

CED: An Overview of the Law

Criminal Law - Defences

Notes for IV.9: Excuses - Provocation

IV.9(a): Partial Defence to Murder

FN1. *R. v. Lowther* (1957), 26 C.R. 150 (Que. Q.B.) (plea of provocation not one of justification or excuse but negating existence of malice).

FN2. Criminal Code, R.S.C. 1985, c. C-46, s. 232; *R. v. Stone* (1999), 24 C.R. (5th) 1 (S.C.C.) (provocation also relevant in sentencing for manslaughter); **see also** *R. v. Bakun* (1966), 50 C.R. 178 (B.C. C.A.) (constructive forms of murder not subject to provocation defence); *R. v. Mullin* (1990), 56 C.C.C. (3d) 476 (P.E.I. C.A.) (provocation not defence to assault charge).

FN3. *R. v. Campbell* (1977), 1977 CarswellOnt 5 (Ont. C.A.) (provocation may be relevant to issue of intent on charge of attempted murder); *R. v. Doucette* (1960), 33 C.R. 174 (Ont. C.A.) (provocation not defence to assault); *R. v. Stewart* (1995), 41 C.R. (4th) 102 (B.C. C.A.) (provoking actions of victim relevant to issue of planning and deliberation); **see also** Criminal Code, R.S.C. 1985, c. C-46, s. 35 [rep. & sub. 2012, c. 9, s. 2] (provocation relevant to rights of persons claiming self-defence); *R. v. Mitchell* (1964), [1964] S.C.R. 471 (S.C.C.) (provoking actions of victim can be considered on issue of planning and deliberation); *R. v. Pilon* (1965), 46 C.R. 272 (Que. C.A.).

FN4. *R. v. Humaid* (2006), 208 C.C.C. (3d) 43 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 7132 (S.C.C.) (outline of provocation at paragraph 63).

IV.9(b): Provocation Defined

FN1. *Criminal Code*, R.S.C. 1985, c. C-46, s. 232(1), (2).

IV.9(c): Questions of Law and Fact

FN1. *R. v. Parnerkar* (1973), [1974] S.C.R. 449 (S.C.C.); *R. v. Thibert* (1996), 104 C.C.C. (3d) 1 (S.C.C.); **see also** *R. v. Faid* (1983), [1983] 1 S.C.R. 265 (S.C.C.) (question of law whether any evidence produced on which jury could decide accused acting in heat of passion); *R. v. Squire* (1976), [1977] 2 S.C.R. 13 (S.C.C.); *R. v. Morrison* (1957), 40 M.P.R. 58 (N.S. C.A.); *R. v. Landry* (1979), [1979] 1 S.C.R. 552 (S.C.C.).

FN2. *R. v. Tripodi* (1955), [1955] S.C.R. 438 (S.C.C.); *R. v. Faid* (1983), [1983] 1 S.C.R. 265 (S.C.C.); *R. v. Louison* (1975), [1975] 6 W.W.R. 289 (Sask. C.A.); affirmed (1978), [1979] 1 S.C.R. 100

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(S.C.C.); *R. v. Parnerkar* (1973), [1974] S.C.R. 449 (S.C.C.) (existence of any evidence of sudden provocation being question of law); *R. v. M. (M.A.)* (1996), 110 C.C.C. (3d) 499 (Ont. C.A.); affirmed on other grounds (1998), 121 C.C.C. (3d) 456 (S.C.C.) (no evidence that accused in fact provoked).

FN3. *R. v. Hill* (1986), [1986] 1 S.C.R. 313 (S.C.C.) (age and sex of accused not idiosyncratic); *R. v. Faid* (1983), [1983] 1 S.C.R. 265 (S.C.C.); **see also** *Daniels v. R.* (1983), 7 C.C.C. (3d) 542 (N.W.T. C.A.) (suddenness being necessary element of both insult and reaction); *R. v. Conway* (1985), 17 C.C.C. (3d) 481 (Ont. C.A.); *R. v. Parnerkar* (1973), [1974] S.C.R. 449 (S.C.C.) (whether accused acting on provocation being purely matter of fact); *R. v. Kent* (2005), 196 C.C.C. (3d) 528 (B.C. C.A.) (charge to jury; "rolled-up" charge; trial judge not sufficiently separating element of intent and defence of provocation, thereby creating confusion in minds of jurors; charge and recharge giving rise to serious concern that jury not appreciating defence of provocation available to accused, thereby reducing murder to manslaughter, even if Crown proving murderous intent); **but see** *R. v. Humaid* (2006), 208 C.C.C. (3d) 43 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 7132 (S.C.C.) (accused's religious and cultural characteristics supported male superiority; Court declined to decide on how these traits should be treated).

