. Also, the actions taken in self-defence were reasonable based on how an ordinary person in the same circumstances would have reacted. This test is the most important part of trying to use self-defence successfully at trial.

Section 34(1) of the *Criminal Code* outlines when the use of force is justified. An accused is justified in using force if it is no more than necessary to defend himself or herself. Also, the force used must not be intended to cause death or serious bodily harm. For example, Daniel is walking home from school when he is unexpectedly thrown to the ground by Harmeet. In this case, Daniel is allowed to use reasonable force to defend himself from Harmeet's attack.

Section 34(2) of the *Criminal Code* also states that killing an assailant is justified if a person reasonably believes that his or her life is endangered. For example, Daniel notices the assailant has a knife. In the act of defending himself, Daniel stabs his assailant, and the assailant dies. In this case, Daniel would be able to use self-defence to justify his actions.

Did You Know?

Under section 40 of the *Criminal Code*, you are justified in using as much force as is necessary to prevent someone from unlawfully entering your home.

You and the Law

In a 6–3 decision in February 2007, the Supreme Court of Canada ruled that the 30-year-old practice of using evidence obtained from hypnotized witnesses is unrealiable and should not be used in criminal trials. Do you agree? Explain.

A person acting in self-defence, such as using pepper spray against an attacker, is not criminally responsible for his or her actions, as long as the force used is reasonable and necessary.

You Be the Judge

R. v. Smith, 2007 ONCJ 47 (CanLII)

For more information, Go to Nelson Social Studies

Robert Smith, aged 52, and Walburga Schaller, aged 74, were walking toward each other on a Toronto sidewalk on June 4, 2005. Both were using canes for medical reasons. Neither would yield the right of way to the other, and there was a face off. Eventually, they began to swear at each other and to hit one another with their canes. Smith forced his way past Schaller, knocking her into a wall, and swatting her with his cane as he passed. He claimed she threatened to break his glasses and had rammed her cane into his stomach. Smith was charged with assault with a weapon. He claimed self-defence for his actions.

- What do you think the trial judge decided? What would you have decided in this case? Explain.

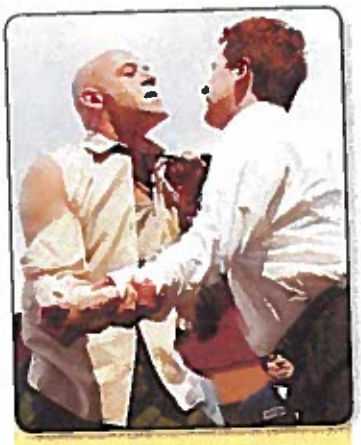
Case

R. v. Paice, 2005 SCC 22 (CanLII)

For more information, Go to Nelson Social Studies

In May 2001, Christiano Paice and some friends went to a bar in Moose Jaw, Saskatchewan, to celebrate a birthday. One of Paice's friends and another person began to argue over a game of pool. Paice left his seat at the bar and intervened, separating the combatants.

According to Paice, as he returned to his seat, he was approached by Clinton Bauck, whose friend was involved in the scuffle that Paice had intervened in. Bauck asked Paice, "Do you want to go outside to fight?" Paice agreed. Once outside, Paice and Bauck squared off, exchanging threats, and Bauck pushed Paice several times. Paice eventually swung hard and struck Bauck on the left side of his jaw. Bauck fell backwards, hitting his head on the pavement. While Bauck was down and unconscious, Paice struck him two more times. Some time later, Bauck died as a result of his injuries, and Paice was charged with manslaughter.



A person who agrees to fight cannot use the self-defence argument if the other fighter gets seriously injured or killed.

The trial judge acquitted Paice. The judge said that, following the deceased's pushing (an unlawful assault), the accused had acted in self-defence within the scope of section 34(1) of the *Criminal Code*. The Saskatchewan Court of Appeal set aside the acquittal and ordered a new trial. Paice appealed to the Supreme Court of Canada. On April 22, 2005, in a unanimous 7–0 decision, the court dismissed the appeal and confirmed the order for a new trial.

