About Criminal Law

This section explores what crimes are and the reasons society criminalizes certain behaviour. The important balance between the rights of the accused and rights of the state are examined as well as sentencing considerations.

Introduction - Nature of Criminal Law

The specific focus of this section is on the nature of criminal law -- what a crime is and the purposes of criminal law. The elements of a crime are examined and applied to actual cases so that you can understand what the Crown must prove before an accused can be found guilty. Criminal Law is a system that tries to balance the rights of society to be protected against the civil rights of the individual by the law.

Definition and Purposes of Criminal Law

A crime is a wrong against society. The main purpose of criminal law is to protect society and maintain the peace. This lesson allows you to understand why society criminalizes certain behaviours.

This section examines the definition and purpose of criminal law and proposes some theories on the causes of crime.

Goal/Purpose/Objective

- analyse why society criminalizes certain behaviours

Definition and Purposes of Criminal Law

The four purposes of criminal law are fairly straightforward:
• maintain order
• protect society
• punish the guilty
• prevent further crime

Many traditional Aboriginal views of criminal law are significantly different from the mainstream Canadian legal system. It is a restorative rather than a punitive process. Individuals who offend are not regarded in the same way as they are in non-Aboriginal justice systems. It is clearly discerned that it is the action of the person that is bad, and not the person. Those who offend are viewed as requiring healing. The purposes of some traditional Aboriginal justice systems are to:

- heal the person who has committed the offense
- heal the relationship between the ‘victim’ and the person who has committed the offense, and the whole community.

The complications start when we ask ourselves how we are going to do these things. If the streets are unsafe at night, should we make it illegal to go outdoors after dark? Would there be fewer murders if we make it illegal to own guns of any type? Should we reduce the number of drug charges by making the sale and use of marijuana legal?

Public opinion has a great influence on how we try to achieve the purposes of criminal law. For example, until 1972 our laws provided for whipping as a punishment for a variety of crimes, including incest and burglary. The law now rejects whipping as a cruel and unusual punishment.

**Grounds for Action**

There's no doubt that being accused of a crime can damage a person's reputation in the community and cause personal suffering. For this reason, the police cannot arrest a person unless there is good reason to believe that the person has committed a crime.

This doesn't mean that the police have to have absolute proof -- whether or not a crime has been committed will be decided in the trial.

**Action**

The law recognizes that some crimes (such as murder) are a greater risk to society than others (such as shoplifting). For this reason, there are three different procedures for making certain people appear at their trial.

A person being charged with a less serious offence will usually be given a summons or an appearance notice that describes the charge and tells the accused person when and where to appear in court. The difference between the two is that an appearance notice is issued on the spot, while a summons is obtained from a justice of the peace. It is more serious for a person to ignore a summons than an appearance notice.

A person accused of a more serious offence will be arrested. When you're arrested, the police officer takes you into detention. This means you go to a police station. The police officer may decide to release you, or you may be brought before a justice of the peace. The justice of peace decides if you should be held in custody until the trial or let go.

The Criminal Code describes every aspect of police action from how evidence may be obtained to the actual forms that should be used. These procedures limit police power to that which is necessary to keep the public safe.
**Burden of Proof**

In a criminal trial, the accused is presumed to be innocent: it is up to the Crown to prove that the accused committed a crime.

**Degree of Proof**

The degree of proof in a criminal case must be beyond a reasonable doubt.

Here's an example. You come into the kitchen to find the once-full milk jug broken on the floor, but no spilt milk. Your cat is sleeping peacefully on the windowsill. Unless you have convincing evidence, such as milk on her whiskers, a witness to the crime, or paw prints on the milk jug, judge and jury might say there is a possibility that your cat is innocent and some stray feline did the deed. Your cat's defence lawyer does not have to prove that the cat is innocent, only that the cat might be innocent.

You can imagine how difficult it is to be certain that there is no doubt that the accused person committed a crime. To try to make this decision less subject to personal interpretation, the judicial system has rules on what may or may not be presented as evidence in a case.

