

---

---

## DEFENCES

---

---

---

---

### TABLE OF CONTENTS

---

---

|  |           |
|--|-----------|
| <b>GENERAL PRINCIPLES</b> .....                | <b>4</b>  |
| <b>A. Air of Reality Test</b> .....            | <b>4</b>  |
| <b>B. Alternative Defences</b> .....           | <b>7</b>  |
| <b>ACCIDENT</b> .....                          | <b>7</b>  |
| <b>ALIBI</b> .....                             | <b>8</b>  |
| <b>AUTOMATISM</b> .....                        | <b>8</b>  |
| <b>CONSENT</b> .....                           | <b>8</b>  |
| <b>DURESS</b> .....                            | <b>9</b>  |
| <b>ENTRAPMENT</b> .....                        | <b>11</b> |
| <b>A. Prong 1: Reasonable Suspicion</b> .....  | <b>12</b> |
| <b>B. Prong 2: Bona fide Inquiry</b> .....     | <b>14</b> |
| <b>C. The Reasonable Person Standard</b> ..... | <b>14</b> |
| <b>D. Inducement-Based Entrapment</b> .....    | <b>15</b> |
| <b>E. Examples from the case law</b> .....     | <b>15</b> |

|   |           |
|---|-----------|
| <b>NOT CRIMINALLY RESPONSIBLE</b> .....                       | <b>16</b> |
| <b>A. The Test</b> .....                                      | <b>16</b> |
| <b>B. The Procedure</b> .....                                 | <b>17</b> |
| <b>C. Trier of Fact's Evaluation of Expert Evidence</b> ..... | <b>17</b> |
| <b>D. Jury Instruction</b> .....                              | <b>18</b> |
| <b>OFFICIALLY INDUCED ERROR</b> .....                         | <b>18</b> |
| <b>PROVOCATION</b> .....                                      | <b>18</b> |
| <b>A. General Principles</b> .....                            | <b>18</b> |
| <b>B. Insult</b> .....  | <b>19</b> |
| i. Section 232(2).....  | 20        |
| <b>C. Ordinary Person's Loss of Self-control</b> .....        | <b>20</b> |
| <b>D. Suddenness</b> .....                                    | <b>21</b> |
| <b>E. Self-induced Provocation</b> .....                      | <b>21</b> |
| <b>F. Provocation and Mens Rea for Murder</b> .....           | <b>22</b> |
| <b>G. First-Degree Murder</b> .....                           | <b>23</b> |
| <b>H. Standard of Review</b> .....                            | <b>23</b> |
| <b>SELF DEFENCE</b> .....                                     | <b>24</b> |
| <b>A. The New Provisions</b> .....                            | <b>24</b> |
| <b>B. General Principles</b> .....                            | <b>24</b> |
| i. The Modified Objective Standard.....                       | 25        |
| ii. Proportionality in Response .....                         | 26        |
| iii. The WD Instruction in Self-Defence cases.....            | 27        |
| <b>C. Jury Charges</b> .....                                  | <b>27</b> |
| i. Baxter Instruction.....                                    | 27        |

|   |           |
|---|-----------|
| <b>D. The Requirement of an Assault.....</b>                    | <b>28</b> |
| <b>E. Self Defence in conjunction with other defences .....</b> | <b>28</b> |
| <b>F. Examples from the Case Law .....</b>                      | <b>29</b> |
| <b>SUICIDE PACT.....</b>  | <b>29</b> |

## GENERAL PRINCIPLES

### A. AIR OF REALITY TEST

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

The absence of evidence on *any* essential element disentitles consideration of that defence. The same holds true when the defence requests that the jury be instructed on an included offence: *R v Durrant*, [2019 ONCA 74](#), at para 177

To satisfy the air of reality standard, the evidence adduced at trial must afford a basis upon which a reasonable jury, properly instructed, could have a reasonable doubt about the constituent elements of an included offence

The trial judge does not consider the credibility of witnesses or the reliability of their evidence; nor does the trial judge weigh evidence substantively, make findings of fact; or draw determinate factual inferences. However, in some circumstances, as for example where the elements of a defence can only be established by drawing inferences from circumstantial evidence, a trial judge must examine the totality of the evidence to determine whether the inferences required to ground the defence fall within the field of inferences reasonably available on the evidence adduced at trial.