For Discussion

1. Why was Paice charged with manslaughter and not murder?
2. Explain the defence of self-defence as it was applied in this case.
3. In her decision, Justice Charron stated that "self-defence under section 34(1) is not available to either combatant in a consensual fistfight because neither could be heard to say that he has been the innocent victim of an unprovoked assault when he has consented to the fight." Do you agree? Explain.
4. What do you think the result will be if a new trial is held? Explain your answer.

Did You Know?

In the 1884 British case *R. v. Dudley and Stephens*, the defence of necessity was used. Tom Dudley and Edwin Stephens were charged with murder after they killed and ate Richard Parker when they were lost at sea without food. The men were found guilty, and their defence failed. The judge had to find them guilty to maintain the precedent that this act was murder. However, the judge gave them only six months or so in prison, which was the "political" way to deal with this problem. They were pardoned by the monarch.

Necessity

The defence of necessity can be used as an excuse for a criminal act committed due to immediate and urgent circumstances. In such cases, accused persons claim that they did not truly act voluntarily. They were forced to act because of certain danger. In other words, they had no other choice. For example, Leslie arrives home to find her mother on the ground having difficulty breathing. She has suffered a heart attack. Leslie picks her up, carries her to the car and speeds off to the hospital for medical attention. If Leslie were to be stopped by a police officer and charged with dangerous driving, she could plead the defence of necessity as a legal excuse to the charges.

Almost half of all fatal collisions involve speeding. Statistics show that drivers who go 30 kilometres per hour over the speed limit on city streets are almost six times more likely to kill or injure someone. Those who go more than 50 kilometres per hour above the limit on highways are nearly 10 times more likely to kill or injure someone.

Canadian courts have reluctantly recognized the defence of necessity. There are several case law examples that clarify the defence. The leading precedent case is that of *Perka v. The Queen*, 1984. There, the Supreme Court stated that the defence applies only in circumstances of imminent risk. The action must have been taken to avoid a direct and immediate danger.

Regardless, necessity can generally be used as a defence to all offences in the *Criminal Code*. In *R. v. Latimer*, 2001 (see the Case feature in Chapter 7 on page 223), Robert Latimer tried to use the defence of necessity to argue against his second-degree murder charge. He was charged in the death of his 12-year-old severely handicapped daughter. The Supreme Court stated that the defence of necessity is narrow and of limited application in criminal law. The court rejected Latimer's argument.

The defence of necessity is rare in Canada. However, the case of *R. v. Ungar*, 2002, on the next page, provides an unusual example of an accused being acquitted on a defence of necessity.

Case

R. v. Ungar, 2002, O.J. No. 2915 (Ont. C.J.)

For more information, Go to Nelson Social Studies

Bernard Ungar was a member of Hatzoloh Toronto, a non-profit volunteer organization run by the Orthodox Jewish community of Toronto. The organization was launched in early 1998 to respond 24/7 to emergencies within the Toronto Jewish community. Hatzoloh volunteers are trained emergency medical technicians (EMTs). They provide basic services in a medical emergency until an ambulance arrives to transport the person to a hospital. Hatzoloh volunteers co-operate with the ambulance personnel and assist in any way possible.

Shortly after 12:45 p.m. on March 28, 1999, Ungar received a call that a woman had been hit by a motor vehicle; it was a general call from the dispatcher. Initially, Ungar did not answer the call because it was outside of his calling area. The dispatcher got back on the radio and asked who was closest to the area to assist the woman, at which time Unger responded.

The defence of necessity is extremely difficult to prove. Bernard Ungar was able to use it successfully to ward off reckless driving charges.

Under normal driving conditions, it would take Unger about five minutes to get to the location of the accident, but traffic was stopped. He informed the dispatcher, who told him to "use his imagination" since the woman's life was in danger. Unger put his flashing coloured lights on his roof and drove at high speeds, weaved in and out of oncoming traffic to get to the scene of the accident. He was followed by police the entire time. Ungar arrived at the scene and immediately began providing medical assistance. The ambulance arrived about six minutes later. Police charged Ungar with dangerous driving.