**Findings**

The findings are what a judge concludes after considering
- the details of the crime
- statutes and case law
- the rights of the accused
- the best interests of society
- current social attitudes to this type of crime
- the verdict of the jury (if there is one)

As a minimum, findings will include a verdict of guilty or not guilty and a sentence for anyone found guilty. A person who is not guilty is acquitted and has no criminal record. When it comes to sentencing, a judge aims to select a punishment that fits the crime. The law provides guidelines for penalties, but there is still room for interpretation. As you'll see, a judge takes into account at least twenty different factors when determining a sentence.

If a sentence is seen as too severe, the defence counsel may appeal the decision to a higher court. If the sentence is seen as too lenient, the Crown may appeal.

**Changes in Society and Crime**

We live in a dynamic world and the changes in society need to be reflected in the changes of the laws. In this section we will look at the relationship between changes in society and crime. We
will focus on the example of suicide (and attempted suicide) as an offence and how the laws on that issue evolved.

**Goal/Purpose/Objective**

- understand how changes in society change what society considers criminal behaviour

**Relationship between Changes in Society & Crime**

As a society, we decide that certain things are illegal and we decide what the punishment for these offences will be. As society changes, so does our definition of crime and appropriate punishment. In this section, we'll take a general look at how and why criminal law is changed. We'll also consider which areas of our lives should be regulated by law and which should be based on personal decisions.

**Private Decisions and Public Acts**

One of the main ways we decide whether or not something is a crime is by deciding whether it is a private matter, or whether it is a public matter that should be controlled by society. For example, certain sexual acts were once against the law. Over time, however, the law has come to see sexual activity as a private matter as long as it occurs in private between two consenting adults.

Recently, this question of public or private became an issue in the medical profession. As we develop new technologies that enable seriously ill people to live longer, doctors, patients, and the judicial system have had to re-examine our laws concerning a person's control over her or his death.

**Consenting to Death**

Most of us know that it is illegal to kill someone. Did you also know that it is illegal to consent to your own death? Section 14 of the Criminal Code says:

No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

In other words, you may not kill me -- even if I ask you to. This law is based on what judges call a respect for the sanctity of life. In our laws, human life is of the highest value. As you'll see in the following activity, the question the courts had to answer in January of 1992 was: "Does this mean a person may be kept alive against her or his wishes?"
Suicide

Attempted suicide -- taking one's own life -- was also once a crime. In response to public opinion, this law was repealed (removed from the statutes). It is, however, still an offence to counsel or aid someone to commit suicide. Section 241 of the Criminal Code says:

Every one who (a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

The purpose of this law is to protect people who are mentally or physically disabled from being persuaded into suicide.

We will learn in the case of Nancy B. that the Supreme Court decided that removing life support and letting nature takes its course is not considered assisting suicide (also known as euthanasia). A person must actively do something, such as explain how to commit suicide or administer a lethal injection to be guilty of a crime.

What if a person wants to commit suicide (a legal act), but cannot because of a disability? Is it a violation of the person's rights to refuse the person the assistance of a physician to help in the suicide? This was the issue the Supreme Court had to decide in September of 1993.

Rights vs Criminal Code Assignment

Read the article called "Nancy B. Can Order Removal of Lifeline" following the questions below. The following questions will help you analyze the review process that happened during this case.

What were the statutes that appeared to be in conflict in the case of Nancy B.?
What was the key legal issue?
On what grounds did the Supreme Court decide to allow Nancy B. the right to refuse treatment?
What danger to society is the law against assisting suicide designed to prevent?

Nancy B. Can Order Removal of Lifeline

In 1989, Nancy B. was admitted to a Quebec hospital because of paralysis and complete respiratory failure. The paralysis was the result of Guillian-Barr syndrome, a rare neurological disease. Doctors told her that she would be paralyzed and on a respirator for the rest of her life. For the next 2 and one half years she lay in the hospital, unable to do anything but watch television and think. In November, 1991, she asked her doctor to turn off the respirator and let her die. She was 24 years old.