IV.9(d)(i): Elements of Defence – Heat of Passion

FN1. *R. v. Faid* [\(1983\)](#), [\[1983\] 1 S.C.R. 265](#) (S.C.C.) (provocation defence not left with jury; no evidentiary foundation that killing in heat of passion); **see also** *R. v. Parnell* [\(1983\)](#), [9 C.C.C. \(3d\) 353](#) (Ont. C.A.); leave to appeal refused [\(1984\)](#), [9 C.C.C. \(3d\) 353 \(note\)](#) (S.C.C.) (provocation defence to be placed before jury even if not raised by defence where evidence capable of constituting provocation); *R. v. Salamon* [\(1959\)](#), [\[1959\] S.C.R. 404](#) (S.C.C.); *R. v. Wilson* [\(1987\)](#), [1987 CarswellBC 980](#) (B.C. C.A.) (accused neither angry nor upset); **but see** *R. v. Pappas* [\(2012\)](#), [288 C.C.C. \(3d\) 323](#) (Alta. C.A.); affirmed on other grounds [\(2013\)](#), [2013 CarswellAlta 1987](#) (S.C.C.) (consideration of post-offence conduct not relevant to issue of provocation).

IV.9(d)(ii): Elements of Defence – Sudden Provocation

FN1. *R. v. M. (M.A.)* [\(1996\)](#), [110 C.C.C. \(3d\) 499](#) (Ont. C.A.); affirmed on other grounds [\(1998\)](#), [121 C.C.C. \(3d\) 456](#) (S.C.C.) (shooting after argument completed not sudden); *Daniels v. R.* [\(1983\)](#), [7 C.C.C. \(3d\) 542](#) (N.W.T. C.A.) (must be evidence of final taunt or insult even if history of past relevant events); *R. v. Conway* [\(1985\)](#), [17 C.C.C. \(3d\) 481](#) (Ont. C.A.) (past events and external pressures can be considered); *R. v. Desveaux* [\(1986\)](#), [51 C.R. \(3d\) 173](#) (Ont. C.A.) (history of tensions and pressures can be considered); *R. v. Pappas* [\(2013\)](#), [2013 CarswellAlta 1987](#) (S.C.C.) (victim threatened to kill accused's mother; victim had previously uttered same

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threats and was extorting accused; threat not sudden); **see also** *R. v. Ibrams* (1981), 74 Cr. App. R. 154 (Eng. C.A.) (long delay between provocative act and killing; no provocation defence); *R. v. MacFarlane* ([1988](#)), [1988 CarswellOnt 1935](#) (Ont. C.A.) (must be sudden).

IV.9(d)(iii): Elements of Defence – Wrongful Act or Insult

FN1. *R. v. Parnell* ([1983](#)), [9 C.C.C. \(3d\) 353](#) (Ont. C.A.); leave to appeal refused ([1984](#)), [9 C.C.C. \(3d\) 353 \(note\)](#) (S.C.C.) (sudden and painful blow being evidence of provocation); *R. v. Gowland* ([1978](#)), [45 C.C.C. \(2d\) 303](#) (Ont. C.A.); *R. v. Squire* ([1976](#)), [[1977](#)] [2 S.C.R. 13](#) (S.C.C.) (assault upon person, not delivered in self-defence, may be evidence of wrongful act); *R. v. Tran* ([2010](#)), [[2010](#)] [3 S.C.R. 350](#) (S.C.C.) (defence of provocation not made out; nothing on facts meeting definition of "insult"); **see also** *R. v. Murdoch* ([1978](#)), [[1978](#)] [3 W.W.R. 313](#) (Man. C.A.) (word "wrongful" modifying only word "act"; insult always wrongful); *R. v. Cameron* ([1992](#)), [12 C.R. \(4th\) 396](#) (Ont. C.A.); leave to appeal refused ([1992](#)), [75 C.C.C. \(3d\) vi \(note\)](#) (S.C.C.) (historical events relevant).

