

**Basic matters of justification and excuse (SHORTEN)**

**Equation:** AR + MR (+ an absence of a defence) = liability. Equation moves from left to right. Refers to substantive defenses. **Difference burden and onus of proof:** They are distinct conceptually but they are related. The burden of proof is set, then the onus. **Onus = who question.** Whose job is it to prove this thing/who does the burden sit on? **Burden of proof = what question.** What is the burden/how heavy is that burden? **Discharge of evidential onus:** Making something a live issue, bringing evidence to say something needs to be discussed. **Burden of proof in defenses:** Prosecution has proved every element of the offence beyond reasonable doubt. The accused then has. Evidential onus to make a defence a live issue (for each element of the defence). **Reversal of normal onus:** Normal onus reversed through statute sometimes. Defence has more than evidential onus, must prove defence is available on balance of probabilities (i.e more likely than not). **Justification:** Focused on the act. Asking whether actor was justified in doing what they did? Actions may even be good. Boat ladder anxiety example **Excuse:** Focused on the actor. Language focus on human frailty. Schizophrenic kids whilst hallucinating example.

**Self-Defence / Justification**

**s48. Everyone is justified in using, in defence of herself/another, such force as is in the circumstances as she believes them to be, in the, it is reasonable to use**  
**Intoxication:** CL position = no SD available. NZ position = s48, interested in subjective perception (*Simpson v R*). **Trigger Question: Has there been a use of force by the defendant? Yes: We can now look at whether the defence can raise enough evidence to make self-defence available as a live issue on the fact. No:** Self-defence not available. **2: If 3 Step Test:** 1) What did the accused believe the circumstances to be from his/her point of view? (sub)) **Tips:** Answer both Q's, engage with facts, how believable for jury? a) **Strict legal test:** Not worried about reasonableness. **B) Pragmatic, evidentiary question:** Subjective story in D's head needs to convince the jury. They may have reasonable doubt that it could be true. **C) Also relevant:** Special sensitivities that played into honest belief (Wang: medical evidence re effects of depression) **1) Given what accused's belief about what was happening, was he/she acting in self defence/defence of another person from his/her point of view?** Includes **A) Strict legal test and B) Pragmatic, evidentiary question.** (Wang: Questions about proportionality/necessity not considered part of circumstances and are not considered at this stage). **3) Given that belief about what was happening, was the force used actually reasonable? (obj, including factors)** Asking what given circumstances as the defendant believes them to be, in objective terms was that use of force reasonable? Factors to think about before. **A) Was it reasonable to use force? (Wang), imminence (Wang).** Need imminence of life-threatening violence to justify killing. / There was no imminent danger to render causing his death", not armed, asleep / she was under no immediate threat, had alternative courses open to her. **Justified in killing deliberately?** Return to law of jungle). **Alternatives (Wang):** In objective terms, was there a return to retreat? No rigid duty to retreat, but useful to consider in assessing reasonableness. **(She was not held hostage, free to seek protection in other ways) B) Was the degree of force used proportionate to the threat? (Wang, Fairburn),** objective terms, was the use of force **proportional** in the circumstances as the defendant believed them to be? Overkill, low level threat/assault. Think was the degree of force needed in order to repel the threat/assault in the circumstances as the defendant believed them to be? / **Wang:** use of force objectively assessed. **Fairburn:** Assess necessity of force subjectively (*Obiter*) **C) Pre-Emptive strikes:** May be some scope for pre-emptive strikes in NZ law i.e don't have to wait until aggressor is already attacking you before you are justified in defending yourself. **Wang:** SD context "force" open to treat use physical power. But reasonable force depends on imminence and seriousness of threat, opportunity to seek protection without recourse to use of force. (Wang: Submitted by defence – s48 not confined to cases where person was resisting physical force, open to defend/protect from force which she believed was threatened.) **3) Conclude on whether the defence counsel has discharged its evidential onus:** Is there enough evidence to make SD a live issue? **Yes:** note that burden now shifts back to prosecution to prove BRD that self defence is not available. The prosecution can do this by raising doubt on either the subjective or objective limb of section 48. **Wang:** Judge should direct SD to jury unless it is impossible for them to entertain the idea that defendant had acted in SD. **3) Critiques/policy arguments:** inevitability is better than imminence (*Law Commission*). HOWEVER it is hard to have a strict and coherent test for inevitability (what makes something inevitable? What is proportionate response to a build up of danger?) and do we need courts to prove psychiatric diagnosis of battered women's syndrome? **Partial Defence for excessive force for victims of family violence (McNaughton):** If made out, doesn't mean act was justified/acquittal, just liable to lesser degree. BUT would frame behavior as an excuse rather than justification. NZ position is that it is not available, not preserved by s20 of Crimes Act. **Belief in necessity of force should be judged subjectively: Wang Alternative: Fairburn:** We can look at defendants belief about what was necessary to repel a threat as part of the subjective analysis (limb 1+2). Focuses on circumstances where D believed they had to use that force. **[Evidence to suggest Wang's belief was honest and genuine, believed that only course she could think of was to kill husband]. Note on Fairburn:** Fairburn is obiter. At present Wang is law in NZ. Argue that from policy point of view, arguably desirable possibility that courts may decide to develop the law.

**Battered Women's Syndrome (Law Commission Report). (SHORTEN)**

Imminence inclines courts to look for a "one off attack" when violence/threats are often on-going to maintain power/control, alternative routes only offer so much protection. **Law Commission Recommendation:** Should amend s48 to make clear that there are fact situations where use of force is reasonable where danger is inevitable but not imminent. Should leave s48 open to cases where danger is inevitable but not imminent. However, make explicit by legislative reform rather than develop law on case by case basis. Sarah Buel Article: Battered Women's Syndrome – Court Tool BW may not behave in a way that is intuitive to us / events are not isolated, things more complicated than they seem, manipulation / expert evidence is helpful in understanding dynamics of violent relationship, psychology in BW.