Her request placed the doctor in a difficult situation. The Quebec Civil code gives patients the right to refuse medical treatment. However, the Criminal Code of Canada prohibits euthanasia,
aiding suicide and harming a person by stopping a course of action. If Nancy B consented to the respirator’s being disconnected, would her doctor be charged with a crime?
In Canada, a physician will not be criminally charged if he or she acts in accordance with accepted ethical medical standards. It is ethical for a physician to allow death to occur with dignity and comfort when death of the body appears to be inevitable. If clinical death of the brain has occurred, the physician need not prolong life by unusual or heroic means. If a patient is terminally ill and death is imminent, a physician can stop medical treatment that is futile or unwanted, even if it shortens life. Nancy B did not fit into any of these categories. Although there was not hope of recovery, she could have lived for decades on the respirator.

Nancy B wanted to stop a medical treatment (the respirator), and because she was paralyzed she needed another person to help her. Canada does not have a law against committing suicide, but it does have a law against helping another person commit suicide (C.C.C.s.241). The purpose of s. 241 is to protect vulnerable people from others who may want to influence their decision to end their lives.

The Nancy B case went to the Quebec Superior Court. The judge had to weigh the right of an individual to control her life against the duty of the state to protect life. In January, 1991, Justice Jacques Dufour ruled that the doctor would not be committing a criminal act if Nancy B requested the he turn off the life-support system and the doctor complied.

The judge decided that stopping Nancy B’s respirator was not the same as homicide or suicide, even though death would be inevitable. By asking the doctor to turn off the respirator, Nancy B was not asking the doctor to end her life. She was asking the doctor to stop medical treatment so that her illness would take its natural course. Justice Dufour said that individuals have the right to autonomy and self-determination, so long as they are not acting against public policy or jeopardizing the life or health of others. He also said that the Criminal Code must be liberally interpreted to take into account humanitarian considerations and new medical technologies.

On February 13, 1992, Nancy B. was given sedatives and anesthetics (to minimize pain) and the doctor turned off the respirator. She died a few minutes later.

Changes in Society and Causes of Crime

There is no definite answer as to what causes crime. Society is very interested in finding an answer to this question. Possible causes are considered.

Goal/Purpose/Objective

- suggest causes of crime in society
Causes of Crime Questions

1. What do you think are the main causes of crime in society?

2. Why do you think that crime in Winnipeg has increased over time?

Elements of Crime

For a crime to occur, two elements must be present: the physical element (actus reus) and the mental element (mens rea). These two elements are looked at in detail.

Goal/Purpose/Objective

- analyse what constitutes a crime

Elements of Crime

There are six things that must be covered when defining a crime:
- the description of the wrongful act (actus reus)
- the state of mind accompanying the act (mens rea)
- a definition of key terms
- the defences to the offence
- the type of the offence
- the maximum punishment for anyone found guilty of committing the offence

In our society we tend to feel that it is not right to punish someone for doing something, unless that person meant to do it, or intended to do it. This is reflected in the criminal law, as before anyone can be convicted of a crime, the crown must show not only 1) that the prohibited act was done, but 2) that the "guilty mind" was there as well.

"Actus reus"

This is a Latin term meaning, roughly, "prohibited act." As all of the "prohibited acts" are set out in the code (or other federal act), the Crown must prove that the particular action listed in the legislation occurred and that the accused is the one who did it. For example, Spetz & Spetz illustrate this by referring to a section of the Code which makes it an indictable offence to discharge a firearm with the intent to wound any person. "Thus, in the case of a hunter chased by a farmer's dog . . . (The hunter had shot the dog in self defence.) The Provincial court judge dismissed the complaint as not stating an offence; there was no actus reus known in law. (R.v. Weaver, Ontario, 1981)." * The actus reus was discharging a firearm with intent to wound a person, not a dog. Mr. Weaver did not commit that actus reus.