Sometimes, while individual factors may not be sufficient to ground a specific defence (e.g., intoxication, anger, provocative words), a consideration of the cumulative effect of those factors, such as would be included in a “rolled-up” instruction, may be sufficient to ground the defence: *R v Durant*, [2019 ONCA 74](#), at paras 175-178

Regardless of who elicited the evidence, if there is direct evidence on each element of the defence, the defence must be left with the trier of fact. If

circumstantial evidence is relied on, the trial judge must engage in a limited weighing to determine if the circumstantial evidence is reasonably capable of supporting the requisite inferences” necessary to support the defence. A trial judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence: *R v Norman*, [2021 ONCA 321](#), at para 26

The burden on the accused is evidential, not persuasive. The question before the trial judge is not whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. That question is reserved for the jury. The air of reality test is only concerned with whether a given defence is put in play by the totality of the evidence, accepting the case of the accused at its highest and assuming the evidence relied upon is true: *R v Alas*, [2021 ONCA 224](#), at para 43; see also *R v Norman*, [2021 ONCA 321](#), at para 27

Evidence sufficient to give rise to an air of reality may be furnished by the accused’s evidence, his statement to the police, or the testimony of others. Even when aspects of accused’s testimony may have undermined the basis for the defence, it is for the jury to determine what aspects of the evidence they would rely on, not the trial judge: *R v Othman*, [2018 ONCA 1073](#), at para 28

In applying the air of reality test, the trial judge considers the totality of the evidence and assumes the evidence relied upon by the accused is true. The evidence must be reasonably capable of supporting the inferences necessary to make out the defence before there is an air of reality to the defence. The trial judge does not make determinations about the credibility of witnesses. She does not weigh the evidence, make findings of fact, or draw determinate factual inferences. The trial judge does not consider whether the defence is likely to succeed at the end of the day: *R v Land*, [2019 ONCA 39](#) at paras 46, 77

The air of reality test controls whether a defence not specifically advanced at trial should nonetheless be left to the jury. The test requires examination and assessment of the whole of the evidence, as well as the conduct of the trial as a whole. Incompatibility of the proposed defence with the primary defence does not, without more, mean that the proposed defence lacks an air of reality.

The nature of the primary defence advanced may factor into a consideration of whether there is an “air of reality” to a defence which conflicts with the primary defence. Incompatibility of the defences may leave evidentiary gaps on essential

elements of the proposed defence that cannot be overcome: *R v Johnson*, [2019 ONCA 145](#), at paras 101-102

There can be an ‘air of reality’ to the defence of provocation even if the appellant’s own testimony contradicts the defence. Similarly, there can be an air of reality where the evidence of the accused is contradictory. This follows necessarily from the trial judge’s obligation to take the defence evidence at its highest when assessing whether a defence has an air of reality, and to avoid determining its credibility by assuming that the evidence relied upon is true. Considering contradictions in the defence evidence to reject the most favourable version of events offered would violate each of these rules.: *Land* at paras 75-76, 78, 79, 80

The reasonableness component of the “air of reality” test incorporates a limited weighing of the evidence by the trial judge. The trial judge must determine whether there is a sufficient evidentiary basis for a properly instructed jury, acting reasonably, to render a conviction based on that theory of liability: *Figliola* at para 29; *R v Durant*, [2019 ONCA 74](#), at para 176

In some instances, there will be evidence that, if believed, would establish an element of a defence. The trial judge, when faced with this direct evidence, must then find that there is an air of reality to that element. No appellate deference is owed to such a determination.

In other cases, there will be no direct evidence going to a particular element. In this case, the trial judge must engage in a “limited weighing” of the evidence to determine whether the element can be “reasonably inferred. In so doing, she must not draw determinative factual inferences, nor make credibility assessments. The limited weighing is only for the relatively narrow purpose of deciding whether there is evidence upon which the trier of fact could reasonably conclude that the element has not been disproved beyond a reasonable doubt. Some deference is owed to these decisions, but the deference owed is necessarily less than that owed to a trial judge’s findings of fact.