FN2. *R. v. Nahar* ([2004](#)), [181 C.C.C. \(3d\) 449](#) (B.C. C.A.) (smoking, drinking and keeping company with other men not sufficient as provocation); *R. v. Parnerkar* ([1973](#)), [[1974](#)] [S.C.R. 449](#) (S.C.C.) (destruction of victim's letter to accused in front of accused not constituting provocation in circumstances).

FN3. *R. v. Parnerkar* ([1973](#)), [[1974](#)] [S.C.R. 449](#) (S.C.C.); **see also** *R. v. Murdoch* ([1978](#)), [[1978](#)] [3 W.W.R. 313](#) (Man. C.A.); *R. v. Olbey* ([1979](#)), [[1980](#)] [1 S.C.R. 1008](#) (S.C.C.) (racial slur; no evidence of wrongful act or insult); *R. v. Merasty* ([1999](#)), [30 C.R. \(5th\) 274](#) (Sask. C.A.); leave to appeal refused ([2000](#)), [2000 CarswellSask 625](#) (S.C.C.) (racial slur); **but see** *R. v. Humaid* ([2006](#)), [208 C.C.C. \(3d\) 43](#) (Ont. C.A.); leave to appeal refused ([2006](#)), [2006 CarswellOnt 7132](#) (S.C.C.) (questionable if accused is offended due to cultural beliefs that offend principles of society, such as female inferiority); *R. v. Tran* ([2010](#)), [261 C.C.C. \(3d\) 435](#) (S.C.C.) (accused finding estranged, separated wife in bed with another man not sufficient).

IV.9(e): Objective Test

FN1. *R. v. Cairney* (2013), [2013 CarswellAlta 1985](#) (S.C.C.) (accused started to lecture victim at gunpoint about spousal abuse; victim verbally rebuffed accused and walked away; no provocation; reasonable person would not lose self control over reaction of victim to being lectured at gunpoint); *R. c. Mayuran* (2012), [2012 CarswellQue 5811](#) (S.C.C.) (victim taunted accused for level of education; accused stabbed victim; no air of reality to defence; ordinary person would not be deprived of self control); *R. v. Tran* (2010), [2010 CarswellAlta 2281](#) (S.C.C.) (test for provocation); *R. v. Thibert* (1996), [104 C.C.C. \(3d\) 1](#) (S.C.C.) (ordinary person considered

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as same age and sex and must share with accused such other factors as giving act or insults special significance; fact that accused's wife once before threatening to leave accused for deceased being experience to be ascribed to ordinary person); *R. v. Wright* (1969), [1969] S.C.R. 335 (S.C.C.) (father and son relationship not material to objective test); *R. v. Carpenter* (1993), 83 C.C.C. (3d) 193 (Ont. C.A.) (question whether ordinary person would lose self-control, not whether ordinary person would act as accused did); **but see** *R. v. Hill* (1986), [1986] 1 S.C.R. 313 (S.C.C.) (general characteristics relevant to provocation in question being ascribable to ordinary person); *R. v. Clark* (1974), [1975] 2 W.W.R. 385 (Alta. C.A.); affirmed (1975), [1976] 2 W.W.R. 570 (S.C.C.); *R. v. Perzenowski* (1946), [1946] 3 W.W.R. 678 (Alta. C.A.) (belief that deceased being traitor no basis for provocation defence); *R. v. Young* (1993), 78 C.C.C. (3d) 538 (N.S. C.A.); leave to appeal refused (1993), 81 C.C.C. (3d) vi (S.C.C.) (termination of relationship not wrongful act or insult); *R. c. Marquis* (1988), 13 Q.A.C. 68 (Que. C.A.) (laughter not sufficient).