Mens Rea
A rough translation of this Latin phrase would be "guilty mind." The crown must prove this element before anyone can be convicted of a crime. Generally, mens rea means intention. If you desired certain consequences to follow your act, you have mens rea. If you are walking along the street and the hooked handle of your umbrella accidentally catches on someone's purse and pulls it away from them, you have likely committed the actus reus of theft (by depriving someone of their right in property) but you did not have the mens rea, or the intention to do so. It was an accident.

Mens rea can also be satisfied by recklessness or criminal negligence, though. If you act in a way that may cause harm, and you are reckless about whether it does or not, and you deliberately choose to keep acting that way, you may be found to have the necessary mens rea for conviction.

Generally, the actus reus and the mens rea must occur at the same time. Once again, Spetz & Spetz illustrate this by an example. "If a person killed another person by accident, but later admitted to being glad that the victim was dead, the killing remains an accident, not murder." *


**Important Legal Terms Exercise**

1. Define actus reus.
2. Define Mens Rea.
3. Which area of law is responsible for criminal law?
4. A young person wants to purchase some drugs and spends his money on a substance he believes to be cocaine. It turns out to be icing sugar. Is this an offence?

**Civil Offence and a Crime**

**Goal/Purpose/Objective**

- distinguish between a civil offence and a crime
Distinguishing Between a Civil Offence & a Crime

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Why Criminal Law

1. Why does criminal law exist?

2. Give three examples of laws enacted in the past few years that indicate society's changing values and/or concerns.

Criminal Offence & Quasi-Criminal Offence

While the federal government has jurisdiction (the power to pass and enforce laws) over criminal offences, the provincial government has jurisdiction over some areas, such as some motor vehicle law and laws regarding alcohol. These laws appear in provincial statutes, not in federal statutes.

We will examine the difference between criminal offences and quasi-criminal offences in this lesson.
Goal/Purpose/Objective

- distinguish between criminal and quasi-criminal offences

Distinguishing between a Criminal Offence & Quasi-Criminal Offence

While the federal government has jurisdiction (the power to pass and enforce laws) over criminal offences, the provincial government has jurisdiction over some areas, such as motor vehicle law, laws regarding alcohol, and laws involving schooling.

Here are some examples:

1) Federal Government – deals with issues such as gun control and murder.

2) Provincial Government – deals with speed limits, impaired driving limits, and issues involving schools.

3) Municipal Government – deals with things such as smoking in public places and zoning laws.

4) First Nations – Under the recommendations of the Aboriginal Justice Implementation Commission, First Nations and Métis communities would have legal systems parallel to those of all three levels. At this time, these recommendations have not been implemented.

5) Laws passed by the provinces or municipalities are not considered part of criminal law but rather are referred to as quasi-criminal law.

Here are the key terms and concepts of this section.

Definition and Purposes of criminal law:

Grounds for Action
Action
Burden of Proof
Degree of Proof
Relationship between Changes in Society and Crime
Suicide
Causes of Crime
Elements of Crime
Distinguishing Between a Civil Offence and a Crime
Distinguishing Between a Criminal Offence and Quasi-Criminal Offence
Introduction - Defences

The Criminal Code sets out which defences apply to particular crimes. You'll examine some of the most common defences in detail and the reasons these defences exist.

Goal/Purpose/Objective

- analyse what constitutes a crime and what circumstances can excuse a person from criminal responsibility

Defences to Criminal Charges

When a person pleads "not guilty" to a criminal charge, he or she is saying that there is a defence against the Crown's allegations. An accused person has a defence to a criminal charge when there is a reason why he or she should not be held responsible for the crime.

