

## Defences

After the Crown presents its case, the accused is entitled to raise a defence. Two types of defences are available: a negating defence and an affirmative defence.

### **negating defence:**

a defence that raises a reasonable doubt about whether the accused committed the offence charged

A **negating defence** raises a reasonable doubt about whether an accused committed the *actus reus* of an offence or had the necessary *mens rea* to support a conviction. In effect, this is a defence that negates an essential element in the Crown's case. Four negating defences will be

examined next: (1) mistake of fact, (2) mental disorder, (3) automatism, and (4) intoxication.

An **affirmative defence** admits that the Crown has established the elements of the offence but claims that the accused's criminal act was justified in the circumstances, or that the accused should be excused from punishment because criminal conduct was the only reasonable option. Two affirmative defences—self-defence and compulsion (or duress, in common law) will be covered later in this chapter.

### **affirmative defence:**

a defence that justifies an accused's criminal conduct

## Mistake of Fact

An accused person who is mistaken about the factual context in which an alleged offence was committed may not possess the *mens rea* (guilty mind) required for a conviction. For example, the *mens rea* for the offence of possession of property obtained by crime requires that the accused knew the property was obtained by crime. Any individual accused of this offence who mistakenly believed that the property was lawfully obtained has a mistake-of-fact defence: the Crown will not be able to prove one of the required elements of the crime if the defence is successful.

Although the mistake-of-fact defence applies in many circumstances, it appears most often in cases of sexual assault. Section 265 of the *Criminal Code* defines the offence of assault (see Chapter 8, page 234). A sexual assault is an assault committed in circumstances of a sexual nature and in which the sexual integrity of the victim is violated. The *actus reus* of sexual assault has two parts: the application of force of a sexual nature, and lack of consent. Accused people who claim they believed the sexual contact to be consensual have a potential mistake-of-fact defence.

Canadian courts have ruled that a mistaken belief must be honestly held to negate *mens rea*. However, whether the mistake needs also to be reasonable has been far more controversial. Some argue that the relevant issue is what the accused thought or knew at the time of the offence, not what a reasonable person would have thought or known. Of course, the more unreasonable the mistake, the less likely it is that the trier of fact will believe that the accused actually made a mistake.

Suppose an individual is charged with trafficking in cocaine. The evidence: the accused was seen on a street corner selling a white, powdery substance to another individual. The substance was tested and found to be cocaine. The accused claims he believed he was selling a herbal supplement meant to increase energy. The willingness of the trier of fact to accept this story will depend on how credible the accused sounds as a witness and on the inherent believability, or reasonableness, of the story.

In the 1980 case *R v. Pappajohn*, which involved the offence of rape (now called sexual assault), the Supreme Court ruled that a mistaken belief did not have to be reasonable, only honestly held. Mistake of fact was a

defence that negated *mens rea*. *Mens rea* was subjectively measured—the question therefore was what was in the mind of this particular accused, not what should have been in the mind of a reasonable person in the same circumstances.

The case became a lightning rod. For some, it brought welcome clarity to the law by establishing the general rule that mistake of fact is a defence that negates *mens rea*. For others, it confirmed that the Court had no understanding of the reality of rape and was offering accused men legal licence to make unreasonable mistakes about the existence of consent.

### *The Law*

Women's groups across Canada had been working for years to identify and combat sexist stereotypes in the law of sexual assault when the decision in *R v. Pappajohn* was released. The case shocked them into greater action. As a result of their work, the laws on sexual assault changed significantly. In 1992, the *Criminal Code* was amended to clarify the law of consent and to limit the availability of the mistaken-belief defence.

273.1(1) "[C]onsent" means ... the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained ... where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

273.2 It is not a defence ... that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where ...

- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

### *Questions*

1. What specific problem was each subsection designed to overcome?
2. What reasonable steps could a person take to ascertain whether consent exists?

# Defences

After the Crown presents its case, the accused is entitled to raise a defence. Two types of defences are available: a negating defence and an affirmative defence.

## negating defence:

a defence that raises a reasonable doubt about whether the accused committed the offence charged

A **negating defence** raises a reasonable doubt about whether an accused committed the *actus reus* of an offence or had the necessary *mens rea* to support a conviction. In effect, this is a defence that negates an essential element in the Crown's case. Four negating defences will be

examined next: (1) mistake of fact, (2) mental disorder, (3) automatism, and (4) intoxication.