FN2. *R. v. Hill* (1986), [1986] 1 S.C.R. 313 (S.C.C.) (trial judge not required to tell jury what specific attributes to ascribe to ordinary person); **see also** *R. v. Camplin* (1978), [1978] A.C. 705 (U.K. H.L.); *R. c. Parent* (2001), 154 C.C.C. (3d) 1 (S.C.C.) (intense anger alone insufficient for provocation defence); *R. v. Cameron* (1992), 12 C.R. (4th) 396 (Ont. C.A.); leave to appeal refused (1992), 75 C.C.C. (3d) vi (note) (S.C.C.) (objective component not violating *Canadian Charter of Rights and Freedoms*).

FN3. *R. v. Thibert* (1996), 104 C.C.C. (3d) 1 (S.C.C.) (propensity to drunken rages or short tempered violence cannot be considered).

FN4. *Daniels v. R.* (1983), 7 C.C.C. (3d) 542 (N.W.T. C.A.) (history of confrontation between deceased and accused over previous two or three years relevant to objective test); *R. v. Carpenter* (1993), 83 C.C.C. (3d) 193 (Ont. C.A.) (history of violence between accused and deceased relevant); *R. v. Thibert* (1996), 104 C.C.C. (3d) 1 (S.C.C.) (accused's wife previously planning to leave accused for deceased); **see also** *R. v. Conway* (1985), 17 C.C.C. (3d) 481 (Ont. C.A.); *R. v. Desveaux* (1986), 51 C.R. (3d) 173 (Ont. C.A.); *R. v. Hansford* (1987), 55 C.R. (3d) 347 (Alta. C.A.); leave to appeal refused (1987), 79 A.R. 239 (note) (S.C.C.) (mistake of fact, provocation, past events affecting accused); *R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C. C.A.) (jury not to consider cultural attitude of Vietnamese male to suspected infidelity); *R. v. Tran* (2010), 261 C.C.C. (3d) 435 (S.C.C.) (accused finding estranged wife in bed with another man did not support finding of provocation).

IV.9(f): Subjective Test

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FN1. *R. v. Hill* (1986), [1986] 1 S.C.R. 313 (S.C.C.) (particular mental state and psychological temperament of accused may be taken into account on subjective test); *R. v. MacDonald* (1997), 117 C.C.C. (3d) 376 (B.C. C.A.) (accused's testimony repeatedly referring to loss of self-control; autopsy evidence also capable of supporting subjective element); **see also** *R. v. Wright* (1969), [1969] S.C.R. 335 (S.C.C.) (character, background, temperament, idiosyncrasies and drunkenness of accused may be considered on subjective enquiry); *R. v. Seyed-Fatemi* (2003), 177 C.C.C. (3d) 231 (B.C. C.A.); leave to appeal refused (2004), 2004 CarswellBC 2923 (S.C.C.) (statements of accused not consistent with loss of self control); *R. v. Reilly* (1984), [1984] 2 S.C.R. 396 (S.C.C.) (objective test not to be used in assessing subjective component); *R. v. Hansford* (1987), 55 C.R. (3d) 347 (Alta. C.A.); leave to appeal refused (1987), 79 A.R. 239 (note) (S.C.C.) (mistake of fact and provocation); *R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C. C.A.); *R. v. Cameron* (1992), 12 C.R. (4th) 396 (Ont. C.A.); leave to appeal refused (1992), 75 C.C.C. (3d) vi (note) (S.C.C.) (historical events relevant); *R. v. Jackson* (1991), 9 C.R. (4th) 57 (Ont. C.A.); affirmed (1993), 26 C.R. (4th) 178 (S.C.C.) (context of young adult assaulted by homosexual friend, lover, provider and protector to be given to jury).

FN2. *R. v. Thibert* (1996), 104 C.C.C. (3d) 1 (S.C.C.) (subjective element requires that accused act upon the insult).

FN3. *R. v. Olbey* (1979), [1980] 1 S.C.R. 1008 (S.C.C.) (lapse of four or five minutes sufficient for accused's passion to cool; provocation defence not available); *R. v. Calder* (2004), 184 C.C.C. (3d) 269 (B.C. C.A.) (escalating anger to homicidal rage not subjective loss); *R. v. Pappas* (2013), 2013 CarswellAlta 1987 (S.C.C.) (suddenness requirement having two aspects).

IV.9(g): Provocation and Intoxication

FN1. *R. v. Hill* (1986), [1986] 1 S.C.R. 313 (S.C.C.) (ordinary or reasonable person not in state of drunkenness); **see also** *R. v. Gowland* (1978), 45 C.C.C. (2d) 303 (Ont. C.A.).