The simplest and most common defence is built into every criminal trial. This is the presumption of innocence. A person cannot be held responsible for a crime unless the Crown proves, beyond a reasonable doubt that the accused did everything he or she is accused of. Accused people do not have to specifically deny anything; when they say "not guilty" they are presumed to have denied everything in the charge. The accused might sit through the whole trial without bringing any witnesses and without cross-examining anyone and still be acquitted. Sometimes, however, there will not appear to be any reasonable doubt of the accused's guilt unless they do something to raise a doubt. Usually this means cross-examining the Crown's witnesses to emphasize facts that favour the defence. Sometimes it also means calling witnesses for the defence who may present another side of the story. Occasionally, the accused will give evidence. But almost always the defence will present a story which is consistent with the accused's innocence. If the judge or jury has a reasonable doubt that, given both the prosecution's and defence's evidence, the accused might be innocent, the accused must be acquitted.

The Crown must prove each essential element of the crime, and sometimes, instead of denying the charge generally, the accused might try to prove certain facts which will raise a doubt about one particular element. Most of these defences concern the mental element of the crime, although one, the defence of alibi, means that the accused denies that he or she was even at the scene of the crime and therefore could not have done the actus reus.

Specific defences which involve denying that the accused had the mens rea include trying to prove that the accused was too drunk to know what he was doing, that he was in a sleep walking-like condition at the time, or that he mistakenly thought he was doing something which would have been perfectly legal if he had been doing it.

All the defences which involve denying that the accused committed the elements of the offence are called "general defences". Some defences, on the other hand, are like excuses. The accused
admits to doing the act and intending to do it, but claims that there are special facts which should prevent him or her from being held responsible. The first group of these amount to statements that although the accused did what was done, he or she was justified in doing so -- that under the circumstances he was within his rights. Self-defence, defence of property, and compulsion by threats or force of circumstances are examples of this kind of defence.

The second group of special defences exist because of public policy. For example, if a person is persuaded by a police officer to commit a crime he or she would not otherwise commit, even if that person commits the crime with the necessary intention, he or she might be acquitted. The police are hired to prevent crime, not to encourage it. Therefore, they are discouraged from inciting people to commit crimes by courts refusing to convict people who are trapped by this sneaky method. Normally it is no defence to claim that someone talked you into committing the crime; this only means that the other person was a party to the offence by counselling. If the counsellor is a police officer, however, this defence, called the defence of entrapment, might apply. The defence of entrapment is well established in American courts, but it is not so certain in Canada.

So far we have looked in some detail at examples of criminal offences.

We will now examine some of the more common defences available to most criminal charges.

1. **Insanity**

Because of our philosophy not to punish someone for wrongdoing unless he or she had the necessary mental capacity and intent to commit an offence, this defence goes to negate the accused's mens rea. "Under our criminal law system an accused found to be insane must be acquitted as the accused lacked the necessary mental capacity to commit a crime." (Spetz & Spetz, 2nd. ed., page 93).

The common law did recognize the defence of insanity and this defence is now defined in the Criminal Code, section 16.

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane.

(2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a
state of things that, if it existed, would have justified or excused the act or omission of that person.

Every one shall, until the contrary is proved, be presumed to be and to have been sane. R.S. c C-34, s. 16.

Notice that the Code makes no attempt to define mental illness or insanity generally, only "for the purposes of this section." Legal insanity then, as a criminal defence may be very different from other medical or psychological definitions of mental illness or insanity. If insanity is to operate as a defence to a criminal charge, it must be such as to render the accused incapable of understanding the nature and quality of his or her act, or from knowing that the act is wrong.

If the accused raises the defence of insanity, it need not be proved beyond a reasonable doubt, but only on a balance of probabilities. If it is established, the accused is not set free, but is committed to a psychiatric hospital for an indeterminate period of time. He or she is only released when sanity is recovered and the Lieutenant-Governor of the province signs a release order.

The Supreme Court of Canada has held that whether or not an accused has a "disease of the mind" for the purposes of section 16 is a legal question and not a medical question. Thus, although expert witnesses such as psychiatrists may testify as to the accused's condition, it is up to the judge or jury to ultimately decide whether or not that condition amounts to legal insanity.