An **affirmative defence** admits that the Crown has established the elements of the offence but claims that the accused's criminal act was justified in the circumstances, or that the accused should be excused from punishment because criminal conduct was the only reasonable option. Two affirmative defences—self-defence and compulsion (or duress, in common law) will be covered later in this chapter.

## affirmative defence:

a defence that justifies an accused's criminal conduct

## Mental Disorder

Criminal law works on the assumption that society should punish people who choose to do wrong. Yet individuals living with certain mental disorders that affect their ability to understand either the nature or consequences of their criminal behaviour may not be able to exercise that choice. At the same time, society needs to protect itself. The defence of mental disorder attempts to identify individuals whose disorder renders them blameless and to identify individuals who might pose a continuing danger to society.

An accused person who is found to be not criminally responsible (NCR) is not simply acquitted; rather, a verdict of "NCR on account of mental disorder" is imposed. Once the NCR verdict is imposed, the court, or a special review board, turns its attention to how it can best deal with the **NCR acquittee**. The focus is on whether treatment is needed and whether the acquittee's freedom must be restricted for public safety.

Mentally ill people have long been stereotyped as inherently dangerous. For many years, Canada's criminal law perpetuated this prejudice by subjecting mentally ill offenders to indefinite detention based on perceived risks. In 1991, the *Criminal Code* provisions dealing with mental disorder were completely overhauled. The new provisions were intended to ensure that NCR acquittees are treated fairly and are not incarcerated unless there is reason to suspect they present an ongoing risk to the community.

Section 672.54 sets out the factors that the court or review board must consider when dealing with an NCR acquittee. These include "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused." The court or review board must choose the disposition that is least restrictive and least onerous for the accused.

To be tried, an accused person must be able to instruct counsel, understand the proceedings and their consequences, and communicate with counsel and the court. An accused who cannot do this because of mental disorder is placed within the jurisdiction of the review board, and the board decides how best to enable the accused eventually to stand trial.

M'Naghten was found not guilty by reason of insanity for the murder of the secretary to then British Prime Minister, Robert Peel. M'Naghten suffered from delusions of persecution from the government. At that time, the House of Lords in Britain established the insanity defence, arguing that an accused could be found not guilty by reason of insanity if it was "clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing" [M'Naghten's Case (1884), 8 E.R. 718 (House of Lords)]. M'Naghten's rules were then incorporated, with some modifications, into our own *Criminal Code* as Section 16 (1), the insanity defence. This section was amended in 1992 and the insanity defence was renamed the **mental disorder defence** and the verdict "not guilty by reason of insanity" was changed to "not criminally responsible by reason of mental disorder."

There is a difference between the medical interpretation of a mental disorder and the legal interpretation. To be found not guilty by reason of a mental disorder, s. 16 of the *Criminal Code* states an accused must not only prove that he or she is suffering from a mental disorder, but also that the condition is of such severity that the person is "incapable of appreciating the nature and quality of the act." Canadian courts have stressed the significance of the word "appreciate" in this statement. It has been interpreted to mean that the accused not only had knowledge that the act was being committed, but also that he or she had the capacity to *measure and foresee* the consequences of the act. One test that can be applied is to ask if the accused would still commit the act if a police officer were standing by his or her side. For example, a psychopath may be mentally ill, but if he or she displays knowledge that an act is legally wrong, he or she would not be able to use the defence of mental disorder.

The second part of the mental disorder defence refers to the fact that the accused is "incapable of knowing that it is wrong." This statement is ambiguous because it does not make it

## **Mental Disorder**

The defence of intoxication is particularly controversial because intoxication is self-induced, but persons suffering from a mental disorder are not responsible for causing their illness. Nevertheless, the defence of mental disorder is also complex and controversial.

Our laws dealing with mental disorder are derived from M'Naghten's rules. In 1843 Daniel

clear whether an accused must not know that an act is *morally* wrong or *legally* wrong. In *R. v. Chaulk*, [1990] 3. S.C.R. 1303, the accused, two young boys, suffered from a psychosis that made them believe they had the power to rule the world and that killing was necessary. They believed they had the right to kill the victim because he was a "loser," although they knew that killing was wrong. The Supreme Court ruled that the accused could have an insanity defence if they were incapable of knowing that the act was *morally* wrong even if they were capable of knowing the act was *legally* wrong.