Thus, where the defence is based on direct evidence, a trial judge’s determination is reviewable on a standard of correctness. When the defence is based on circumstantial evidence, a trial judge’s determination is entitled to some deference on appeal: *R v Paul*, [2020 ONCA 259](#), at paras 28-30

Whether there is an air of reality to a defence is a question of law and reviewable on a standard of correctness: *R v. ADH*, [2015 ONCA 690](#); *R v. Budhoo*, [2015 ONCA 912](#); *R v Grewal*, [2019 ONCA 630](#), at para 37

---

## B. ALTERNATIVE DEFENCES

---

The defences of self-defence and provocation are not inconsistent. A person can, at the same time, fear bodily harm and act to prevent it, while losing control through anger or rage in the face of an impending risk of bodily harm. Moreover, there is nothing to prevent the defences from working in the alternative: *R v Land*, [2019 ONCA 39](#), at paras 73-74

---

## ACCIDENT

---

The defence of accident arises where the act in question was involuntary, thereby negating the *actus reus* of the offence, or the accused did not have the requisite *mens rea*.

Regarding accident in the context of *mens rea*, where the offence charged requires proof of subjective intent to bring about a particular consequence, the claim that the accused did not intend to bring about that consequence, making it a mere accident, is legally relevant, as it could negate the *mens rea* required for a conviction. By contrast, where the offence only requires a subjective awareness of particular circumstances, an accused's claim that the consequences of his act were unintentional and unexpected, making those consequences a mere accident, is naturally of no assistance. Finally, if the offence requires proof of objective fault — for instance, that the prohibited consequence was objectively foreseeable — then a claim of accident could negate that fault element if the prohibited consequence was such a chance occurrence that the trier of fact is left in a state of reasonable doubt as to whether, objectively, it was foreseeable.

To avoid confusion in future cases, trial judges should focus on the questions of voluntariness and/or negation of *mens rea*, as appropriate, when instructing jurors on the so-called “defence” of “accident”: *R v Barton*, [2019 SCC 33](#)

## ALIBI

At common law, an accused who advances an alibi defence at trial must disclose the substance of that defence to the prosecution in sufficient time and with sufficient particularity to allow the authorities to investigate it before trial. When the accused does not do so, the trier of fact may draw an adverse inference when weighing the alibi evidence. The courts have recognized this qualification of an accused's constitutional right to silence in order to guard against surprise alibis being fabricated in the witness box which the prosecution is almost powerless to challenge: *R v Bushiri*, [2019 ONCA 797](#), at paras 1, 32-34

## AUTOMATISM

Automatism is available as a defence to both a specific intent offence and a general intent offence. This was confirmed in *Sullivan*, when the Ontario Court of Appeal, 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 threatened interference with the bodily integrity of another. The Court found that the provision violated s.7 of the *Charter* by criminalizing behavior in the absence of the requisite *mens rea*: *R v Sullivan*, [2020 ONCA 333](#), see also *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 rationale underlying the defence of duress: *R v Aravena*, [2015 ONCA 250](#)

Courts must apply strict standards for the application of the defence of duress to prevent its abuse: *R v Norman*, [2021 ONCA 321](#), at para 43

The common elements of the common law and statutory defence of duress are as follows:

1. There must be an explicit or implicit threat of present or future death or bodily harm. The threat can be directed at the accused or a third party.
2. The accused must reasonably believe that the threat will be carried out.
3. There is no safe avenue of escape. This element is evaluated on a modified objective standard.
4. A close temporal connection between the threat and the harm threatened.
5. Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened. 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 threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy, or association.

If the defence is available in law, and the evidence gives an air of reality to the defence, an accused is entitled to an acquittal unless the Crown disproves one or more of the essential elements of the defence on a reasonable doubt standard: *R v Norman*, [2021 ONCA 321](#), at paras 24-25

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 abettors, 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; see also *R v Norman*, [2021 ONCA 321](#)

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

The law does not require an accused to seek the official protection of police in all cases. The requirement of objectivity must take into consideration the special circumstances in which the accused finds himself or herself as well as his or her perception of those circumstances. For example, in *Norman*, the Court of Appeal upheld the trial judge’s decision to leave duress with the jury, notwithstanding that there may have been options for escape available, based on the accused’s testimony that he felt there was no safe avenue of escape due in part to his knowledge of the politics of the inmate system and his belief that a correctional officer could not help him. The accused’s explanation for why he could not alert authorities even after released from custody (based on threats from the gang and his brother remaining in jail and being threatened) gave rise to an air of reality to

duress. The fact that the accused acknowledged that the police could have assisted did not vitiate the accused's broader evidence that he believed he or his brother would be harmed : *R v Norman*, [2021 ONCA 321](#) at paras 34-39