2. Automatism

A good definition of automatism was provided by the Supreme Court of Canada in 1980:

Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action is not conscious of what he is doing. It means an unconscious, involuntary act where the mind does not go with what is being done (Rabey v. The Queen) (found in Spetz & Spetz, 2nd ed., page 97).

Spetz & Spetz go on further to explain that if for some reason a person's physical movements are not subject to the control of the mind, there is no voluntary action by that person and therefore no actus reus of any offence. If, however, the causes of the automatic acts, or the automatism result from something internal, such as a disease of the mind caused by tumours or venereal disease, the person is suffering from insane automatism, and if found not guilty for that reason would be confined to a psychiatric institution.

A successful defence of non-insane automatism, however, would result in the accused being acquitted and set free, as there would be no reason to suspect that the person had not recovered
from the trauma that caused the automatism. Conditions that have been accepted as causing a state of automatism include sleepwalking, carbon monoxide poisoning, a physical blow and a stroke.

3. Drunkenness

When considering this defence it is important to realize that it is only a partial defence, and may not be used to excuse an accused who voluntarily got into the intoxicated state and committed an offence for which no specific intent is required. Public policy is very much against people being excused because of drunkenness.

You will recall that some sections of the Code state very specifically the degree of intent required. Usually clear wording such as "with intent" is used. The effect of drunkenness as a defence has been to say that perhaps the accused was too drunk to have been able to form the necessary intent to commit the crime of robbery, for example, if the Crown is trying to establish assault with intent to steal (section 343 [c] ). But the crime of simple assault requires only a general intent - to apply force - and drunkenness cannot negate general intent. In our example then, the charge could be reduced to assault if drunkenness was successfully established.

Often the defence of drunkenness is used to reduce murder to manslaughter, as murder requires proof that the accused meant to cause death or bodily harm by his or her actions. If the accused was too impaired by alcohol or a drug to have formed this intent, a conviction for manslaughter may result, as it does not require the specific intention to cause harm.

4. Duress

The defence of duress or compulsion is set out in the Code at section 17.

17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons). R.S., c. C-34, s. 17; 1974-75-76, c. 105, s. 4.

If you read the wording of this section carefully, a few points stand out. First, if this defence is successful, you may still be found to have committed all of the necessary elements of an offence, but you are "excused" from responsibility for it. This recognizes that someone forced at gunpoint
to commit a theft may have had the necessary mental element, and committed the necessary act, but should not be held responsible. Second, the threats must be of violence against a person; a threat against property is not sufficient to raise this excuse. Third, the threats must be immediate, it is not good enough to say that bodily harm may have occurred at some later date, if you did not go through with the crime. Fourth, this defence is not available for a list of very violent crimes. Finally, the section may operate as an excuse for the actual commission of a crime, but it does not speak of excusing those who are parties to an offence (see section 21, Lesson 7). There may, however, be a defence available at common law, not codified in the Criminal Code similar to the section 17 excuse of duress. The common law defence of duress is similar to the section 17 defence, and continues to be a part of Canadian law by virtue of section 8 (3) of the Code which states

8. (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament. R.S., c. C-34, s. 7.

While all common law crimes are expressly repealed by the Code, all common law defences are expressed to remain in effect.

5. Necessity

"Compulsion by force of circumstances" (Jennings and Zuber, 4th ed., page 67) is a form of the common law defence of necessity. It is a rarely used defence, and a difficult one to establish. The Supreme Court of Canada has said that it only applies in circumstances of imminent risk where the criminal action was taken to avoid a direct and immediate peril. (Perka et al v. The Queen). Jennings and Zuber, 4th ed., provide an example of the use of this defence.

You are walking along a beach and hear a drowning man calling for help. You see a boat nearby and take it out into the water to save the drowning man. If there was no other alternative available to you, you may raise the defence of necessity to a charge of theft of the boat.