At trial, Ungar argued the defence of necessity since he was faced with a situation that was not only urgent but life threatening. The Crown argued that there was a reasonable legal alternative to Ungar's driving. That was to not do anything and allow the ambulance to arrive when it did. Therefore, he was not entitled to use the necessity defence. The trial judge dismissed the charges and accepted the defence of necessity. He stated that, given the circumstances that Ungar found himself in, every second could mean the difference between life and death. In this case, there was no reasonable legal alternative.

For Discussion

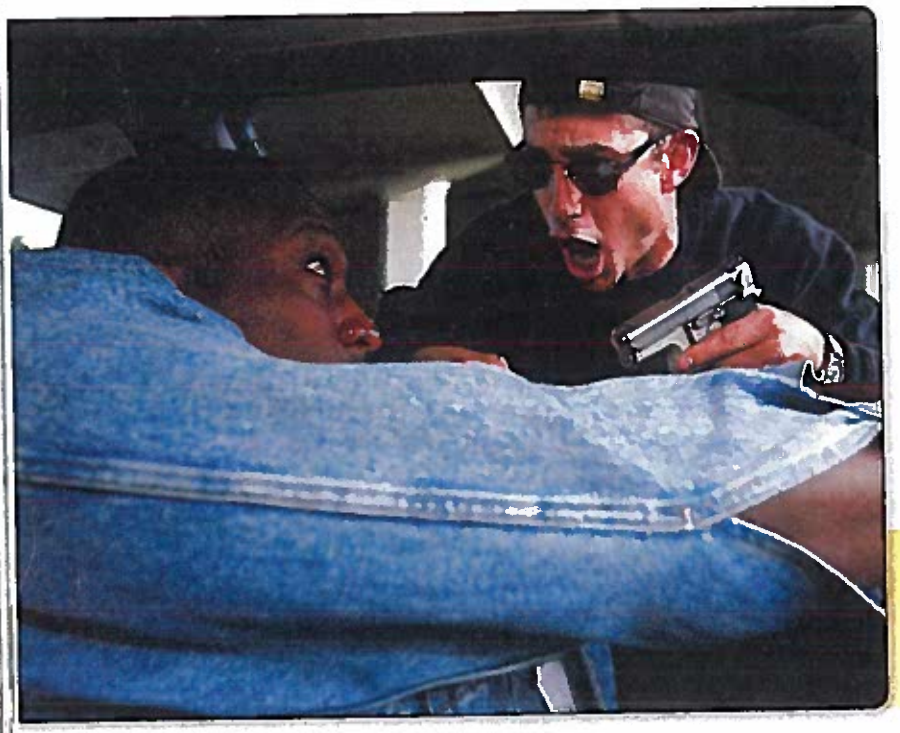
1. Why was Ungar charged with dangerous driving?
2. Explain the defence of necessity as it was applied in this case.
3. In his decision, Justice Lampkin stated that this case should never have come to trial. Do you agree? Explain.
4. Do you agree with the decision in this case? Why or why not?

Duress

duress threat or coercion to force someone to do something against his or her will

The defence of duress is similar to that of necessity in that an accused commits a crime in response to some sort of external pressure. In this case, the defence of duress is brought on by a threat of harm by some other person, forcing the accused to act against his or her will. An example would be if Leanne participates in a crime when threatened at gunpoint. Recognizing that the threat is real, Leanne acts against her will to avoid being seriously harmed herself.

The defence of duress is found in section 17 of the *Criminal Code*. It requires threats of death or bodily harm from a person present when the offence is being committed. The defence excludes a long list of offences, including murder. Like the defence of necessity, duress can only be considered when the accused had no realistic choice when deciding whether or not to commit the crime.



The defence of duress can be used if someone is forced to commit a crime upon fear of immediate death or bodily harm. However, it is often difficult to establish.