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 Nouredine*, [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

The test does not require that the reasonable person would have inevitably succumbed to the inducement: *R v Darnley*, [2020 ONCA 179](#), at paras 62-64; *R v Ghotra*, [2020 ONCA 373](#), at para 17

The onus is on the accused to prove entrapment on a balance of probabilities: *Ghotra* at para 18

Much of the entrapment case law focuses on the distinction between presenting an individual with an opportunity to commit an offence, and merely taking a step in investigating criminal activity. The former is entrapment unless the police first have reasonable suspicion. The latter is permissible police conduct. The distinction will sometimes be difficult to draw. The analysis often focuses on whether the police or the accused took the initiative in the interaction and when. The narrow conception of “providing an opportunity” excludes investigative techniques where the originating criminal spark comes from the accused. Where it is the accused who takes the lead in conversation and turns it toward the commission of an offence, the police have not provided the accused with an opportunity to commit the offence: *Ghotra*, at paras 19-29

---

## **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 be attentive 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: *R v Ahmad*, [2018 ONCA 534](#), at para 37-38, 41

In the entrapment context, the “reasonable suspicion” standard requires something more than a mere suspicion and something less than a belief based

upon reasonable and probable grounds. It focuses on what the police knew at the time the opportunity was provided. In addition to information originally provided, investigative steps taken by the police as a consequence of that information can be relevant. Interactions with the accused before the opportunity to commit the offence was offered may also be considered, as the police may form a reasonable suspicion in the course of a conversation with the target, but prior to presenting the opportunity to commit a crime: *R v Ray*, [2020 ONCA 351](#), at para 40

An individual phone number can qualify as a place over which police may form reasonable suspicion. However, police cannot offer a person who answers the phone the opportunity to commit an offence without having formed reasonable suspicion that the person using that phone, or that phone number, is engaged in criminal activity.

A bare tip from an unverified source that someone is dealing drugs from a phone number cannot ground reasonable suspicion. However, it can be sufficiently corroborated such that the standard is met. Although it would be prudent for police officers to investigate the reliability of the tip before placing the call where they are able to do so, it is also possible for the police to form reasonable suspicion in the course of a conversation with the target, but prior to presenting the opportunity to commit a crime. The target's responsiveness to details in the tip, along with other factors, may tend to confirm the tip's reliability. The target's use of or response to language particular to the drug subculture properly forms part of the constellation of factors supporting reasonable suspicion. Whether or not responding to such terminology is neutral or adds to the weight of other factors will depend on the circumstances. There is no requirement that the police rule out innocent explanations for these responses.

Unless the police had formed reasonable suspicion before a phone call was made, the court must review the words spoken during the call to determine whether an accused was entrapped. In the particular context of drug trafficking, an opportunity to commit an offence is offered when the officer says something to which the accused can commit an offence by simply answering "yes:" *R v Ahmad*, [2020 SCC 11](#)

---

## 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

---

## C. THE REASONABLE PERSON STANDARD

---

The relevant inquiry examines whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of the crime. However, in *Darnley*, the Court of Appeal found that it was an error for the trial judge to elevate the standard of resistance expected of a police officer, who must be taken to have elevated standards of moral restraint and fortitude. On this analysis, the Court held, no police officer could ever avail

themselves of the defence of entrapment: *R v Darnley*, [2020 ONCA 179](#), at paras 65-73

---

## D. INDUCEMENT-BASED ENTRAPMENT

---

The SCC in *Mack* identified a number of factors in determining whether police have gone beyond providing a mere opportunity to commit an offence to inducing the commission of an offence:

- the type of crime being investigated and the availability of other techniques for the police detection of its commission;
- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
- the persistence and number of attempts made by the police before the accused agreed to committing the offence;
- the type of inducement used by the police including: deceit, fraud, trickery or reward;
- the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;
- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
- the existence of any threats, implied or express, made to the accused by the police or their agents;
- whether the police conduct is directed at undermining other constitutional values: *R v Jaffer*, [2021 ONCA 325](#), at para 19

---

## E. EXAMPLES FROM THE CASE LAW

---

- Entrapment in the context of police investigating accused online who are seeking sexual services from minors: *R v Ramelson*, [2021 ONCA 328](#)