**Cases**

**Fairburn:** Gives us alternative test to Wang. **McNaughton v R:** No partial defenses for excessive self defence, provocation not available either. Not preserved by s20 of Crimes Act. **Wang:** Husband demanded money, threatened to kill family, Wang killed him when drunk/sleeping, suffering from major depressive disorder & BWS, needed present danger + no alternative, meets subjective but fails reasonable standard test (convicted).

**Compulsion, Necessity, Duress of Circumstances Structure:**

**Onus and burden:** Evidential onus still on the defence, must bring enough evidence to make live issue. In doing so, would have created RD to whether prosecution can prove equation. **1) Trigger Question:** Has D's will been overborne by some kind of external threat? Yes = can look at s24, or necessity/DoC. **2) Follow up question:** to determine whether we're looking at compulsion checklist or DoC/Necessity? **Threat from a person = compulsion (Kopi/Kawiti):** from person then cannot look at DC/N as back up, s24 'covers the field' and replaced CL DoC with respect to threats from people. **Danger/emergency/threat that comes from a situation, state of affairs etc. other than a person =** look at duress of circumstance and/or necessity. **NOTE:** Remember Kawiti move.

**Compulsion / Excuse (Threat from person + specific demand = s24 / threat from person + no specific demand = no defence)**

**s24 Crimes Act: codifies compulsion, covers the field' Common law version. Duress, but s24 replaces it (Kopi). Aim:** Even though AR + MR committed, in moral sense were forced to do it, should not be held accountable. A concession to human frailty. **s24(2). Does not apply to: Treason, espionage, sabotage (military, practical acts, murder/attempted murder, wounding with intent, intent to cause GBH, abduction, kidnaping, robbery, aggravated robbery, arson)**

**Teichelman Elements:**

**1: Was there a threat of death or serious harm? How serious do threats have to be?** Wording of s24 specifies death of GBH / GBH: harm that will seriously interfere for a time, with health of comfort. / If considering previous threats: **Mauriere:** Sets high threshold. Only read in context of threats in that instance, don't consider surrounding circumstances (unfair for our ladies). **Actual threat vs reasonable mistaken belief or generalized fear:** **Rororo:** Must be actual threat (yes); a non-existent threat cannot give rise to compulsion. / **Generalized fear (no) = Rororo:** there was no real suggestion of threat, just generally afraid of what may happen if didn't comply. / **Mistaken belief (no):** Rororo didn't really afford that. But interpretation to take at the moment is that actual threat is required, it cannot be imaginary. **Rororo: Threat doesn't need to be in words (can be implied), but must be a particular threat associated with a particular demand:** must be specific and relate to offence which D is charged with / cannot use compulsion for acts further down the causal chain. **Threats can be against others/third parties:** Hensen: Immediate family, or "any person for whose safety D would reasonable regard himself as responsible". **However:** 3<sup>rd</sup> parties make immediacy and presence requirements tricky.

**2: Was it an immediate threat? s24 Language: "threats of immediate harm" / Teichelman:** "Belief in the inevitability of immediate and violent retribution for failure to comply with threatening demand". i.e immediacy relates to how soon threat will be carried out if refuse to comply. **Immediacy retribution = needs to happen then and there. Akulue:** Meth supplier threatened to kidnap D's family. Not found to be of immediate harm, there would be a lag if he did not comply. / **Neho:** Mucked up, would have living daylight's kicked out. In UK was some discussion around whether imminent was more appropriate than immediate. But the HoJ. said that it needs to be immediate. Small argument that courts may open this discussion again. **3: Was there 'presence' of the threatener when the offence was carried out? Teichelman:** Present means physical presence. **BUT key question: Joyce:** Was the threatener in a position to execute the threat? / **Joyce:** Aggravated robbery. 'Co-offender threatened to shoot'. Threatener went inside building, D was outside when offence took place. **Therefore threatener was no longer 'present', defence could not be met / Constructive presence:** Rororo: There can be constructive presence e.g gun man several blocks away, planted bomb to be detonated. **Construct presence reception:** Courts unenthusiastic **(Akulue, no immediacy or physical presence).**

**It's a strict requirement: Zoe:** says Whitika requirements will likely to adhered to despite Court's willingness to accommodate position of people in Whitika's situation. **Whitika:** Child abuse case, mother could have sought help as partner wasn't always present. BUT no expert evidence, didn't understand psychology well. **Buka:** Thomas discusses effect of battering relationship on women, should appreciate impact it has on mind and will. Doesn't depend on presence. So may have small argument if D is a battered woman. **4: D must believe that the threats will be carried out immediately if he/she doesn't comply: A: Subjective belief that threat will be carried out:** As if subjective, need not be reasonable (Rororo). **Reasonableness?** Relevant as to whether it was genuinely held (evidential matter). **Genuinely held = Availability of alternative course of action:** Relationship with immediacy: If not immediate, likely had alternative course of action (*Hansen*). / **Offender must have:** "no realistic choice other than to break the law" (*Neho*). **Further elements: Simister and Brookbanks Textbook:** **5: No reasonable opportunity to avoid the threat / 6: The threat may, if it submitted, be to kill or inflict GBH upon someone other than the accused. / 7: The accused must not have voluntarily exposed himself to the threat by becoming a party to a conspiracy/association whereby he is subject to the compulsion that follows:** **Joyce:** Reasonable foreseeability/objective requirement. Must be RF that becoming party to conspiracy/association may put DF at risk of compulsion. **8: The offence must fall outside the list of offences in s24(2).**

**Cases:**

**Mauriere:** Female partner DUI due to male panter. Hits her and threatens to bash her if she doesn't drive. On previous occasions had beat her badly. CA determines threats not sufficiently severe. **Rororo:** Assisted in avoiding arrest, helped to move bodies. **Whitika:** Extreme abuse of child resulting in death. Family violence case, mother subject to ongoing abuse by father. Mother failed to provide medical care. Partner told her not to take child, but partner not always present, could have sought help. **Neho:** Credit card fraud entering retail stores. D got involved with gang because of debt, threatened they would hurt her, children if she didn't do it. If she mucked up, would have living daylight's kicked out of her. No immediate threat. **Akulue:** Nigeria, threatened to kidnap family unless drug shipment – no immediacy.