This decision raised the question of whether persons who had no moral conscience or whose value system differed from the norm could be found not criminally responsible for their acts. For example, could an offender who believed that the sexual assault of children was morally correct be found not guilty by reason of mental disorder? Judge Lamer, in the Chaulk decision, argued that this would not happen. He explained, "First, the incapacity to make moral judgments must be causally linked to a disease of the mind....Secondly, 'moral wrong' is not to be judged by the personal standards of the offender, but by his awareness that society regards the act as wrong..."

The mental disorder defence is not widely used in Canada for two main reasons. First, the law assumes that everyone is sane, thus the burden of proof lies with the defence to show, on a balance of probabilities, that their client is suffering from a disease of the mind that renders him or her incapable of "appreciating the nature and quality of the act." This argument can only



**FIGURE 11.3** Diane Mitsuko Yano is led into court in Cranbrook, B.C., in November 1999. The Calgary mother was accused of drowning her two children, but was found not guilty by reason of a mental disorder in a one-day trial. What must the defence prove in order to secure a verdict of not guilty by reason of mental disorder?

be raised after the accused has been found guilty. Second, the insanity defence often becomes a battle between psychiatrists, with those for the defence arguing the accused is insane and the Crown's expert witnesses arguing the opposite. Psychiatrists attempt to provide an objective assessment using the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) to determine whether defendants are fit to stand trial, if they can understand criminal responsibility, and if they are a danger to themselves or others. However, the psychiatrists' testimonies are often conflicting and complex, and may be difficult for a jury to understand.

## Defences

After the Crown presents its case, the accused is entitled to raise a defence. Two types of defences are available: a negating defence and an affirmative defence.

### **negating defence:**

a defence that raises a reasonable doubt about whether the accused committed the offence charged

A **negating defence** raises a reasonable doubt about whether an accused committed the *actus reus* of an offence or had the necessary *mens rea* to support a conviction. In effect, this is a defence that negates an essential element in the Crown's case. Four negating defences will be

examined next: (1) mistake of fact, (2) mental disorder, (3) automatism, and (4) intoxication.

An **affirmative defence** admits that the Crown has established the elements of the offence but claims that the accused's criminal act was justified in the circumstances, or that the accused should be excused from punishment because criminal conduct was the only reasonable option. Two affirmative defences—self-defence and compulsion (or duress, in common law) will be covered later in this chapter.

### **affirmative defence:**

a defence that justifies an accused's criminal conduct

***Tryi*** Under *Criminal Code* provisions for mental disorder, a person can serve more time in custody than the maximum prison sentence for the offence committed. Recent amendments (ss. 672.64–672.66) include a system of capping to limit the time a mentally disabled person can be detained. The amendments have yet to be proclaimed in force.

## Automatism

One fundamental principle of criminal liability is voluntariness. For the accused to be found guilty, the *actus reus* of an offence must be committed voluntarily—that is, it must be the conscious choice of an operating mind. The criminal law does not hold people responsible for actions they cannot control. The defence of mental disorder discussed earlier in this chapter is one example of the voluntariness principle. Another example is the defence of automatism.

The Supreme Court of Canada has defined automatism as “a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.” A successful defence of automatism leads to a finding of not guilty.

Much of the case law in this area focuses on whether the automatism was caused by a mental disease or was of the “non-insane” variety. The distinction is critical because it determines how the accused is treated by the system.

If the automatism is deemed to be caused by mental disease, the defence of mental disorder applies, and the accused may be subjected to custodial treatment. If the automatism is deemed to be “non-insane,” the acquittal leads to freedom. Automatism has been recognized in cases involving stroke, psychological trauma, hypoglycemia, and a severe blow to the head. One of the most famous Canadian cases, *R v. Parks*, involved sleepwalking.

## Case SLEEPWALKING OR MURDER?

*R v. Parks*, [1992] 2 SCR 871

### Facts

Kenneth Parks drove approximately 23 kilometres in the middle of the night, entered his in-laws’ home, and attacked them both with a knife, killing his mother-in-law and seriously injuring his father-in-law. Immediately after the attacks, Parks drove to the nearest police station and made the following statement: “I just killed someone with my bare hands; oh my God, I just killed someone; I’ve just killed two people; my God, I’ve just killed two people...”

At trial on charges of first-degree murder and attempted murder, Parks claimed that he was sleepwalking and offered evidence about his sleep patterns: he always slept heavily, had trouble waking up, and other family members suffered from sleep disorders, including sleepwalking. Other evidence suggested that his relationship with his in-laws had been good and that they had been particularly supportive of him during the previous year, when he had experienced many difficulties, both at work and because of a gambling habit.