## 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. THE PROCEDURE**

---

When the trial is tried by a jury on the merits and a conviction is returned, any subsequent application to determine whether the offender was not criminally responsible must be made by the jury. The trial judge does not have jurisdiction to make this determination: *R v Café*, [2019 ONCA 775](#), at para 72

---

## **C. 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 omitted)

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 omitted)

---

## D. JURY INSTRUCTION

---

The consequences of an NCR verdict are totally irrelevant to a jury's deliberations, and they should be so instructed in the clearest terms: *R v Goudreau*, [2019 ONCA 964](#), at paras 39-40, 46

---

## 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. GENERAL PRINCIPLES

---

The defence of provocation recognizes that, as a result of human frailties, the accused reacted inappropriately and disproportionately, but understandably to a sufficiently serious wrongful act or insult: *R v A/s*, [2021 ONCA 224](#), at para 45

There are four components of the provocation defence: (1) there must be a wrongful act or insult; (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control; (3) the accused must have acted in response to the provocation; and (4) the accused must have acted on the sudden before there was time for his or her passion to cool. The first two components constitute the “two-fold” objective element. The latter two components comprise the “two-fold” subjective element of the defence. It is important to recognize, however, that the various components of the defence may overlap and that s. 232 must be considered in its entirety: *R v Land*, [2019 ONCA 39](#), at paras 54, 56; *R v Johnson*, [2019 ONCA 145](#), at paras 88-95

The wrongful act or insult must be sudden, in the sense that it strikes on the mind of an accused who was unprepared for it. Likewise, the response of the accused to the sudden provocation must be equally sudden. In other words, suddenness must characterize both the provocation and the accused’s response or reaction to it: *Johnson*, at para 95

Where the defence in issue is the statutory partial defence of provocation, the air of reality standard must be satisfied for both the objective and subjective components of the defence: *Johnson* at para 99

The provocation defence can apply even if the accused intended to kill: *Land* at para 105

Provocation is still available where the evidence tends to show that an accused was prepared for an insult or initiated a confrontation and received a predictable response which he later asserts amounted to a wrongful act. But the defence may usually be defeated in such circumstances because of the application of appropriate contextual factors to the question of whether an ordinary person would have lost the power of self-control: *Johnson* at para 95

---

## **B. 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 perceived 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

All of the offensive circumstances, including taunting words or words of challenge, should be considered in characterizing the wrongful act or insult: *R v Land*, [2019 ONCA 39](#), at para 91

---

**i. SECTION 232(2)**

---

Section 232(2) limits provocation to conduct of the victim that would constitute an indictable offence punishable by five or more years of imprisonment. In *R v Simard*, [2019 BCSC 531](#), the British Columbia Supreme Court struck down this provision as an unconstitutional violation of s.7 of the *Charter*. Leave to appeal to the Supreme Court of Canada was denied.

---

**C. ORDINARY PERSON'S LOSS OF SELF-CONTROL**

---

The ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background

circumstances should be considered. The ordinary person is not someone who is exceptionally excitable or pugnacious, lest the objective standard becomes so “subjectivized” as to be meaningless. The question is how an ordinary person with the accused’s life experiences will be apt to respond: *R v Land*, 2019 ONCA 39, at paras 95-97

The court takes a flexible and contextual approach to the ordinary person in the context of provocation. All contextual factors that would give the act or insult special significance to an ordinary person must be taken into account: *R v Alas*, [2021 ONCA 224](#), at para 49; see also para 50

---

#### **D. SUDDENNESS**

---

“Suddenness” is not exclusively a subjective consideration. Suddenness impacts, as well, on the objective inquiry. Specifically, if a wrongful act or insult is not sudden and unexpected, it is unlikely to satisfy the objective requirement that “the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control”: *R v Land*, [2019 ONCA 39](#), at para 57

---

#### **E. SELF-INDUCED PROVOCATION**

---

“Self-induced provocation” arises where the provocative conduct of the deceased came about as a result of the accused initiating an aggressive confrontation. That the accused induced the act or words said to constitute provocation does not preclude the defence from being raised. What is prohibited absolutely by s. 232(3) is “manufactured” provocation – inciting the victim to engage in a wrongful act or insult in order to generate an excuse for killing him. But beyond this, there is no absolute rule that a person who instigates a confrontation cannot rely on the defence of provocation. Rather, the matter is always one of context.