**Duress of Circumstances / Necessity**

**Duress of circumstance (Excuse) (Danger created by person + no specific demand = DC)**

**s20 Crimes Act: Preservation of CL defenses that aren't inconsistent with another enactment. Aim:** Recognizes that it is difficult to comply with law in emergencies. It is a narrow defence to be applied to specific circumstances. **The threat must be from a non-human source (Kopi, Akulue, Kawiti, Matsuba):** **s18 is a murder or attempted murder charge:** At CL, DC not available for murder or attempted murder (*Kawiti*). Only possibility if 'pure' necessity defence found e.g Re A. Makes sense in terms of excuse framework, don't want to excuse serious things. **Requirements for DC in NZ (Kopi):** 1: **Belief formed on reasonable grounds:** **Kopi:** This is an objective test (reasonableness of belief), not just whether defendant subjectively, honestly believed (affirmed in *Kawiti*). **Kopi: Didn't matter than D honestly held belief he was going to be beat up, it wasn't reasonable.** **2: Of imminent peril or death or serious bodily injury (Kopi, Kawiti):** 3: No realistic choice but to breach the law (i.e. commit the offence) (*Kopi, Kawiti*). **Kopi:** He realistically could have reversed the car back to just have a look / **Matsuba:** All he could do was lock the car and stay inside. They could have broken a window. Was drunk and not in position to defend himself. **4: Response must be proportionate to the peril (otherwise cannot be excused) (Kopi, Kawiti):** Expands on this idea: a sober person of reasonable firmness, sharing certain characteristics of the defendant, would have responded in likewise manner. / **Matsuba:** Did minimal amount of driving away from scene that was necessary to get out of danger. **5: There should be a nexus/connection/casual link between imminent peril and a choice to respond by unlawful means.**

**'Necessity proper' available in NZ?**

*It is still undecided in NZ whether there is a "pure" or "general necessity" or "necessity proper" defence in NZ at common law. Dudley and Stephens:* Shipwreck little food and water, cannibalism. Murder too serious, necessity not available (but were actually talking about DC, just using necessity language. **s20:** If it is available, will be preserved under s20 of Crimes Act and will be a justification rather than an excuse. **Hypothetical argument:** That particular facts mean this may be a case where courts should/might find defence of pure necessity is available. **Examples from class:** Shipwreck (life boats overloaded, need to throw some overboard so rest will survive)/ ferry (rope ladder)/Roped mountaineer (falls from cliff, needs to cut rope bc will die). **Re A)** (conjoined twins, needed to save one of them). **Dudley?** Their key purpose was to kill the boy. In this case, needed to save life of stronger twin, death of other twin was side effect/oblique intention. **Murder?** DC definitely not available, just doesn't fit excuse framework because of seriousness. However, law of necessity isn't entirely clear in NZ. May be some scope for it if we follow Re A case, where death was a side effect but not intended consequence of intervention.

**Cases**

**Kopi:** Drove home after beers claimed he was scared, thought somebody would beat him up. Court assumed he was telling truth/honest, but Q was how reasonable it was. **Kawiti:** D drinking in remote location, assaulted by partner. Dislocated shoulder, suggestion she believed in further violence, was drunk and didn't have drivers license. Partner drove with her. Failed compulsion as not only was boyfriend present, arguably posed no further threat. Succeeded on DC, external circumstances around having a dislocated shoulder, being somewhere she didn't know well, in a lot of distress and needed help. **Matsuba:** Japanese man very drunk waiting for sober driver to come and pick up. Set upon by youths, abusing him from outside of car. Worried they would break window, hurt his so without glasses and intoxicated drove 50-100m around the corner. As soon as he was out of vision, pulled car over. **Neho:** necessity may be a defence, but no need to decide now.

**Inchoate offences:**

**Trigger question:** Has the defendant offended in a way that is a bit different/more incomplete than our traditional picture of a completed result crime? This yes then clue it may be an inchoate offence.

**Inchoate offences: Attempt**

**Criminalized by s311(1): Creates specific offence of attempts, sets out maximum penalties. Defined by s72: Having an intent of committing an offence + does to omit an act for purpose of accomplishing object.**

**Aim/Utilitarian:** Criminal law punishing blameworthy actors, here they have the MR, has just not done the harm. Arguably just by bad. **Moral luck** that it happened to not be carried out. **However goes against orthodox principles:** need AR + MR for liability. This casts the net wider.

**1: Mens Rea (Section 72(1): 'Having intent to commit an offence. Intent:** Means full intention, highest level of culpability (not recklessness, negligence etc.) / must intend conduct and consequences/result and have full knowledge of the circumstances. / **Murder:** Recklessness not enough for attempted murder, even though it may be enough for completed offence. / **Possibly lower MR: R v L:** re attempted sexual offence. Where element of offence is that complainant did not consent, and unreasonable belief is sufficient for completed offence: this will be sufficient for MR as to circumstances for the completed offence. **Therefore possibility to extend law and apply R v L in non-sexual cases that involve less than full knowledge/intention for circumstances element e.g arson.**

**2: Actus Reus (s72(3): 'Does or omits an act for the purpose of accomplishing his or her object. 2: s72(2) and (3): Distinction between acts that are mere preparation, and are too remote to constitute an attempt and acts that are immediate and proximately connected with the intended offence.**