The jury accepted the automatism defence, and Parks was acquitted. After Parks’s acquittal was upheld by the Ontario Court of Appeal, the Crown appealed the case to the Supreme Court of Canada.

### Issue

Was the defence of non-insane automatism available to Parks?

### Decision

The Supreme Court upheld Parks’s acquittal because the defence of non-insane automatism was available. It focused on whether Parks’s sleepwalking was likely to recur and, if it did, whether he presented a danger to society. The Court also considered whether allowing the defence would diminish respect for the justice system. Would courts be filled with alleged sleepwalkers trying to get away with murder?

The Court concluded:

Sleepwalking has been recognized as a possible defence for at least a century, and there is no apparent problem with baseless claims of auto-

### Questions

1. a) What facts support a defence of automatism?  
b) What facts, if any, detract from this defence?
2. Why did the Supreme Court uphold Parks’s acquittal?
3. Do you support the Supreme Court’s decision? Why or why not?

matism due to sleepwalking. ... Some people think that freeing the accused because of sleepwalking or automatism impairs the credibility of the justice system. A fundamental rule of criminal law, however, is that only those who act voluntarily, intending to commit an offence, should be punished.

# Defences

After the Crown presents its case, the accused is entitled to raise a defence. Two types of defences are available: a negating defence and an affirmative defence.

## **negating defence:**

a defence that raises a reasonable doubt about whether the accused committed the offence charged

A **negating defence** raises a reasonable doubt about whether an accused committed the *actus reus* of an offence or had the necessary *mens rea* to support a conviction. In effect, this is a defence that negates an essential element in the Crown's case. Four negating defences will be

examined next: (1) mistake of fact, (2) mental disorder, (3) automatism, and (4) intoxication.

An **affirmative defence** admits that the Crown has established the elements of the offence but claims that the accused's criminal act was justified in the circumstances, or that the accused should be excused from punishment because criminal conduct was the only reasonable option. Two affirmative defences—self-defence and compulsion (or duress, in common law) will be covered later in this chapter.

## **affirmative defence:**

a defence that justifies an accused's criminal conduct

## Intoxication

In dealing with criminal offences, society seems to have less sympathy for intoxicated people than it does for people living with mental disorders or suffering from automatism. The public accepts that alcohol or drugs may adversely affect an individual's behaviour, but it is not entirely prepared to excuse individuals for committing offences while intoxicated. Most often, intoxication results from choices the accused has made. But personal choice is not involved in the conditions of mental disorder or automatism.

Courts have fashioned a complicated and controversial rule to deal with intoxication. Offences are divided into two categories: general intent and specific intent. For **general intent offences**, intoxication is not a defence. Intoxication may, however, be used as a defence for **specific intent offences**. Such a defence would use evidence of intoxication to establish that the accused did not possess the specific intent to commit the offence.

In general intent offences, the intent involves only the prohibited act itself. Assault, for example, is a crime of general intent. The Crown need only prove that the accused intended to apply force. Intent can be inferred from the fact that the accused actually did apply force. With specific intent, the offender's intent goes beyond committing the act in question. For example, "break and enter with intent to commit an indictable offence" is a specific intent offence. It includes a general intent offence (break and enter) plus the hidden, or ulterior, specific intent to commit an indictable offence (perhaps robbery). The defence could present evidence that the accused was too intoxicated to be able to form the specific intent. If this evidence raises a reasonable doubt about the required *mens rea*, the accused is acquitted of the specific intent offence. For example, the person charged with "break and enter with intent to commit an indictable offence" would be acquitted of "intent to commit an indictable offence," but would still be convicted of simple break and enter.

The legal distinction between specific and general intent was created by judges, and many commentators have found it confusing. They argue that if evidence of intoxication is admissible for some mental states, it

## **general intent offence:**

an offence in which the accused's intent is limited to the prohibited act itself, with no other criminal purpose

## **specific intent offence:**

an offence in which the accused's intent goes beyond the prohibited act itself to include another, criminal purpose



should be admissible for all mental states. If criminal law is concerned with the dangerous behaviour of drunken offenders, why not create an offence of being drunk and dangerous? Others argue that the distinction makes sense: an individual can be too intoxicated to anticipate cause and effect and the future, but still be able to understand what he or she is doing and perceiving in the moment. The distinction has served the law well, this argument continues, and it reflects a societal sense that drunken offenders are blameworthy.