To be sure, the fact that an accused person has incited the provocative act is relevant to both the objective and subjective considerations that make up the defence. The instigating role played by the accused may assist in determining whether the accused actually, subjectively expected the victim’s response. The

instigating role played by the accused may also affect the objective inquiry into whether the wrongful act or insult relied upon as the provocation fell within a range of reasonably predictable reactions. Yet even the reasonable predictability of the response is not determinative. This may and usually will undermine the defence, but this is not an absolute rule. The reasonable predictability of the reaction remains to be weighed together with all other contextual factors.

Just as there is no fixed rule prohibiting self-induced provocation defences, there is no fixed rule undermining the provocation defence where the accused initiated the confrontation while armed, anticipating that the victim could become violent *R v Land*, [2019 ONCA 39](#), at paras 61-63

The fact that a violent altercation may have been predictable is certainly relevant, but not necessarily determinative: *R v Alas*, [2021 ONCA 224](#), at para 61

The defence of provocation is not necessarily defeated in situations where the accused arms himself with a knife in preparation for an encounter he could anticipate: *R v Alas*, [2021 ONCA 224](#), at para 62

---

## **F. PROVOCATION AND MENS REA FOR MURDER**

---

Evidence of the deceased's provoking conduct and the accused's reaction to it, together with evidence of other circumstances surrounding the killing, including those relating to the mental state and condition of the accused, is relevant for the jury to consider in determining whether the Crown has proven either state of mind required to establish the unlawful killing was murder. This evidence is often an integral part of a "rolled up" instruction on the mental element in murder.

Evidence of provoking conduct by the deceased and of the accused's reaction to it relevant to proof of the state of mind essential to make the unlawful killing murder need *not* qualify as provocation as defined in s. 232(2) of the *Criminal Code*

Second, provocation which meets the requirements for the statutory partial defence as defined in s. 232(2) reduces an unlawful killing *proven* to be murder to manslaughter.<sup>[4]</sup> This statutory partial defence does *not* relate to the mental element in murder. This is so because the opening words of s. 232(1) provide that "[c]ulpable homicide that otherwise would be murder may be reduced to manslaughter."

Since the term “provocation” may be used in either or both of these senses, it is critical to the jury’s understanding that the trial judge explain the difference between them and confine their use to the issue to which each is relevant. In a decision tree, the provocation question should appear following an affirmative answer to the question about proof of the mental element in murder: *R v McGregor*, [2020 ONCA 307](#), at paras 147-150, 153

---

## **G. FIRST-DEGREE MURDER**

---

Where the charge is first degree murder based on planning and deliberation, provoking words and conduct not reached by s. 232(2) are also relevant to proof of deliberation: *R v McGregor*, [2020 ONCA 307](#), at fn3

---

## **H. STANDARD OF REVIEW**

---

There is some complexity in the standards of appellate review in air of reality determinations in provocation cases. Occasionally, the Supreme Court of Canada has stressed the need for deference to the decision of the trial judge. On other occasions, the court notes that whether there is an air of reality is a question of law, inviting a correctness standard, but that, even within a correctness standard, the trial judge is in the best position to determine whether the evidence that is capable of supporting the necessary inferences is credible. Furthermore, however, the appellate court does not owe deference to the trial judge’s determination that there is no air of reality where that determination was based on a misunderstanding of the law: *R v Land*, [2019 ONCA 39](#), at para 71

---

---

## 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

---

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

A trial judge is not required to specifically identify and discuss each of the factors listed in s. 34(2): *R v Randhawa*, [2020 ONCA 668](#), at para 18

Section 34(2)(g) of the *Criminal Code* requires the trier of fact to consider "the nature and proportionality of the person's response to the use or threat of force". In doing so, the trier of fact must not weigh the exact measure of necessary defensive action to a nicety or hold the accused to a standard of perfection: *R. v. Cunha*, [2016 ONCA 491](#), at para. 24.