Remoteness Q's are questions of law for the judge. / **Harpur and Johnson: No strict test for proximity. Look to all surrounding circumstances and draw on case law/facts to do this: Wylie (real and practical steps towards commission of offence):** Means having laid preparation stage behind and was trying to procure cocaine (**drug bust, cops happened to catch them before complete**) / **Wilcox (close physical proximity, focus on what needs to be done):** Has D only put himself into a position from which to launch the attempt? Has taken a step in the actual offence itself? (**Narrowest test: open to policy critiques e.g basically everything but the actual offence happening likely very culpable people who fit outside of that/ overruled by Harpur / Drewery (intention spectrum idea):** Strong intent = act does not need to be as proximate. Weak intent = act needs to be really proximate (**unequivocal evidence of intent can outweigh practical steps**) / Has D commenced a series of steps essential to the successful commission of the crime? (**Stonehouse (UK): man fakes death for insurance payout for wife. Act of faking death sufficiently proximate, an essential step for successful completion**) / **Harpur (beyond mere preparation, cumulative, focus on what has been done):** Has D gone beyond mere preparation? / s72 permits D's conduct to be considered "in its entirety". / **Critiques Wilcox:** Too much focus on what needs to be done, look at what has been done. (Clear intent, number of acts which taken together constituted attempt to commit sexual violation). **Moved beyond mere preparation and was laying in wait for victim/ Johnstone (confirms Wylie/Harpur, clear intent = basis for beyond mere preparation):** Where clear intent is shown, the decision-maker has a basis to determine whether the conduct is more than mere preparation. **Impossibility s72(1): 'Whether in the circumstances it was possible to commit the offence or not'**

Only legal impossibility exculpate. Can be liable even if completion was a factual impossibility (*Donnelly*). / **Donnelly:** Legal impossibility to receive stolen goods because they were no longer stolen / **Jay:** Factual impossibility to receive cannabis, because it was in fact hedge clippings. / **Nicholls:** factual impossibility to assist fugitive BF to evade police, had already been arrested / **NOTE: Overseas trend:** impossibility only exculpates in the case of imaginary crimes (UK, Canada, Australia) e.g believing that sugar kiosk so selling sugar is illegal, no such crime known to law. NZ may reject Donnelly and follow this trend. **Critique:** No sensible distinction + abandonment to establish. Can say it is uncertain what courts may decide. **4. Abandonment: No defence of withdrawal in NZ** i.e once committed a sufficiently proximate Act (AR) with the requisite intention (MR), attempt liability crystallizes. **Sentencing:** If change your mind, may be taken into account then.

**Cases**

**R v L:** Women attempted rape with 15 yr old (s128: belief in consent on reasonable grounds). Tried to complete conduct and failed. **Wylie:** Undercover cop case, bust them before they've bought the drugs. **Wilcox:** Planned post offence robbery, one chickens out and snitches. D claims changed mind in car. **Drewery:** Default insurer, lights car on fire but they get caught. Don't get to complete plan. (**Stonehouse case:** English man fakes death for insurance payout for wife).

**Harpur:** Tried to have sex with imaginary niece. Telling woman this who became alarmed and set up sting with police. **Johnstone:** Man discovered in back garden, hiding behind some bushes, beanie + gloves. Chased away. 15 year old girl lives there.

**Inchoate offences: Conspiracy**

**Section 310 (Penalty provisions): We don't have any definition to look like we did with attempt. Law hasn't entirely codified it, waits spare language around it.**

**Actus Reus: Agreement to act together to bring about the commission of an offence (Gemmill):** Negotiation/suggestion/acquiescence/knowledge is not enough: need actual agreement / **Kotzsky:** need at least two parties to the agreement

**Mens Rea: Intention to agree and an intention that the agreement be carried out (Gemmill):** So not just intention to agree, some kind of common design/plan to commit offence / **Full intention as to result/consequence of elements is required (Salk):** (Money laundering, claimed didn't know funds converting were proceeds to criminality. But kind of suspected – not enough. Although had he completed offence it would have been.) / **Majority in Salk:** conspirator must intend-know (i.e full intent) that every relevant circumstance element will exist. / **Minority in Salk:** Conditional intention may be enough for circumstance elements (i.e suspected, decided to go through it anyways, "even if" money turned out to be proceeds of crime) / **Could argue to extend R v L arguments** (from attempt) in context of conspiracy. Saw we could have lower mental state for these circumstance elements. This is consistent with English Law Commissions arguments. **Impossibility (slightly different position than for attempt and not completely settled): Nock (English Case):** Factual impossibility exculpated on the facts of Nock ("objective innocence") / **Sew Hoy (NZ): Held no form of factual impossibility excuses / more ambiguous re legal impossibility,** but it is doubtful under case that legal impossibility will excuse. / **Stated definitely that you cannot be guilty of conspiracy to carry out an imaginary crime.** Unclear about cases such as Jay etc. but probably best to follow overseas authority, just rule out imaginary crime. **Abandonment:** Doesn't matter. Once agreement is made, criminal liability has crystallized.

**Cases**

**Salk:** Money laundering case. **Sew Hoy:** Ladies clothes actually mens clothes. Documentation fuck up, but so bad that impossible to have convinced anybody with them. **Inchoate offences: Incitement** s311: Only applied when offence has not occurred otherwise s66(1)(d). **AR: Persuading rather than helping / doesn't matter if incite isn't convinced by persuasion. MR: D must seek to persuade another person to commit an act that would constitute a crime if carried out by them /** Knowledge of the circumstances that would make it a crime (recklessness R v L?) **AND** an intention that the person incited should commit the act constituting the offence **AND** knowledge or belief that the incite would act with the requisite MR for the completed offence (*Claydon:* however incite need not actually have requisite MR). **Impossibility:** Encouraging with intent is sufficient; does not matter if the offence cannot be committed (except if "imaginary offence"). **Abandonment:** Once inciter has communicated encouragement with required MR state, offence is complete and cannot be abandoned. **Insanity/Automatism (defence)**