In 1994, the Supreme Court of Canada introduced a gloss on the distinction between specific and general intent in *R v. Daviault*. Henri Daviault, a chronic alcoholic, was charged with the general intent offence of sexual assault after having consumed a bottle of brandy and several beers. The trial judge had reasonable doubt whether Daviault's conduct was voluntary, owing to extreme intoxication, and acquitted him. The Court of Appeal for Quebec convicted Daviault. The Supreme Court restored Daviault's acquittal, fashioning an exception to the rule regarding intoxication and specific and general intent.

In essence, the Supreme Court decided that evidence of extreme intoxication equivalent to automatism is admissible in general intent offences. The public was outraged. The minister of justice reacted quickly, and the *Criminal Code* was amended. Section 33.1, proclaimed in force in 1995, overruled the judgment in *R v. Daviault* for all offences that involve assault or interference with the bodily integrity of the victim.

## Defences

After the Crown presents its case, the accused is entitled to raise a defence. Two types of defences are available: a negating defence and an affirmative defence.

### **negating defence:**

a defence that raises a reasonable doubt about whether the accused committed the offence charged

A **negating defence** raises a reasonable doubt about whether an accused committed the *actus reus* of an offence or had the necessary *mens rea* to support a conviction. In effect, this is a defence that negates an essential element in the Crown's case. Four negating defences will be

examined next: (1) mistake of fact, (2) mental disorder, (3) automatism, and (4) intoxication.

An **affirmative defence** admits that the Crown has established the elements of the offence but claims that the accused's criminal act was justified in the circumstances, or that the accused should be excused from punishment because criminal conduct was the only reasonable option. Two affirmative defences—self-defence and compulsion (or duress, in common law) will be covered later in this chapter.

### **affirmative defence:**

a defence that justifies an accused's criminal conduct

## Self-defence

As an affirmative defence, self-defence provides a justification for the reasonable use of force in certain situations. These include defending oneself against an assault and defending one's property against trespass. An accused who claims self-defence is asking to be completely excused for otherwise criminal activity. Society is prepared to excuse self-defenders, but only if their behaviour is objectively reasonable. Section 34 of the *Criminal Code* establishes the framework for the defence.

Read the self-defence section of the *Criminal Code* below and answer the questions that follow.

- 34(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
- (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
  - (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

### *Questions*

1. What are the requirements for successfully raising the defence of self-defence?
2. How does the requirement of reasonableness influence both ss. 34(1) and (2)?
3. How does the requirement of reasonableness differ in ss. 34(1) and (2)? Suggest reasons why the difference exists.

The traditional model of self-defence is a single, violent quarrel between two men of similar size and strength who are strangers to each other. In this context, the two requirements in s. 34(2) of the *Criminal Code*—that the threat is imminent and that no alternative to the defensive action is possible—make sense. However, in the context of abusive relationships, these requirements must be reconsidered. In *R v. Lavallee*, the Supreme Court of Canada accepted expert testimony on battered women's syndrome (see Chapter 1, page 25) and made headlines. Although the legal issue in *Lavallee* was evidentiary, the legacy of the case is in the way the Court reconceptualized self-defence.

While hearing the case, the Supreme Court examined *R v. Whynot*, in which the accused shot her abusive husband while he was asleep. Evidence in *Whynot* established that the husband had repeatedly abused his wife and children and had threatened to kill every family member if his wife left him. On the night of the shooting, he had threatened to kill his wife's son. Whynot was convicted because, in the trial judge's opinion, she had acted in anticipation of an assault, not in response to an assault that was imminent.

The Supreme Court rejected this approach in *Lavallee*, concluding that it would condemn battered women to "murder by instalment." In the

Court's view, society gains nothing by insisting that the battered woman wait until the gun is pointed or the knife uplifted. The issue is whether the fear that motivated the defensive action is reasonable. In some situations, the immediacy of the threat provides a way of answering that question. In other situations, the reasonableness of the fear must be assessed using different criteria, ones that take into account the dynamics of the abusive relationship.

The Court in *Lavallee* also re-examined the no-alternative requirement—that is, that the self-defender must reasonably believe that there is no alternative but to defend. In *Lavallee*, the Court pointed out that the relevant question is, “Did the accused reasonably believe that she had no alternative?” In answering this question, the Court acknowledged that the nature of the relationship between the accused and the abuser is relevant.