FN2. *R. v. Olbey* (1979), [1980] 1 S.C.R. 1008 (S.C.C.); *R. v. Robinson* (1996), [1996] 4 W.W.R. 609 (S.C.C.) (jury should be instructed to consider evidence of intoxication, provocation and self-defence cumulatively on issue of whether accused possessing requisite specific intent); *R. v. Kent* (2005), 196 C.C.C. (3d) 528 (B.C. C.A.) (evidence of intoxication falling short of negating intent still to be considered when discussing defence of provocation; charge to jury); **see also** *R. v. Haight* (1976), 30 C.C.C. (2d) 168 (Ont. C.A.) (failure to include intoxication as relevant factor on subjective test may lead to new trial).

IV.9(h): Legal Right to Act

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FN1. *Criminal Code*, R.S.C. 1985, c. C-46, s. 232(3)(b); *R. v. Haight* (1976), 30 C.C.C. (2d) 168 (Ont. C.A.) (right to use lawful force in self-defence sanctioned by law); *R. v. Thibert* (1996), 104 C.C.C. (3d) 1 (S.C.C.) (words or acts put forward as provocation need not be words or acts specifically prohibited by law; deceased taunting accused to shoot him could constitute provocation in circumstances); *R. v. Hobbs* (1994), 155 A.R. 58 (Alta. C.A.); leave to appeal refused (1995), 184 N.R. 319 (note) (S.C.C.); leave to appeal refused (1994), 180 N.R. 399 (note) (S.C.C.) (victim's use of force in defence of property not act of provocation); **see also** *R. v. Galgay* (1972), [1972] 2 O.R. 630 (Ont. C.A.) (no legal remedy for private insult but not because of any legal right to insult another person); *R. v. Louison* (1975), [1975] 6 W.W.R. 289 (Sask. C.A.); affirmed (1978), [1979] 1 S.C.R. 100 (S.C.C.); *R. v. Squire* (1976), [1977] 2 S.C.R. 13 (S.C.C.).

IV.9(i): Self-Induced Provocation

FN1. *R. v. Louison* (1975), [1975] 6 W.W.R. 289 (Sask. C.A.); affirmed (1978), [1979] 1 S.C.R. 100 (S.C.C.); **see also** *R. v. Squire* (1976), [1977] 2 S.C.R. 13 (S.C.C.) (mode of resentment not proportionate to nature of provocation); *R. v. Edwards* (1972), [1973] A.C. 648 (Hong Kong P.C.).

FN2. *R. v. Cairney* (2013), 2013 CarswellAlta 1985 (S.C.C.) (accused attempted to lecture victim at gunpoint about spousal abuse; victim verbally rebuffed accused and walked away; no provocation).

IV.9(j): Third-Party Provocation

FN1. *R. v. Manchuk* (1937), [1938] S.C.R. 18 (S.C.C.); **see also** *R. v. Fisher* (1837), 8 Car. & P. 182 (act directed against third person may be wrongful act or insult to accused); *R. v. Droste* (1981), 34 O.R. (2d) 588 (Ont. C.A.); affirmed (1984), [1984] 1 S.C.R. 208 (S.C.C.) (accidental killing of third party); *R. v. Porritt* (1961), [1961] 1 W.L.R. 1372 (Eng. Ct. of Crim. App.) (third party killed by accident; provocation defence available).

IV.9(k): Burden of Proof

FN1. *R. v. Linney* (1977), [1978] 1 S.C.R. 646 (S.C.C.) (accused entitled to verdict of manslaughter if jury entertaining reasonable doubt on issue of provocation); **see also** *R. v. Squire* (1976), [1977] 2 S.C.R. 13 (S.C.C.) (trial judge having no obligation to charge jury on defences of which there being no evidence); *R. v. Leblanc* (1985), 22 C.C.C. (3d) 126 (Ont. C.A.) (if provocation made out, murder to be reduced to manslaughter).

FN2. *R. v. Humaid* (2006), 208 C.C.C. (3d) 43 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 7132 (S.C.C.) (Crown bears the persuasive burden in disproving provocation).

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