**s23 / Aim: Defence for those who do not realise the nature/quality of acts. (1) Presumption of sanity. (2): No conviction if, acting under natural imbecility/disease of the mind to render her incapable of: (2)(a) Understanding nature/quality of acts, or (2)(b): Knowing act was morally wrong, retaining commonly accepted standards of right/wrong. **BOP:** Effect of s23(1) places it on accused on balance of probabilities. **Who can raise it?** Mostly raised as defence by accused/defence. / Judge or prosecution can put issue to jury even though accused disclaims it as a defence. If they raise issue as to state of mind (e.g automatism) based upon evidence consistent with insanity. / **Issue:** public welfare, provide D with treatment they need? **Wording of statute: Natural Imbecility.** Congenital mental sub normality or intellectual handicap/disability. **Disease of the mind:** a legal concept, covers psychoses/schizophrenia. / Broader definition from *Kemp:* degeneration of the brain or some other functional derangement; can be transitory or permanent; curable or incurable. / Issue with *Kemp* is that it is a bit too wide. Doesn't provide basis to distinguish between insanity and automatism.**

**Automatism structure:** **Preliminary matters:** **1: Identify statutory/CL origins:** IA=s, SA=CL **2: Onus and burdens:** s has evidential burden to raise it as a live issue. Then P has to disprove claim beyond reasonable doubt. **3: Have to prove insane automatism on the balance of probabilities.** D has to prove this because there is presumption of insanity in the Crimes Act. **4: The judge acts as a gatekeeper** for the disease of mind inquiry should be left to jury. Ultimately it is a question of fact for the jury. **5: Sane automatism =** D entitled to complete acquittal. **Insane automatism =** qualified acquittal, has options available at discretion of judge. **1: Evidential foundation:** Only needs to be made a live issue; ultimately whether or not defendant acts in automatic state is Q for jury. If it's sane automatism that's left to them. / **Look for evidence of "Woosh":** clammy, sweaty, seems out of / expert evidence. Does not need to be full loss of consciousness, impaired or altered is fine. Relatively low threshold bc ultimately job of the jury. **Any recognized mental disorder/psychoses? Yes = go to s23(2)(a). No =** disease of the mind inquiry. **2: Sane or insane? Stone, followed in Yesler: Test for**

**determining insane or sane automatism is a holistic one dependent on the facts of the case A: intentional/external factor test:** Internal cause = insane automaton, external cause = sane automaton. / **Contextual objective test: Question is whether an ordinary reasonable person would have reacted by going into automatic state and doing what occurred?** If they act the same as D

then external, if differently then internal. **Rabey:** Are we dealing with extreme shock/psychological blow (more likely to be external), or are we dealing with a trigger which is the ordinary stress of disappointment of daily life? (internal) **D attacked V with rock after rejected by girl. SC decides internal so DOM) Relation to continuing danger test:** Interruptive. If internal cause, more likely to recur. Protection of public element still present. / **Issue:** Isn't related to recurrences or what kind of help somebody may need. Difficult to apply sensibly. / **Quick:** Diabetic, external cause so sane automaton vs **Hennesy:** Glycemia due to internal cause so insane automaton. **B: continuing danger test: (public protection theory): Aim:** Any condition which is going to present recurring danger to public, should be treated as a disease of the mind in order to protect them. **Bratty:** Has it manifested in violence, and if so is it prone to recur? If yes then insane automaton (**Parks: Sleep walker drove to in laws place and killed them. Condition likely to present recurring danger, public safety). Stone:** Logically this approach makes more sense. Ask whether the trigger is likely to recur and has it manifested in violence in the past? If it is likely to recur that points to there being a continuing danger, and therefore Insane automatism **Issues:** Courts have fallen out of love with this test. Can be under inclusive (rule out conditions which haven't manifested in violence or have but are unlikely to recur) or is overinclusive. **d: Other public factors: a)** Should not criminalize people who could not appreciate the wrongfulness of their act. May affect credibility of the criminal law. **B)** Floodgates: if we accept this as sane automatism – are we setting the bar too low and suddenly anybody in that situations who wants to hurt somebody will be protected from liability? **C)** Would D benefit from some sort of medical treatment and intervention through medical institutionalization? **e: Conclude on basis of this set of tests – "holistically".** **9: Disposition options of insane automatism** Yvette wants us to think about whether there is anything on the facts which indicate a special patient order may be necessary e.g how violent, multiple incidents. Just provide a bit of reasoning. **If Insane = entitled to qualified acquittal: CPMPIC Act, S24:** Four disposition options. **(1) Commital as a special patient:** requires sign off from minister of health. Issue is politicized? Less likely for somebody to be released with extra requirement. **(2) Commital as patient subject to compulsory treatment order:** just requires medical sign off. **(3)** Where liable to be detained in prison for no order to be made. **(4) Immediate release. S25:** Tends to be used when it is a lesser serious/violent offence. **If sane automaton = entitled to full acquittal.**

#### Cases

**Campbell:** X put hand on thigh triggering memories of abuse – "lost all control – no defence as D knew nature/quality of acts."  
**Rabey:** Rejected by girl, D attacked V with rock. SC overruled CA, insane automaton as not triggered by external factors.  
**Parks:** Drove to in-laws; killed mother and father in law. Claimed sleepwalking.  
**Stone:** D murdered wife after insults. Claimed "whooching" sensation. Ordinaly P in D ditch would not act the way he did so therefore internal factor (DOM). Follows holistic approach: risk of recurrence (not yet used in NZ), internal/external, public policy.  
**Yesler:** Annoyed with wife + ordinary stresses – felt 'pressure' – circumstances do not count to psychological blow that would cause ordinary P to enter automatic state – must be DOM.