You Be the Judge

R. v. Keller, 1998 ABCA 357 (CanLII)

For more information, Go to Nelson Social Studies

The appellant, Shane Keller, was convicted of trafficking in lysergic acid diethylamide (LSD). In a written statement, he admitted to picking up at least 10 similar packages during the preceding four months. He claimed, however, that he was compelled to do so under a threat of death or serious bodily harm made by a man he knew as "Shawn." He described Shawn as a big man, over 6 feet 7 inches tall, and a known drug dealer. Shawn threatened that if the appellant did not co-operate, there would be "nasty consequences" and that it would be "over" for him. The appellant interpreted this as a threat of death or serious bodily harm if he did not do what he was told. The trial judge denied his request that the jury be instructed on the common law defence of duress. The Alberta Court of Appeal confirmed that the defence of duress did not apply in this case.

- Why did the defence of duress fail in this case? Explain.

Review Your Understanding

1. Explain the battered woman syndrome defence. Why do you think this has been allowed as a valid defence in criminal cases where the accused has been a long-term victim of spousal abuse?
2. What is meant by "reasonable" when the courts are considering self-defence?
3. What is the difference between sections 34(1) and 34(2) of the *Criminal Code*?
4. Explain the defence of necessity. Why is it difficult to establish in court?
5. How is the defence of duress similar to the defence of necessity?

8.6 Other Defences

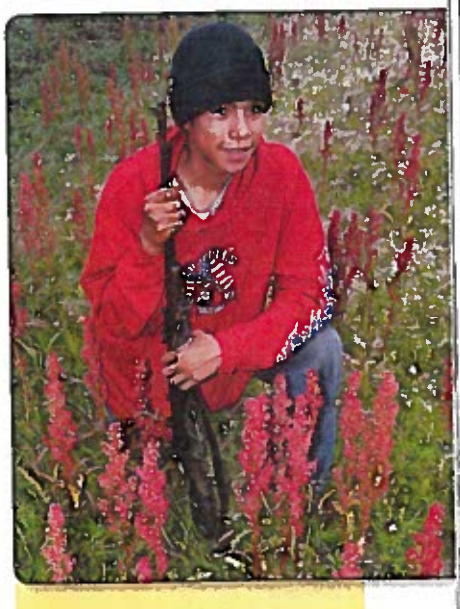
There are a number of other defences outlined either in the *Criminal Code* or established through case law precedent.

Ignorance of the Law and Mistake of Fact

Pleading "ignorance of the law" is not an accepted defence. Persons who commit an offence cannot argue that they should not be found guilty because they did not know their actions were against the law. Often, individuals rely on their own knowledge of the law and even seek legal advice that may be incorrect. Regardless of a person's honest (but mistaken) intention, mistaken belief is not a defence.

For example, assume that Jonathan goes hunting with an expired gun licence. He is aware that his licence has lapsed and has every intention of renewing it, but he thinks there is a six-month amnesty period. The grace policy is, in fact, only for three months, and Jonathan's licence has already been expired for five months. Jonathan would be found guilty under the *Firearms Act* in this case, regardless of his honest but mistaken belief that he was not breaking the law.

Sometimes, ignorance of the facts, however, can be accepted as a defence in Canadian law. Mistake of fact is a valid defence if it prevents the accused from having the necessary *mens rea* required by law for the crime that was committed. There is a requirement in such a defence that the mistake was genuine and not the result of the accused neglecting to find out the facts. For example, suppose you receive counterfeit money while shopping. When you try to use this money later (for example, to pay a bill with it), you are arrested. You can use the defence of mistake of fact for not knowing that the money was counterfeit, as people do not usually check every bill they receive. As another example, suppose you buy a used bicycle that was advertised in a bulletin board notice.



Ignorance of the law is no excuse. If you go hunting with an expired gun licence, you are breaking the law, even if you think you are within an acceptable grace period before having to renew the licence.

mistake of fact a defence that shows a lack of *mens rea* due to an honest mistake

Later, you are arrested for possessing stolen goods. If you can prove that you did not know the goods were stolen, then your mistake of fact defence will succeed. Unless the brand-new $500 bicycle is offered to you for $40, your mistake of fact would be reasonable.

