DEFENCES

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GENERAL PRINCIPLES

A trial judge must instruct the jury on any defence for which there is an evidential foundation sufficient to raise an air of reality. Correspondingly, a defence that lacks an air of reality should be kept from the jury. An air of reality must exist for each and every element of the defence in question: *R v Freeman,* 2018 ONCA 943, at para 8

AUTOMATISM

Automatism is available as a defence to both a specific intent offence and a general intent offence. This was confirmed in *McCaw,* when the Superior Court of Justice struck down as unconstitutional s.33.1 of the *Criminal Code.* This section removed the defence of automatism from general intent offences in cases involving self-induced intoxication resulting in the interference or thretaeened interference with the bodily integrity of another. Justice Spies found that the provision violated s.7 of the *Charter* by criminalizing behavior in the absence of the requisite *mens rea*: *R v McCaw,* 2018 ONSC 3464

CONSENT

For defence in sexual assault cases, see chapter on Offences: Sexual Assault: Defences

In order for the defence of consent to apply in a case of assault, the force applied to the complainant must not be excessive: *R v BW,* 2016 ONCA 96 at para 18

DURESS

Detailed analysis of the statutory and common law defence of duress, its scope and application, and the rational underlying the defence of duress: *R v Aravena*, 2015 ONCA 250

The duress defence in s. 17 of the *Criminal Code* applies only to perpetrators. The common law defence of duress is available to persons charged as aiders and abetters, including persons charged with murder: *R v Noureddine*, 2016 ONCA 770 at para 89*; R v Aravena*, 2015 ONCA 250

Duress can only be left with the jury when there is an air of reality to that defence. An air of reality exists if it is realistically open to a jury, on the entirety of the evidence, to have a reasonable doubt as to the existence of each of the essential elements of the duress defence: *R v Noureddine*, 2016 ONCA 770 at para 93

The existence of a safe avenue of escape is to be determined on an objective standard and is adjusted for subjective circumstances. The belief of the accused that he had no reasonable alternative is not sufficient to give an air of reality to the defence simply because the belief is asserted. The question is whether a reasonable person, with similar history, personal circumstances, abilities, capacities and human frailties as the accused, would, in the particular circumstances, reasonably believe there was no safe avenue of escape and that he had no choice but to yield to coercion: *R v DBM,* 2016 ONCA 264 at para 7

The "safe avenue of escape" analysis involves a reasonable person in the same situation as the accused and with the same personal characteristics and experience as the accused. The issue is whether such a person would conclude that there was no safe avenue of escape or legal alternative to committing the offence. If a reasonable person, similarly situated, would think that there *was* a safe avenue of escape, this element or requirement has not been met. The excuse of duress would fail because the accused's commission of the crime cannot be considered morally involuntary: *R v Foster,* 2018 ONCA 53 at paras 92-95

An accused's failure to testify does not foreclose a duress defence although, practically speaking, it will have a negative effect on the availability of the defence in most cases: *R v Noureddine*, 2016 ONCA 770 at para 95

ENTRAPMENT

Entrapment is a variant of the abuse of process doctrine. If an accused can show that the strategy the state used to obtain a conviction exceeded permissible limits, "a judicial condonation of the prosecution would by definition offend the community" and the accused is entitled to a stay of proceedings. However, given the serious nature of an entrapment allegation and the substantial leeway given to the state to develop techniques to fight crime, a finding of entrapment and a stay of proceedings should be granted only in the "clearest of cases." The accused must establish the defence on a balance of probabilities: *R v Ahmad,* 2018 ONCA 534 at para 31

Entrapment occurs when:

1. The authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry; or

2. Although having such reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence: R v Argent, 2016 ONCA 129 at para 8 [quote]; *Ahmad,* at para 32

A. PRONG 1: REASONABLE SUSPICION

Reasonable suspicion is a robust standard determined on the totality of the circumstances, based on objectively discernible facts, and is subject to independent and rigorous judicial scrutiny. In the entrapment context, appellate courts have agreed that the standard requires something more than a mere

suspicion and something less than a belief based upon reasonable and probable grounds.

Trial judges must beattentive to the words used and the sequence of the conversation. The reasonable suspicion requirement distinguishes between whether the language police use constitutes a mere investigative step, which is permissible absent reasonable suspicion, or an opportunity to commit an offence, which is not. While the line between an investigative step and an opportunity is sometimes difficult to draw, the jurisprudence suggests that it is crossed in the dial-a-dope context when the police make a specific offer to purchase drugs as opposed to engage in a more general conversation aimed at confirming a tip: *Ahmad* at para 37-38, 41

B. PRONG 2: BONA FIDE INQUIRY

Even if the police do not have a reasonable suspicion that a particular individual is engaged in criminal activity, the police may present an opportunity to commit a crime to people associated with a location where it is reasonably suspected that criminal activity is taking place. the police conduct must be motivated by the genuine purpose of investigating and repressing criminal activity.