#### Criminal procedure

Bringing a prosecution:  
Police bring most in NZ. But anybody can initiate.  
Categories of offences:  
Previously only 2 categories (summary and indictable). But **Criminal Procedure Act 2011** introduced 4 new ones:  
**Category 1 (least serious):** fine or community sentence, heard in DC  
**Category 2:** 2 years max, judge alone hears in DC.  
**Category 3:** 2 or more (includes life). D can elect trial by jury unless too complex/long/jury intimidation. **Fault:** don't need evidence of intimidation, taking away someone's rights to jury trial easily?  
**Category 4 (most serious):** Jury trials in HC unless long/complex/intimidation then judge alone. Serious offences/high public interest. **Protocol offences:** Cat 2/3 offences which must always be considered for transfer to HC. Can be due to offence type (violence/public interest), particular features (complex, public concern, rare charge/public focus).  
**How a case progresses through court:**  
**1: Prosecution file charging document:** someone is arrested/summons made.  
**2: First appearance:** Disclosure, name suppression, bail etc. decided. Can enter guilty plea but must wait until 2<sup>nd</sup> appearance to get legal advice.  
**3: Second appearance:** Make plea, jury election if a category 3. If you don't plea, courts likely will plead not guilty. Earlier you plea, lesser since you'll get (crime control mechanism).  
**4: If not guilty plea:** Case management memorandum and date for judge trial for category 1 / or other categories have case management meetings.  
**5: Jury trials:** jury trial call over; pre-trial hearings; trial.  
**History of Act re: Case Management Meetings:**  
Parties discuss the case, complete memorandum, have plea discussions. You can have resolution of the case (d decides to plead guilty for lower charge) or prosecution realizes valid defence and drops the charge. / Process is mandatory as it encourages D to show their hand about issues with the case and defenses they will run HOWEVER currently D's do not have to reveal this information. UK D must tell prosecution what

defenses are. Issues with this are: they might change/add defenses and becomes difficult to disclose if mandatory, difficult process to add defence later on if you haven't disclosed, defeats whole point of adversarial system by disputing the right to silence.

#### Trial:

Judge opening comments, prosecution opening, defence opening (optional), crown evidence(examination in chief, cross examination, re-examination) + can give evidence in alternative way (usually sexual offence victims/children), defence evidence: does not have to call any evidence, crown and defence closings, summing up (jury retires in a jury trial), verdict.)

**Fact based question trial/integrated route to verdict:** judges give list of Qs for jury to work their way through, based around the facts that are needed to be proved for the offences. Integrated into judge's summing up, usually remove the law out of it.

**Roles of judge/jury:** Take up 1% of cases / Judge decides questions of law / jury decides questions of fact / jurors cannot be asked what happened during deliberations by the judge or later appeal court.  
**Jury as a conscience of the community:** Jury can help the law to adapt to society / reliant on jurors being represented in the community / legitimize the criminal justice system through participation / **Critique of jury trial:** May reach decisions based on emotional responses and personal prejudices, undermine Rule of Law (especially since we don't find out what happens in deliberative process) / conscience of community assumes that all groups in community are represented in juries and that a shared notion of fairness can be achieved through democratic and deliberative process / overrepresentation of Maori/Pasifika in particular Maori men, therefore more likely to be a defendant, less likely to be on jury (not great for diversity).

#### Culpable Homicide

Culpable homicide structure  
Issue statement  
**Will X be liable for murder/mauslaughter under s168/171 after X...?**  
**Step 1:** Is it homicide?  
**Section 158:** Killing of a human being by another / Directly/indirectly by any means / 'but for' factual causation (Myatt) / **Section 164:** Acceleration of death = still a crime / **Double effect: Seals case:** Did the doctor administer the drug knowing that there was a substantial risk of death, but only intends to relieve pain? / Policy reasons  
**Issues:** No corporate homicide, when do fetuses become humans?  
**Step 2:** If yes, is it culpable homicide? S 160(2)

**Homicide that is not culpable is not an offence. Culpable homicide that is not found to be murder, will at least be manslaughter. In this case A:** if subsection 2 is satisfied, it will be either murder or manslaughter unless it is infanticide. It will be murder if you satisfy the further MR states in s167, 165. **Preliminary Q:** Under s162, did it occur within a year and a day after the cause of death? **S 160(2)(a): Unlawful Act Manslaughter Under s160(2)(a).** X can be liable for culpable homicide if committed in the course of an unlawful act.

**1: Identify predicate offence: a) Definition of unlawful act:** Section 2 of Crimes Act: *Unlawful act means a breach of any Act, regulation, rule or bylaw / Myatt:* Boating case where he didn't follow the bylaws of the river. Tried arguing that purpose of provision was not for public safety, it was to prevent erosion. **If the act is objectively dangerous that will still be enough, doesn't matter if primary purpose is public safety.** / *Lee, Myatt:* The predicate offence must be dangerous (likely to do harm, more than trivial.). **2: Is the predicate offence satisfied? Asses Actus Reus: Asses Mens Rea:** Intention, recklessness, negligence (S150A: gross negligence is standard, it is a major departure from duty owed). **3: Did the predicate offence/unlawful act actually cause the death? Myatt: Was the unlawful act a substantial and operating cause of death? 3: 160(2)(b): Negligent Manslaughter (omissions): 1: Firstly, it must be established that X has a relevant common law or statutory duty. A) Can be at common law:** Assumption of responsibility / Special relationship / Defendant creates the harm (Miller) / Virtue of position **B) Statutory Duties:** 151: Duty of provide necessities and protect from injury / 152: Duty of parent to provide necessities and protect from injury / 155: Duty of persons doing dangerous acts (Myatt: Dangerous to life means reasonable possibility of death) / 156: Duty of persons in charge of dangerous things / 157: Duty to avoid omissions dangerous to life. **2: It has been established that X has a common law/statutory duty. It needs to be assessed whether X neglected to omit or perform that duty.** Just a factual causation test. Did they not do what they were supposed to do? Because of question below, establish very clearly what they did, and what they were supposed to do. **3: Next it must be assessed whether the omission or neglect was a major departure from the standard of care expected of a reasonable person to whom that legal duties applies in those circumstances? Q:** Is it gross negligence as per s150A? / *Q:* Major departure has to be in relation to the death / *Hamer(In Lee):* Personal characteristics are irrelevant / Was there any lawful excuse to neglect/omit to perform the duty? (has to be legally recognised) / Consent may be relevant as to whether there was major departure, but is no defence (Lee). **4: Causation: Myatt: Was the unlawful act a substantial and operating cause of death?**

#### Conclusion on s160(2)

If unlawful act or negligence manslaughter are satisfied, the defendant has committed culpable homicide and will be guilty of at least manslaughter.  
Murder can now be assessed.