Entrapment

entrapment police action that induces a person to commit an offence

double jeopardy being tried twice for the same offence

provocation the act of inciting to commit a crime in the heat of passion

Entrapment occurs when police coerce, or forcefully encourage, an individual to commit a crime. The fault lies in the fact that they have no reason to believe that person is already engaged in the particular criminal activity. Of course, the accused has to establish the entrapment. For example, suppose police officers set up an undercover drug operation in a certain neighbourhood, which has been identified as a problem area. Jimmy happens to live in that neighbourhood, but he has never used or sold drugs. Over a period of three weeks, however, he is harassed by an undercover officer to get him drugs. Jimmy eventually helps the officer purchase drugs and is arrested as a result. This is an example of entrapment, since there is no reasonable suspicion that Jimmy was engaged in the criminal activity of drug trafficking.

In *R. v. Mack*, 1988, the Supreme Court recognized entrapment as a defence as well as an abuse of powers by the police. A judge who finds that entrapment has occurred should stay (stop) the proceedings rather than order an acquittal.

Activity

To learn more about double jeopardy,

Go to Nelson Social Studies

Double Jeopardy

Double jeopardy means to be tried twice for the same offence. Section 11 of the *Charter of Rights and Freedoms* states that anyone charged and acquitted of an offence cannot be tried for it again. Similarly, someone convicted of an offence cannot be tried again on the same evidence.

In a case of double jeopardy, a pre-trial motion can be made using one of two pleas:

1. In a plea of *autrefois acquit*, the accused states that he or she has already been acquitted of the charge.
2. In a plea of *autrefois convict*, the accused states that he or she has already been convicted on the charge.

The judge then investigates the matter and rules on whether the current charge is based on the same facts as the previous charge that was tried. If so, the judge will dismiss the case.

The principle of double jeopardy is fundamental to Canadian criminal law.

Provocation

Provocation is defined in section 232 of the *Criminal Code*. It is an accepted legal defence that can reduce a charge of murder to manslaughter. Provocation is a wrongful act or insult that is so significant in nature that it can deprive an ordinary person of the power of self-control. For example, a parent comes home to find that his or her child is being assaulted and attacks and kills the assailant. This person could plead provocation. The offensive act (killing of a person) must be done in the "heat of passion," and the act must occur immediately after the provocation so that there is no cooling-off period.

You Be the Judge

R. v. Humaid, 2006 CanLII 12287 (ON C.A.)

For more information, Go to Nelson Social Studies

Abi Abdel Humaid and the deceased, Aysar Abbas, were married in 1979. Both were engineers, but Aysar was much more successful than her husband, the appellant. She earned over $500 000 a year. In 1996, Humaid had an affair with the family maid. When Aysar found out, she transferred funds from a joint bank account to one in her name only. Aysar and the accused separated for a short time in February 1997. Then, Aysar decided to give the marriage a second chance. Humaid moved back into the family home in April 1997. By the fall of 1999, the marriage had soured.

On October 14, 1999, while out for a walk, Aysar made some comments to Humaid, leading him to believe that she had been unfaithful to him. On hearing this, Humaid testified that he blacked out. He claimed to have no recollection of chasing Aysar along the road and stabbing her 19 times. Humaid was charged with first-degree murder. At trial, he raised the defence of provocation. Humaid was a devout Muslim. He argued that his wife's statements had greater significance because of his Muslim faith. He claimed that it raised the level of insult beyond what an ordinary person in the same situation could tolerate. Humaid argued that he lost self-control and killed his wife in the "heat of passion."

- Were the required elements of the provocation defence met in this case? How would you have decided if you were the judge presiding over this case? Give reasons for your decision.