*R v. Lavallee* is a landmark case because it recognized that assessing reasonableness and relevance requires attention to context. The Court accepted evidence on battered women's syndrome, but the case is about much more than this aspect alone. As Justice L'Heureux-Dubé explained recently in *R v. Malott*:

The legal inquiry into the moral **culpability** of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from “battered woman syndrome.” ... By emphasizing a woman's “learned helplessness,” her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from “battered woman's syndrome,” the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women. Therefore, it should be scrupulously avoided because it only serves to undermine the important advancements achieved by the decision in *Lavallee*.

**culpability:**  
blameworthiness

## Defences

After the Crown presents its case, the accused is entitled to raise a defence. Two types of defences are available: a negating defence and an affirmative defence.

### **negating defence:**

a defence that raises a reasonable doubt about whether the accused committed the offence charged

A **negating defence** raises a reasonable doubt about whether an accused committed the *actus reus* of an offence or had the necessary *mens rea* to support a conviction. In effect, this is a defence that negates an essential element in the Crown's case. Four negating defences will be

examined next: (1) mistake of fact, (2) mental disorder, (3) automatism, and (4) intoxication.

An **affirmative defence** admits that the Crown has established the elements of the offence but claims that the accused's criminal act was justified in the circumstances, or that the accused should be excused from punishment because criminal conduct was the only reasonable option. Two affirmative defences—self-defence and compulsion (or duress, in common law) will be covered later in this chapter.

### **affirmative defence:**

a defence that justifies an accused's criminal conduct

## Compulsion

The defence of compulsion excuses individuals whose criminal conduct is compelled by threats and who have no realistic choice but to commit a criminal offence. As with self-defence, compulsion is an affirmative defence that, if successful, leads to an acquittal. The defence is codified in s. 17 of the *Criminal Code*, and its use is restricted. The accused person must be subjected to serious threats by a person who has the present capacity to act on the threats. These are known as the requirements of immediacy and presence. In addition, s. 17 contains a list of offences for which the defence of compulsion is unavailable.

Recently, the statutory requirements of immediacy and presence have been subjected to analysis. Many commentators have suggested that the requirements are unfairly restrictive and breach s. 7 of the Charter—"the right to life, liberty and security of the person." And the Supreme Court of Canada has ruled that a serious threat made before the commission of an offence by a person who is not present at the time of the offence can reasonably be considered a dangerous threat.

**duress:** illegal threats;  
coercion through threats

The common-law defence of **duress** is also available to excuse criminal acts that are compelled by threats. The common law, however, excludes no offences. In theory, even a party to murder could successfully rely on the common-law defence of duress.

## Duress

The defence of **duress** makes the argument that an accused was forced to commit a criminal act under threat of personal injury or death. Section 17 of the *Criminal Code* refers to duress as "compulsion by threats":

A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused from committing the offence if the person believes the threats will be carried out.

However, the defence of duress is excluded if the crime was one that caused serious harm to another person, such as murder, abduction, or assault with a weapon. The courts have also been strict in their interpretation of whether the threats were immediate. For example, in the case of an inmate who was charged with damaging public property during a prison riot, his defence of duress was denied. The inmate argued that he had acted under duress because fellow prisoners threatened him with death or serious injury if he did not participate. The courts, however, concluded that the threats were not immediate

because the prisoners issuing the threats were locked in their cells at the time.

But in the later case of *R. v. Ruzic*, (1998-08-28) ONCA Docket C20580, the courts recognized that a person who was morally innocent could be convicted under s. 17. The accused was charged with importing heroin after a person had threatened to kill her mother, who lived in a foreign country, if she did not import the drugs. The threat was not immediate and therefore, under s. 17, the accused could not use the defence of duress. However, the Supreme Court allowed that an accused could use the *common-law* defence of duress. This defence does not require that the threats have to be made by a person who is present when the offence is committed, and they may apply to threats to third parties.

## Provocation

If successful, the defences of automatism or intoxication lead to a complete acquittal, but this is not so for the defence of provocation. **Provocation** is a partial defence that reduces the crime of murder to manslaughter providing the



**FIGURE 11.5** Road rage is seen by some as a growing concern in large urban centres in North America. According to your understanding of the *Criminal Code*, are there situations that could occur while driving for which an accused could raise the defence of provocation? Explain.

accused can show that he or she was provoked into killing the victim. Section 232 of the *Criminal Code* states: "Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation." The *Code* then defines provocation in s. 232 (2) as a "wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self control."