In the context of a dial-a-dope operation, where the police reasonably suspect that a phone line is being used as part of a dial-a-dope scheme, they may, as part of a *bona fide* inquiry, provide opportunities to people associated with that phone line to sell drugs, even if these people are not themselves under a reasonable suspicion. To constitute a *bona fide* inquiry, the investigation must be motivated by the genuine purpose of investigating and repressing criminal activity and directed at a phone line reasonably suspected to be used in a dial-a-dope scheme: *R v Ahmad,* 2018 ONCA 534 at paras 50, 58

Because reasonable suspicion may be directed at a particular individual, a particular location or a particular phone line, the relevant considerations will vary depending on the context. This means that certain facts may support a finding that the police had reasonable suspicion that a particular phone line is being used in a dial-a-dope scheme, but not that the particular individual who is using that phone line is engaged in criminal activity, or vice-versa. While there may be overlap, different considerations may take on different weight in the analysis. For example, the fact that a phone line has been linked through a tip to

the drug trade may take on greater importance in determining whether the police had reasonable suspicion the line was being used for criminal activity than when assessing whether the police had reasonable suspicion that a particular person using that line was already selling drugs. Reasonable suspicion must be assessed in the context of the particular case: *Ahmad,* at para 67

NOT CRIMINALLY RESPONSIBLE

A. THE TEST

The inquiry under section 16(1) of the Criminal Code asks whether the accused lacks the capacity to rationally decide whether the act is right or wrong, and hence to make a rational choice about whether to do it or not. This may stem from a variety of mental dysfunctions, including delusions and disordered thinking that deprives the accused of the ability to rationally evaluate what he is doing: *R v Richmond,* 2016 ONCA 134 at paras 51-53

The concept of "wrong" embodied in s. 16(1) contemplates knowledge, in spite of a delusion, that an act was morally – not legally – wrong in the circumstances, according to the ordinary moral standard of reasonable members of the community: *Richmond* at para 54; see also *R v LaPierre,* 2018 ONCA 801, at paras 33-35

This branch of the test holds that an accused who has the capacity to know that society regards his actions as morally wrong and proceeds to commit those acts cannot be said to lack the capacity to know right from wrong. As a result, he is not NCR, even if he believed that he had no choice but to act, or that his acts were justified. However, an accused who, through the distorted lens of his mental illness, sees his conduct as justified, not only according to his own view, but also according to the norms of society, lacks the capacity to know that his act is wrong. That accused has an NCR defence. Similarly, an accused who, on account of mental disorder, lacks the capacity to assess the wrongness of his conduct against societal norms lacks the capacity to know his act is wrong and is entitled to an NCR defence: *R v Dobson,* 2018 ONCA 589 at para 24

Under the second branch of s. 16(1), the court must determine whether an accused was rendered incapable, by the fact of his mental disorder, of knowing that the act committed was one that he ought not have done. The issue is whether the accused possessed the capacity present in the ordinary person to know that the act in question was wrong having regard to the everyday standards of the ordinary person. The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not: *R v McBride,* 2018 ONCA 323 at paras 48, 53 [citations omitted]

B. TRIER OF FACT'S EVALUATION OF EXPERT EVIDENCE

The trier of fact is not obliged to accept an expert's uncontradicted opinion that there is a strong circumstantial case for an NCR finding. Rather, the judge/jury is entitled to assess the probative value of the expert evidence, examine its factual foundations, and accord it less weight if it was not based on facts proven at trial, or where it is based on factual assumptions with which the trier of fact disagrees: *R v Richmond,* 2016 ONCA 134 at para 57

On appeal, a reviewing court must consider whether there was a rational basis for rejecting expert opinion evidence that an accused is NCR. This may arise if there is some "discernible flaw" in the expert's reasoning or "because the opinion was formulated on too fragile a factual basis or because the opinion conflicts with inferences one might logically draw from other evidence": *Richmond* at para 58 (citations ommitted)

However, there is a real danger that juries can be unduly skeptical of a psychiatric "defence", which is "often perceived as easy to fabricate and difficult to rebut". For this reason, "the weight of judicial experience must be brought to bear on the assessment of the reasonableness, as a matter of law, of the conclusion reached by the jury" and "the appreciation of the import of expert psychiatric evidence must be a realistic and reasonable one": *Richmond* at para 59 (citations ommitted)

OFFICIALLY INDUCED ERROR

The defence of officially induced error of law is intended to protect a diligent person who first questions a government authority about the interpretation of legislation so as to be sure to comply with it and then is prosecuted by the same government for acting in accordance with the interpretation the authority gave him or her.