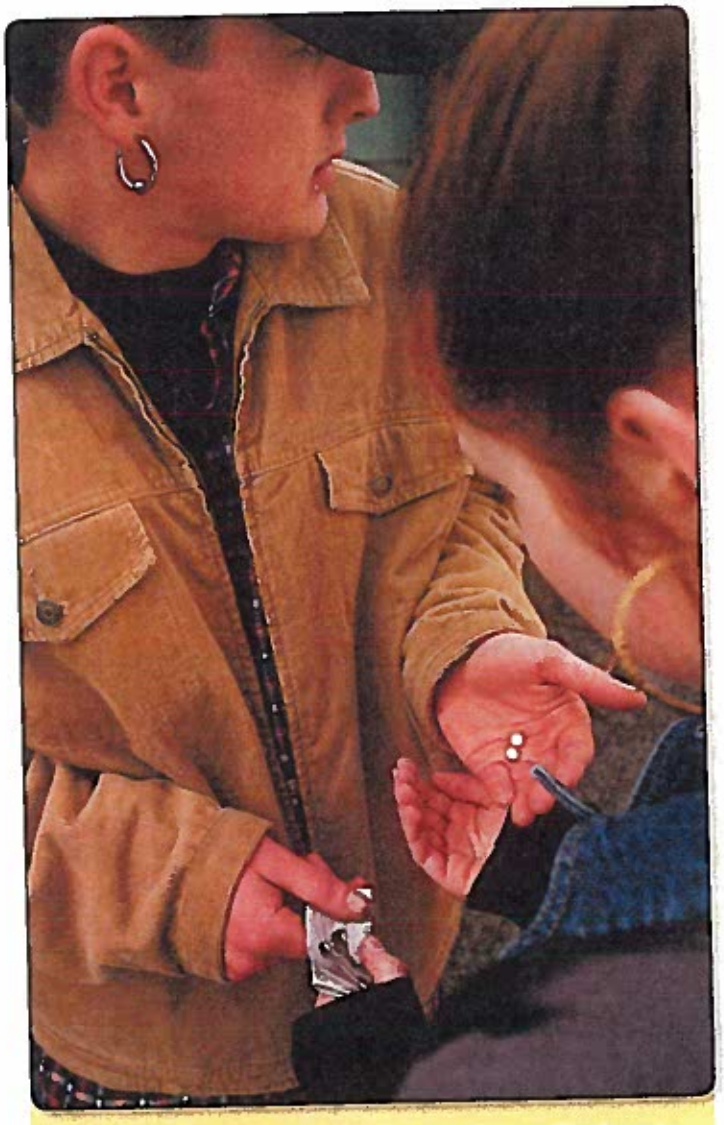
Abi Abdel Humaid, a devout Muslim, argued that he killed his wife for religious beliefs. Ramandeep K. Grewal (pictured here) is active in women's issues in the Asian community. She argues that some Asian cultures are very male dominated and chauvinistic in many ways. According to Grewal, "It's not a religious conflict; it's a cultural conflict."

Review Your Understanding

1. Explain the difference between ignorance of the law and mistake of fact. In your own words, create an example for each.
2. Police have often been accused of entrapment. Explain how this is possible.
3. What is double jeopardy?
4. Explain the difference between *autrefois acquit* and *autrefois convict*.
5. What does section 232 of the *Criminal Code* say about the defence of provocation?

ISSUE

Should Buy-and-Bust Police Operations Be Unconstitutional?



When engaging in buy-and-bust operations, police have to be careful that they do not cross the line and give the accused the opportunity to use the defence of entrapment.

Police forces in Canada sometimes use informers (some paid) or undercover police agents to obtain information about crimes. With drug cases, infiltrating a group and posing as one of them is often the only way for the police to obtain evidence. In most cases, informers or undercover agents observe the suspect. If necessary, they may need to present the suspect with an opportunity to commit an offence. The police must ensure that the actions of the informer or the undercover agent do not go too far. In such cases, the accused may attempt to use the defence of entrapment to escape charges.