#### Cases

**Lee:** Korean exorcism case, 'deliverance', didn't intend to cause harm. 160(2)(a) unlawful act must be objectively dangerous. Consent not defence but maybe relevant for negligence analysis.  
**Q:** Adict mother, fell asleep on baby whilst breast feeding. Issues with it being an unsafe verbid because of process, just sets out test.  
**Perry:** Group plan to rob drug dealer, held knife to throat and demanded drinks. Took fright and hid in leveal, group abandoned search and he died. Knew he got paranoid and fearful w drugs. Last moments "sheer terror".

#### Murder

*The distinction between murder and manslaughter lies in the state of mind of the killer when he or she acts or omits to act. So when one of these states of mind are present, it will be manslaughter.*

#### Section 167: Murder defined

**Culpable homicide is murder in each of the following cases: s167(a): "if the offender means to cause the death of the person killed"**  
**1: MR:** Assess different types of intention: Direct intention / Means to an intention / Oblique intention (Wollen intention = Was death of serious bodily injury a virtual certainty as a result of the defendants actions? Did the defendant believe this was the case?) **Facts of Wollen: Father lost temper because of crying, threw baby onto hard surface. Charged with murder, s167(b): "if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not."** **1: Did the defendant intend to cause bodily injury? AND 2: Did the defendant believe it was likely to cause death? AND 3: Was the defendant reckless as to whether death ensued or not?**

**s167(d): "if the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting anyone"** **1: Was there an unlawful act/purpose? Shadrock:** Has to be criminal **2: Fatal act must be distinct from the unlawful purpose 3: Shadrock: The fatal act must be for the unlawful purpose: a) Shadrock: "For" means before or during, not after the completion of the offence. Shadrock:** If like theft it looks like all essential legal elements are already completed, can make argument that factually the offence is still occurring (Shadrock said this may be the case on their facts as by escaping they were attempted to alienate the handbag from the victim. Essential part of successful commission. But criticism is when does this end?) / *Shadrock:* Depends on nature of elements of other crime (UO). Accept that it is not merely when the legal elements are complete, that the offence can be said to have been completed. **b) Shadrock: Was the act sufficiently proximate (temporarily + spatially)? 4: Did the defendant have knowledge that the act was likely to cause death? Was there an appreciation of the risk?**

#### Section 168 Murder: Further definition of murder

This section is aimed at protecting police. Its circumstances are limited, but it is aimed at widening liability. **1: Did the defendant intend to cause grievous bodily harm? 2: Was it in the commission of one of the offences listed in s168(2)?** Treason, sabotage, piracy, piratical acts, escape or rescue from prison or lawful custody or detention, sexual violation, murder, abduction, kidnapping, burglary, robbery, arson. (*Rapira:* Aggravated robbery is added to this list.) **3: No need for the defendant to know that death was likely to ensue.**

#### Cases

**Shadrock (s167d):** Bag snatch gone wrong. D chased P, ran over D's foot, fell and suffered fatal brain injury. Later asked friends to hide handbag and destroy car. Sorted out 'unlawful object' and fatal act scope.

#### Secondary Party Liability (need to finish filling this up).

**s66(1): (a) actually commits offence; (b) does or omits act w/ purpose of aiding (help) any person to commit offence; (c) abets (encourage) any person in commission of offence; or (d) incites, counsels, or procures (encourage) any person to commit offence. Aim:** Extend the criminal law to embrace those who have by their actions, facilitated the commission of an offence or inspired it. Recognition that culpability may extend beyond person who has actually offended. **Underlines orthodox equation!** SP can sometimes not commit AR of crime but suffer same as P. **Pick which one you're going for 1: Is there a guilty principal offender?** **Secondary liability is based on the principle of derivative liability. Therefore there has to be a guilty principle offender. Exceptions: Doctrine of innocent agency (Paterson):** Law enters into fiction. Although wording says "commits the offence", law will treat SP as though they were the principle offender and have the AR through an innocent person. / *Bourne:* Man gets wife to commit bestiality w/ dog / *Cogan & Leak:* Friend told to have sex w/ wife, "likes a struggle" / *Nieuwkoop:* Limited scope, hasn't been tested out for true crime e.g murder. **Critique/Issues:** Weak reasoning. Judge's believe somebody is culpable and should be punished. Because of this scope of when to use it is

uncertain, but do we really want to acquit somebody we believe is culpable? **2: Actus Reus: 1: Any assistance/encouragement must be contemporaneous with the offence (before or at the same time) (Larkins, principle of contemporaneity) 2: Knowledge of principle offender. B: Principle offender isn't required to have knowledge about assistance under (Larkins) / C and D: Principle offender does need knowledge about and participation (Russell) / However if principle has no knowledge – makes it harder to establish assistance (Larkins). 3: They must assist or encourage in fact in the type of offence that actually occurred (Larkins): (Becoming an issue in homicide cases e.g ones involving weapons.) / **Law threshold:** "extra pair of eyes - sound of mind it gives principle" (Larkins) / D. Encouragement requires communication to the principle (because actually helping them to commit it) / Needs to be a connection between their actions and the offending – **causation element. / Mere presence is not sufficient** to find party liability (Clarkson); some form of active involvement is required (Duncan) = However, if it can be proved that presence encouraged principals or that he indicated approval in any way – AR is therefore made out. (Clarkson?) **B: Mens Rea: 1: Knowledge: Did the secondary party have knowledge of essential matters of the offence? And; Type or list of jobs (Maxwell):** D needs to know the type of offence P intends OR that P is likely to commit one of a number of offences from a "list" containing the offence which is eventually committed. / Note that test has endured, but is more narrow now than originally perceived in Maxwell. Test above was affirmed in *Kimura*. **Kind (Baker):** Don't need to know about particular instance/specific crime – just that they were going to commit offence of breaking and entering with intent to commit a crime. / *Criticism:* But unfair? Extending reach of the CL too far? **2: Intention: Was there intention to assist or encourage? A: Did the secondary party intend his/her conduct** (from Richards we know that this means behaving deliberately) and; **b: Did the secondary party intend those actions to encourage/assist the principal offender to commit the offence?****