The defence does have some restrictions. For example, it cannot be used if the victim who provoked the accused was exercising a legal right, such as a parking attendant giving the accused a parking ticket. Also, the act of alleged provocation must be a sudden act or insult and it must be sufficient enough to seriously upset a reasonable person.

The defence of provocation is very controversial. Although the accused is still convicted of an offence, the charge of manslaughter carries a maximum penalty of life, whereas murder carries life as the minimum penalty. As a result, many critics argue that the provocation defence allows deadly rage and violence to be treated less seriously than other deliberate killings.

### CONFIRM YOUR UNDERSTANDING

7. Explain how murder may sometimes be reduced to manslaughter.
8. The defence of provocation is restricted. Explain the limitations of using this defence.
9. Why is the defence of provocation so controversial?
10. Some defence lawyers argue that the defence of provocation should be permitted for all crimes. Do you agree? Explain your views.

## Provocation

**Provocation** is any act or insult that causes a reasonable person to lose self-control. The defence of provocation applies only to the crime of murder.

Once the Court is convinced beyond a reasonable doubt that the accused has committed murder, provocation may be considered as a partial defence to reduce the conviction from murder to manslaughter. For the defence of provocation to succeed, defence counsel must prove *all* four elements listed below.

- A wrongful act or insult occurred.
- This act or insult was sufficient to deprive an ordinary person of the power of self-control.
- The person responded suddenly.
- The person responded before there was time for passion to cool.

**provocation:** words or actions that are insulting enough to cause an ordinary person to lose self-control

1. Why did the Ontario Court of Appeal allow Belance's appeal?
2. What evidence is there to show that the elements of provocation are present?
3. Why did the Court reject Belance's self-defence argument?
4. If Belance is successful in raising the defence of provocation in his new trial, he will not be charged with second-degree murder. What will be his charge?

The accused, Belance, was convicted of second-degree murder in the stabbing death of a man at a dance club. He admitted to stabbing the victim four times in the abdomen during an altercation between his cousin and three men.

Belance raised the defences of self-defence and provocation. The trial Judge ruled that there was no air of reality to the defences and refused to leave them with the jury. The accused appealed the ruling and further argued that the trial Judge had erred in his instructions regarding provocation.

The Ontario Court of Appeal allowed the appeal, the conviction was set aside, and a new trial was ordered. The Court stated that self-defence was unacceptable because Belance did not claim that he stabbed the victim to protect himself, but rather to protect his cousin. However, there was sufficient evidence before the trial Judge for him to find an air of reality on the defence of provocation. Belance's evidence that he accosted the victim out of concern for the safety of his cousin, whom he believed to have been assaulted and to be in danger, provided evidence sufficient to meet the air of reality threshold. He was also able to show the Judge that he was deprived of self-control and that he stabbed the victim relatively quickly after they began fighting. The trial Judge's instructions to the jury on provocation were unclear and confusing to the extent that the jury did not know how to proceed if it disagreed with one of the elements of provocation. It was possible that the jury could have interpreted the trial Judge's instructions as meaning they had to agree unanimously on all three elements, when, in fact, they only had to agree on the question of provocation. The Crown failed to establish that the verdict would have necessarily been the same if the errors had not been made.



## Defences

### **negating defence:**

a defence that raises a reasonable doubt about whether the accused committed the offence charged

After the Crown presents its case, the accused is entitled to raise a defence. Two types of defences are available: a negating defence and an affirmative defence.

A **negating defence** raises a reasonable doubt about whether an accused committed the *actus reus* of an offence or had the necessary *mens rea* to support a conviction. In effect, this is a defence that negates an essential element in the Crown's case. Four negating defences will be

examined next: (1) mistake of fact, (2) mental disorder, (3) automatism, and (4) intoxication.

An **affirmative defence** admits that the Crown has established the elements of the offence but claims that the accused's criminal act was justified in the circumstances, or that the accused should be excused from punishment because criminal conduct was the only reasonable option. Two affirmative defences—self-defence and compulsion (or duress, in common law) will be covered later in this chapter.

### **affirmative defence:**

a defence that justifies an accused's criminal conduct

## Absolute and Strict Liability

Traffic offences, pollution offences, and offences relating to unfair or dangerous commercial practices are all examples of regulatory offences. These offences regulate otherwise desirable behaviour (such as driving, manufacturing, or selling goods and services) where such behaviour could cause harm to individuals or the public if carried out improperly. Both the provinces and the federal government have the constitutional authority to create regulatory offences.