A common tactic used by police is known as a "buy-and-bust" operation. In these situations, undercover police officers try to buy drugs from known dealers. However, there are limits on what police officers can do during these sting operations. Generally, police are expected to uncover criminal activity that is already occurring. They are not supposed to try to provoke innocent citizens into breaking the law.

On One Side

As modern criminals become more sophisticated, police have to be able to employ new tools to keep pace. But these incidents should never see police officers breaching the law while carrying out their duties. When the police are enforcing the *Controlled Drugs and Substances Act*, they often employ "buy-and-bust" operations. An examination of buy-and-bust operations reveals that, overall, they greatly increase the number of arrests. The result is positive public relations for local police forces. This enhances

their image and presence in the community. Regardless whether or not the arrests lead to convictions, the fact that there is police presence in the community can help to deter the illegal sale of drugs in troubled areas.

On the Other Side

The strongest argument against buy-and-bust programs is that they often lead to an abuse of the legal process. There is a real risk of goading (pressuring) innocent individuals into committing a crime. Police officers have other ways of investigating, such as surveillance, wire taps, and search warrants. These should be relied upon and might even be more effective. Police sting operations may lead to a decrease in drug operations in the short term. However, the illegal activity sometimes returns after a short lull. Another issue that these programs raise is the possibility of infringements of individuals' Charter rights. The courts must decide whether evidence obtained during a buy-and-bust can be admitted at trial. Critics of these programs argue that they can take a long time to set up. That is why the cost to run such programs can be very high.

The Bottom Line

In *R. v. Barnes*, 1991, Supreme Court of Canada Chief Justice Lamer clarified the legality of buy-and-bust programs. He stated that police should target only those people they suspect are already engaged in criminal activity. He pointed out an exception to this rule when police blanketed an entire neighbourhood known for such crimes.

In the end, when examining these cases, the courts must look for ways to keep a proper balance between stopping criminal activities and not subjecting individuals to unfair investigations by police. Entrapment is unfair. The courts must uphold individuals' legal rights under the *Charter of Rights and Freedoms*. Courts must review police conduct and tactics to ensure that they are acceptable. Canadian courts have placed limits on what police are allowed and not allowed to do and will continue to do so.

What Do You Think?

1. Explain the concept of entrapment.
2. Why do you think truly innocent individuals are sometimes pressured into committing crimes? Explain.
3. Why do police forces regularly set up buy-and-bust programs?
4. What are the arguments against buy-and-bust programs?
5. Are these programs an effective way to stop the sale of illegal drugs in Canada, or are they ultimately pointless? Explain your opinion.

Chapter Review

Chapter Highlights

- A defence is the accused's response to the criminal charges.
- When presenting a defence, an accused is disputing the facts of the case, or he or she is arguing that he or she has a lawful excuse or explanation for what occurred.
- The best possible defence is an acceptable alibi, a defence that places the accused somewhere else at the time the offence occurred.
- Automatism is a state of impaired consciousness during which an individual has no control over his or her actions, but is still capable of committing an act.
- Automatism is classified as either insane or non-insane automatism.
- The defence of intoxication argues that the accused could not form the required *mens rea* at the time the offence was committed.
- Breathalyzer results are considered infallible unless evidence can be produced to show that there was something wrong with the machine.
- Canadian law recognizes prolonged abuse as a form of self-defence.
- Self-defence allows individuals to use force to protect themselves, someone in their care, or their property; the force must be "necessary" and "reasonable" according to the circumstances.
- Canadian courts have been reluctant to recognize the defence of necessity, which is arguing that the accused had to commit the act because of imminent peril or danger.
- The defence of duress requires threats of immediate death or bodily harm from a person present when the offence is being committed.
- Canadian law has not accepted the defence of "ignorance of the law," but the defence of "ignorance of the facts" has been accepted.
- Entrapment can occur if police present a person with the opportunity to commit an offence without reasonable suspicion that the person is already engaged in the particular criminal activity.
- Double jeopardy, being tried for the same crime twice, is prohibited under section 11 of the *Charter of Rights and Freedoms*.
- The defence of provocation can reduce a charge of murder to manslaughter.