Assistance/encourage does not need to be the primary purpose – can encompass both direct and oblique intention (Richards, Woolin) / Intention differs from desire or motive (Richards) / **Foresight:** They need to know that the consequence will happen or is a virtual certainty (Woolin) but they do not need to desire it (Gamble/Richards). **Foresight is relevant to intention** because it can help prove it. Hard to find a person intended something if they didn't contemplate that their actions would cause it. / **Does not require intention to aid a particular offence at a particular time**, rather they must have known the necessary consequence. (Baker) **3: Spontaneous collaboration is sufficient (Ahsin). s66(2): When 2 or more persons form common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is party to every offence committed by any one of them in the prosecution of the common purpose. This section is most often used for collateral offences. However, if applicable, it can also be used in situations where you have a common unlawful purpose, you go out and commit that, and are liable under it for principles offence which was all part of the plan (usually where it is difficult to pinpoint particular assistance or encouragement so hard to use s66(1)) Actus Reus / Mens Rea **Actus Reus is completed once Mens Rea/intention is formed. 1: Two or more people 2: Common intention: Form common intention/unlawful purpose: Shared understanding or agreement** to do something unlawful, and to help each other achieve that goal. / Can be planned out or spontaneous e.g "I'm going to hit somebody, come now". (Ahsin). **3: Recklessness/appreciation of risk:** Will be a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose = **Recklessness requirement** – need to appreciate that it was a probable consequence. If they do something which is for a total departure from the common purpose, will not be liable for that. Courts have said that this is a matter of fact, have declined to put together any strict rules around it. / **Note: Can pitch this as different levels.** E.g easy common intention (assault), but more difficult appreciation of risk (assault turned into killing). More specific common intention (entering with weapons), but easier appreciation of risk (that somebody would get shot).**

#### Cases

**Clarkson:** Audience at gang rape, passively watched, so acquitted.  
**Larkins:** SP keeping watch for liquor store burglary, PO wasn't aware.  
**Baker:** Prisoner wrote letter instructing D how to break into safe. Wished him luck.  
**Richards:** Pharmacist supplied drugs to accused, suspected they were being used to make meth. Didn't matter that he didn't want them to make meth, was convicted.

**Ahsin:** Gang case, beat up/stabbed man in red clothing, SP was driving, 'enough lets go'. Purpose to intimidate mongrel mob members. SP did not intend/want death to occur.

#### Withdrawal

**Aim of Withdrawal is that the law should encourage criminal participants to change their mind/prevent crime. The defence creates an incentive to not continue offending. The evidential burden is on the secondary party to raise withdrawal as a defence. If unsuccessful, it may be a mitigating factor at sentencing. 2 Step Requirements (reaffirming Pink): 1: Give unequivocal notice of withdrawal, by words or actions / that demonstrate clearly to / other parties that you are withdrawing 2: Take reasonable and sufficient steps to undo the effects of your participation or prevent the crime:** If insufficient potential to undo or prevent the participation, it doesn't matter. You are **outside the window** of being able to withdraw. / What is sufficient/reasonable is **proportional to the extent of your assistance**, e.g oral assistance / oral withdrawal is likely okay. (Gauthier case. Mother should have done more e.g call authorities, hide the medication, take the children away.) **3: Some actions can fit under both limbs:** E.g clear communication may demonstrate both withdrawal and step towards prevention (if you only orally assisted). **Aims:** May prevent commission of a crime, therefore avoiding harm / Principle may become dissuaded and frustrated if one party has withdrawn. / May indicate lack of entrenched criminal purpose, less future dangerousness – may reduce blameworthiness or future risk of offending / The law should encourage persons who participate in criminal arrangements to change their mind and take steps to prevent the crime reaching consummation. It gives them an incentive.

**Secondary Party Liability and Homicide:** If P has been charged with manslaughter, most SP can be as manslaughter.  
If principle charged with murder under s167 (just carry out normal SP enquiry, add this in at the end?)

**s66(1) = Murder:** AR = actual assistance/encourage murder. MR = knows type of act to occur and that PO had MR from either s167(a)(b)(d). **s66(1) = Manslaughter:** Know type of unlawful act/omission, intend to assist/encourage that unlawful act/omission. Do not need to know risk of death.  
**s66(2) = Murder:** If knows that murder committed in the same kind of circumstances was a probable consequence of prosecution of the common purpose (i.e. if knew that P likely to kill with any of MR states under s167).  
**s66(2) = Manslaughter:** Knows unlawful act/omission (e.g stabbing, shot) is a probable consequence. Does not need to know risk of death.

If principle charged with murder under s168

**s66(1) = murder:** AR = actual assistance/encourage murder. MR = knowledge of essential matters: did SP know of the type of act that would occur, and that PO had MR states from s168? **s66(1) = manslaughter:** Know type of unlawful act/omission, intend to assist/encourage that unlawful act/omission. Do not need to know risk of death. **s66(2) = murder:** SP must know that PO intends to cause GBH for facilitation of a specific crime. **s66(2) = manslaughter:** If SP know that infliction of physical harm which is more than trivial or transitory is a probable consequence of prosecution of the common purpose, then guilty of manslaughter. **Weapons:** Normally is totally unexpected it is a complete departure, but not when carrying weapons. If they knew weapons were carried then they must have known there was an "ever present real risk of killing in some way".

**Tomkins:** 3 rob taxi driver, armed w knives and BBQ forks. Took him into bush, took glasses, other man stabbed him twice. Weapons taken to scare not kill, did not intend to kill driver.