The distinction between regulatory offences and crimes is reflected in the way in which the Crown is required to prove its case. Until the mid-1970s, regulatory offences were treated as **absolute liability** offences. All that the prosecution had to establish was that the accused committed the *actus reus* of the offence. Questions about *mens rea* were, by definition, irrelevant.

### **absolute liability:**

culpability based on the commission of an *actus reus* without regard to the *mens rea*

**strict liability:** culpability based on the commission of an *actus reus* and inability to prove the defence of due diligence

However, in 1978, the Supreme Court of Canada decided that absolute liability was unfair. In *R v. Sault Ste. Marie*, the Court set out a new approach to regulatory offences. Henceforth, these offences were to be treated as strict liability offences. When prosecuting a **strict liability** offence, the Crown must establish that the accused person or corporation committed the *actus reus* of the offence. It is then open to the accused person or corporation to avoid liability by proving that it took all reasonable care to avoid committing the *actus reus*. If the accused cannot prove that it was "**duly diligent**" (took all reasonable care), it will be convicted. The Court saw strict liability as a compromise between absolute liability and full-blown criminal liability based on *mens rea*.

The difference between the three approaches can be illustrated by the example that follows. Assume that it is an offence under environmental protection legislation to discharge pollutants into a waterway. Assume also that the Crown can prove that Company X discharged pollutants into a river.

- If the offence is an absolute liability offence, Company X will be found guilty (and probably fined) once the Crown establishes that it committed the *actus reus* of discharging pollutants.
- If the offence is a full *mens rea* offence, the Crown will have to prove not only that Company X committed the *actus reus* of discharging pollutants but also that Company X did so with the requisite *mens rea*—that is, that Company X discharged pollutants intentionally or recklessly.
- If the offence is a strict liability offence, the Crown will have to prove that Company X committed the *actus reus* of discharging pollutants. Company X then has the option of avoiding liability by demonstrating that it was duly diligent because it made all reasonable efforts to avoid discharging the pollutants. It is the court's duty to determine what amounts to "reasonable efforts" in the circumstances.

## *Case* DUE DILIGENCE AND ENVIRONMENTAL CONTAMINATION

*R v. MacMillan Bloedel*, 2002 BCCA 510

### **Facts**

The possibility of a leakage from the accused company's underground pipes at its Skidegate operation in the Queen Charlotte Islands came to its attention in 1993, when it received a complaint from the Ministry of the Environment. At that time, the pipes, which had been installed in the 1960s, were dug up and tested. No leakage was discovered. The accused's equipment supervisor and its manager were of the opinion that the pipes were sound.

In September 1995, an environmental inspector with the accused's environmental services department prepared a comprehensive report. The report identified the use of underground fuel lines by the accused as a significant environmental problem. The inspector recommended that the pipes either be installed above ground or be contained in a secondary sleeve to allow early detection of leaks. The accused's personnel reviewed the report. As a result, underground lines were replaced at some locations.

The accused had replaced underground lines at some of its operations before receiving the report. There was some evidence that replaced pipes were found to be in good condition. The Skidegate pipes were regarded as low on the accused's list of environmental concerns, and

there was no evidence as to when it intended to take any action with respect to them.

In May 1997, when a fisheries officer observed diesel fuel, the accused was charged with the offence of permitting a deleterious (harmful) substance to be deposited in water frequented by fish. The accused was convicted at trial, but an appeal was allowed, and the conviction was set aside. The Crown then appealed to the British Columbia Court of Appeal.

### **Issue**

Did the accused exercise due diligence?

### **Decision**

The Crown's appeal was dismissed. The majority of judges held that the conditions that produced the leak were not carelessly created by the accused. The accused honestly believed that the pipes were sound. The leak was caused by microbiological corrosion, which was not reasonably foreseeable. The accused did not foresee, and could not reasonably have foreseen, the particular event.

The minority held that the fact that the spill was not foreseeable was not a sufficient defence. There was no evidence that the accused had in place any specific plan to protect against the environmental risk of leaks from the pipes. The absence of a plan was not justified by the fact that the risk that materialized was not the precise risk contemplated by the accused.

### **Questions**

1. Was the accused charged with an absolute liability offence, a strict liability offence, or a full *mens rea* offence? Explain your answer.
2. Over what issue did the court split? Do you prefer the majority or the minority opinion? Why?
3. Who should pay for the cost of cleanup? Does your answer depend on whether the accused company was found to have violated the regulations? Why or why not?