Check Your Knowledge

1. Describe a situation in which an alibi can successfully be used as a defence.
2. Identify three examples that would be considered to be non-insane automatism.
3. How has the defence of battered woman syndrome been used in criminal court cases?
4. Explain why the courts have been reluctant to readily accept the defence of necessity.

Apply Your Learning

5. How much force can you legally use to defend yourself or your property? Write a case example to support your response.
6. Find at least five recent criminal cases where a defence discussed in this chapter was used. Use your local newspaper, the Internet, or your library to find the cases. Summarize the cases by answering the following questions:
   a) What are the facts of the case?
   b) What are the criminal charges?
   c) What defence was raised, and what arguments were presented to support the defence?
   d) If there was a decision in the case, identify whether or not the defence was successful.
   e) If there is no decision yet, provide an opinion on whether you think the defence will be accepted by the courts.
   f) Provide a personal opinion on the case.

Communicate Your Understanding

7. You have been asked to prepare a list of questions to ask a forensic psychiatrist to determine if she or he is in fact an expert witness. The psychiatrist has been called to testify in a criminal case where the defence of battered woman syndrome has been raised. Prepare a list of at least 10 questions that you would want answered.
8. Scott Starson was found NCR on criminal charges of uttering death threats. He was detained at a psychiatric facility in Ontario in 1998. While in hospital, he refused the treatment needed to enable him to be discharged. His psychiatrists determined that he was incapable of making treatment decisions for himself. Starson appealed this decision. His case eventually reached the Supreme Court of Canada. In June 2003, the court ruled that Starson was capable of refusing treatment.

Review the *Starson v. Swazye*, 2003, case in detail. Summarize the facts of the case, the arguments put forth by Starson, the arguments put forth by his doctors, and the reason given by the Supreme Court for their decision. Do you agree with this decision? Why or why not? Present your response to the class. With the rest of the class, debate this issue: Should patients with a mental health disability be allowed to make treatment decisions for themselves?

Develop Your Thinking

9. On August 1, 1995, Ottawa sportscaster Brian Smith was shot and fatally wounded as he walked out of the broadcast centre where he worked. He died the next day. Just a few hours before that, a man turned himself in at the courthouse. Jeffrey Arenburg was charged with first-degree murder and was booked for 60 days of psychiatric assessment. Arenburg was found not criminally responsible for Smith's death. The defence was insane automatism. Arenburg had paranoid schizophrenia. He spent almost 10 years institutionalized in a psychiatric hospital. As a result of this case, the government announced a review of the *Mental Health Act*. On June 23, 2000, *Brian's Law*, a law designed to more adequately deal with mentally disordered individuals who pose a risk to society, came into effect.

   Conduct research into *Brian's Law* and summarize the details about this law. Why do you think this law is important?
10. In October 2007, Curtis Fee was arrested for drunk driving after a police officer spotted him weaving across a major highway. At trial, Fee came up with a new defence—the "BlackBerry defence." He indicated that he was not impaired by alcohol when he was arrested, but instead was using his BlackBerry while driving. The trial judge rejected his defence. Do you agree with the judge's decision? Explain.
11. In 1995, Paul Bernardo was found guilty of first-degree murder in the slaying of two Ontario schoolgirls. Before his trial, he had told his lawyer, Ken Murray, where he could locate videotapes of the murders. The police had not discovered these during the search of his home. Later, Karla Homolka, Bernardo's wife, negotiated a lighter sentence in exchange for testifying against her husband. A judicial review confirmed that prosecutors could have avoided making a deal with Homolka if they had had the tapes. In February 1997, Murray was charged under section 139(2) of the *Criminal Code* for obstructing justice. On June 13, 2000, Ken Murray was acquitted of the charges.

    Research the lawyer–client relationship in more detail. Should it be allowed as a defence if a lawyer withholds physical evidence that, if disclosed, may incriminate the accused?