In *Bedard,* the SCC expressed serious reservations about the very possibility of a government official raising the defence of officially induced error of law in relation to the performance of his or her duties: 2017 SCC 4

PROVOCATION

A. INSULT

Dictionary definition of an insult: *R v Barrett,* 2015 ONCA 012 at para 34

The question is not whether the accused would perceive something as an insult, but whether an ordinary person would: *R v Barrett,* 2015 ONCA 012 at para 33

An intention to get an abortion is not, and cannot, be perceved to be an insult: *R v Barrett,* 2015 ONCA 012 at para 35

Note that in June of 2015, Parliament introduced the Zero Tolerance for Barbaric Cultural Practices Act. Under the new legislation, the victim's conduct must be an indictable offence punishable by five or more years in prison to qualify as provocation. It also has to deprive an "ordinary person of the power of self control," and the accused has to have acted on it "before there was time for their passion to cool."

The suddenness requirement must characterize not only the wrongful act or insult, but also the responsive conduct of the accused: *R v Freeman,* 2018 ONCA 943, at para 11

Anger is a precursor to the loss of self-control. It cannot, however, be equated with the loss of self-control: *R v Ariaratnam,* 2018 ONCA 1027, at para 16

SELF DEFENCE

A. THE NEW PROVISIONS

The new self-defence provisions do not apply retrospectively to offences that predated their coming into force: *R v Bengy,* 2015 ONCA 397

B. GENERAL PRINCIPLES

The prison setting and the "inmate's code" had to be considered as crucial contextual factors in assessing self-defence: *R v Primmer,* 2018 ONCA 306 at para 6

Evidence of the complainant's peaceful disposition is relevant if the appellant has raised and is relying on self-defence, because the trier of fact has to determine if the complainant acted in a way that caused the accused to fear that his life was in danger or that he would suffer grievous bodily harm. Such evidence is admissible where its probative value outweighs its prejudicial effect: *R v Cote,* 2018 ONCA 870, at para 39

In cases in which the state of an accused's mind is to be determined in whole or in part by circumstantial evidence, an analysis of what a reasonable person

would think or do in the same circumstances is a relevant factor ripe for consideration in assessing an accused's state of mind. It follows that it is not wrong for a trier of fact to take into account conclusions about the objective elements in determining the subjective elements: *R v Mohamad,* 2018 ONCA 966, at para 231

C. JURY CHARGES

For guiding principles on a functional approach to a jury charge on self-defence (i.e., how to narrow and focus the instruction) see *R v. Rogers*, 2015 ONCA 399

i. BAXTER INSTRUCTION

The Baxter instruction relates to the reasonableness of an accused's belief of the necessity of killing or very seriously injuring a victim as the only means of self-preservation under former s. 34(2)(b).

The instruction advises that, in deciding whether the force used by the accused was more than was necessary in self-defence under both s. 34 (1) and (2), the jury must bear in mind that a person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety, the exact measure of necessary defensive action.

In some cases, it is an error in law to omit the instruction: This will depend on such factors as: the absence of a request for the instruction or an objection to its omission; the thoroughness of the judge's review of the relevant evidence; the emphasis laid on the subjective component of the excessive force element in former s. 34(2)(b): *R v Sinclar,* 2017 ONCA 38 at paras 112-119

D. THE REQUIREMENT OF AN ASSAULT

The requirement of an "unlawful assault" by the victim is satisfied if there was an actual unlawful assault, or the accused reasonably believed that he was being unlawfully assaulted: *R v. Batson,* 2015 ONCA 593 (A case involving the application of self defence provisions (s.34(2) an s.35) where the accused pulled a gun on the victim first).

Where the claim of self-defence rests on an assertion of actual assault, and a distinction between what an accused said happened and what she reasonably believed happened or was about to happen cannot be fairly said to arise from the evidence, a trial judge is under no obligation to instruct the jury on the basis of apprehended assault: *R v Sinclar,* 2017 ONCA 38 at para 58

E. SELF DEFENCE IN CONJUNCTION WITH OTHER DEFENCES

The trial judge can put two incompatible defences to the jury, as long as each meets the air of reality test: *R v. Woodcock*, 2015 ONCA 535

The defence of self-defence can co-exist with the defence of accident in a similar fact scenario: R v Budhoo, 2015 ONCA 912

SUICIDE PACT

The court in *R. v. Gagnon* (1993), 84 C.C.C. (3d) 143, 24 C.R. (4th) 369 (Que. C.A.) accepted a very narrow "suicide pact" defence. That defence was available only when the parties formed a common and irrevocable intention to commit suicide together, simultaneously by the same event and the same instrumentality, and where the risk of death was identical for both: *Gagnon*, at p. 155. The court distinguished a true suicide pact from a murder-suicide pact in which one person agreed to first kill the other and then kill himself. *Gagnon* would not have extended the "suicide pact" defence to the murder-suicide situation.

No such ‘suicide pact” defence has been recognized by the Ontario Court of Appeal: *R v Dobson,* 2018 ONCA 589 at paras 41, 43