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

It is an error of law to reject self-defence on the basis that the accused struck first. Self defence is still available in these circumstances: *R v Fougere*, [2019 ONCA 505](#), at para 22

---

#### **i. THE MODIFIED OBJECTIVE STANDARD**

---

The self-defence provisions blend subjective and objective considerations. Reasonableness cannot be judged "from the perspective of the hypothetically neutral reasonable man, divorced from the appellant's personal circumstances. Instead, the court contextualized the reasonableness assessment by reference to the accused's personal characteristics and experiences to the extent that those characteristics and experiences were relevant to the accused's belief or actions. For example, an accused's prior violent encounters with the other person or her knowledge of that person's propensity for violence had to be taken into account in the reasonableness inquiry. Similarly, an accused's mental disabilities can be factored into the reasonableness assessment:

An accused's self-induced intoxication, abnormal vigilance, or beliefs that were antithetical to fundamental Canadian values and societal norms are not relevant to the reasonableness assessment.

Contextualizing the reasonableness inquiry to take into account the characteristics and experiences of the accused, does not, however, render the inquiry entirely subjective. The question is not what the accused perceived as reasonable based on his characteristics and experiences, but rather what a reasonable person with those characteristics and experiences would perceive: *R v Khill*, [2020 ONCA 151](#), at paras 48-50

---

## ii. PROPORTIONALITY IN RESPONSE

---

Section 34(1)(c) examines the accused's response to the perceived or actual use of force or the threat of force. That response – “the act” – which would otherwise be criminal, is not criminal if it was “reasonable in the circumstances”.

The “relevant circumstances of the accused” in s. 34(2) can include mistaken beliefs held by the accused. If the court has determined, under s. 34(1)(a), the accused believed wrongly, but on reasonable grounds, force was being used or threatened against him, that finding is relevant to, and often an important consideration in, the court's assessment under s. 34(1)(c) of the reasonableness of “the act in the circumstances”.

Other mistaken beliefs by an accused that are causally related to the “act” that gives rise to the charge will also be relevant to the assessment of the reasonableness of “the act in the circumstances”. Those beliefs may be reasonable or unreasonable. To the extent that the court determines that a mistaken belief causally related to the “act” is reasonable, that finding will offer support for the defence claim that the “act” was reasonable. However, if the court assesses a mistake as honest but unreasonable, that finding may tell against the defence assertion that the accused's “act” was “reasonable in the circumstances”.

The imminence of the threat and the nature of the threat are relevant in deciding the reasonableness of the accused's act under ss. 34(2)(a) and (b). The nature of the force used is but one factor in assessing the reasonableness of the act. The weight to be assigned to any given factor is left in the hands of the trier of fact: *R v Khill*, [2020 ONCA 151](#), at paras 58-63

Pursuant to section 34(2)(c), the court is required to examine the accused's behaviour throughout the “incident” that gives rise to the “act” that is the subject matter of the charge. The conduct of the accused during the incident may colour the reasonableness of the ultimate act.

Section 34(2)(c) renders an accused's conduct during the “incident” relevant, even though the conduct is not unlawful or provocative as that word was defined in the prior self-defence provisions. The court must consider whether the accused's behaviour throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge. It is for the trier of fact, judge or jury, to decide the weight that should be given to the accused's behaviour throughout the incident

when deciding the ultimate question of the reasonableness of the act giving rise to the charge: *R v Khill*, [2020 ONCA 151](#), at paras 75-76

---

### **iii. THE WD INSTRUCTION IN SELF-DEFENCE CASES**

---

The appropriate manner in which to apply WD in cases of self defence is as follows:

If you accept the accused's evidence and on the basis of it, you believe or have a reasonable doubt that he/she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty.

Even if you do not accept the accused's evidence, if, after considering it alone or in conjunction with the other evidence, you believe or have a reasonable doubt that he/she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty.

*R v Khill*, [2020 ONCA 151](#), at para 107

---

## **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](#)

A trial judge is under no duty to repeat verbatim the language in s. 34(2) of the *Criminal Code*. The trial judge's responsibility is to ensure the jury appreciates the parts of the evidence relevant to the reasonableness inquiry required under s. 34(1)(c): *R v Khill*, [2020 ONCA 151](#), at para 69

---

### **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 Sinclair*, 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 Sinclair*, 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

---

## F. EXAMPLES FROM THE CASE LAW

---

In *RS*, the Court of Appeal overturned convictions for manslaughter, careless use of a firearm, and aggravated assault and substituted acquittals instead on the basis that the accused was acting in self defence when he fired his gun at a group of attacking males, killing one of them: *R v RS*, [2019 ONCA 832](#)

---

### 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