6. Entrapment

"Entrapment basically involves the police first luring, inducing, persuading, harassing, or bribing a person to commit an offence that would otherwise not have been committed; and then arresting the person for that offence." **

Contrary to the law in the United States, entrapment was not formally recognized as a defence in Canada or the United Kingdom. In a few cases decided since the proclamation of the Charter of Rights and Freedoms, however, Canadian courts are slowly suggesting that such a defence may be available, given the "right" circumstances. Those circumstances must be very clear and show that the accused was entrapped by a police scheme which was "so outrageous and shocking as to bring the administration of justice into disrepute" (Greenspan, annotation to R. v. Mack, Martin's Criminal Code, 1989, page 23). If the administration of justice is brought into disrepute in this way, courts will not convict an accused, and have taken the route of dismissing the proceedings against the accused as an abuse of process, rather than acquitting the accused of the charge.

7. Mistake

This is another common law defence. It recognizes that if the mistake was an honest and reasonable belief in a certain set of facts, which, if they were true, would have made the accused's act an innocent one, the accused has a defence to the charge. You honestly but mistakenly believe that your spouse is dead and remarry someone else. Your spouse then turns up alive a month later and you are charged with the crime of bigamy. You can be acquitted of this change, because of your mistake or ignorance of the facts.*

Notice that it is only mistake or ignorance of the facts which is a defence, not mistake or ignorance of the law. Everyone is presumed to know the law, but we cannot all be presumed to know all the facts of any given situation.

8. Alibi

Alibi is an example of one of the specific defences which may be raised in a general denial of the offence. It means "elsewhere" and when you raise it you are saying you were somewhere else at the time the offence was committed. You need not prove your alibi beyond a reasonable doubt; you merely have to raise a doubt in the Crown's case, but in most cases your credibility (believability) will be important in this type of defence. It should, for credibility purposes, be raised as soon as possible, not for the first time at the trial, as the judge or jury may regard that as suspicious.


9. Self-defence

The Criminal Code does allow you to use force to protect yourself, your property, or anyone under your protection, but the amount of force used must be "reasonable under the circumstances." You may not provoke an attack and then attack the attacker, and self-defence may not be available to you if you could have avoided a fight.
If you are in possession of property you may use force to prevent someone from removing it, but remember again, it must not be more than is necessary. Whether or not the force used was excessive is a subjective question for the court to determine, meaning that what is important is whether you, the accused, believed reasonable force was being used, not whether it was objectively reasonable.

10. Double Jeopardy

This is another of the defences based upon public policy. Our society does not allow the Crown to "try again" for a conviction, if it was unsuccessful the first time round and an accused was acquitted. For the same reason, once an accused has been convicted of a crime and has been punished for it, the accused may not be punished for it a second time.

This defence is different from all of the others because instead of pleading "not guilty" the accused must plead "autre fois acquit" (formerly acquitted) or "autre fois convict" (formerly convicted), as the case may be. The burden of proof then shifts to the accused to prove his or her plea.

A dismissal of the charge because of a technical defect in the proceedings, a stay of proceedings, or a hung jury, is not an acquittal, however, and the charge may be laid again in those circumstances.

Conclusion

After looking at some of the common defences, you will see that some of them are based upon public policy (i.e., insanity - we do not want to punish someone for their actions if they are not capable of knowing right from wrong or cannot form the guilty intent required). Some are based strictly upon the facts of the case and the individual accused. Alibi is such an example. What does an examination of the defences available to criminal charges tell you about our system of criminal law? Do you feel that the system adequately protects the rights of an accused person?

Legal Defense Questions

1. The defence of insanity eliminates what important element of a crime?
2. Why might hospitalization in a mental institution be a harsher penalty than a jail sentence?
3. What is the major weakness of the defence of drunkenness?
4. What does the law say regarding a threat against property with respect to the defence of duress?
5. What does alibi mean?
6. Do you think the defence of drunkenness should be available at all?