Chapter 7: Lack of Intent Due to Mental Disorder or Mental Handicap

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I. Introduction

For a variety of reasons, a mentally disabled[1] client may not rely upon the exemption for mental disorder found in section 16 of the *Criminal Code.*[2] However, his or her lawyer may be able to argue that a mental disability affected their client's ability to form the mental element or intent to commit the crime. If the Crown fails to prove that the accused had the required mental element, the accused may be convicted of a lesser offence or acquitted. The type of intention required varies with the particular offence.

This chapter discusses the legal concepts of general and specific intention and how they may apply to a particular offence. In particular, it examines the effect of finding that the accused did not possess the required level of intention.

The argument that the accused lacked the requisite mental element may be particularly useful to those representing mentally handicapped or brain injured clients because the s 16 exemption may not apply to them.[3] The intention argument may also be attractive to other mentally disabled clients because a successful intention argument could result in an acquittal.

II. General

Most offences in the *Criminal Code* require the accused to have the appropriate mental element or intention in order to be convicted. This means that the court will look for "fault" or a "blameworthy state of mind" on the part of the accused in order to convict. Basically, we speak of offences that require "fault", or a *mens rea* element, as being either offences that are committed with intent or negligence offences. Negligence

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[1] For a discussion on our choice of terminology for persons with mental disabilities, please refer to Chapter 1.

[2] RSC 1985, c C-46 (hereinafter *Criminal Code*). This exemption is discussed in Chapter Six. Parliament will be overhauling the *Criminal Code* in the next while, so section numbers may change.

[3] The issue of whether s 16 applies to mentally handicapped individuals is discussed at length in Chapter Six: The Exemption for Mental Disorder.

offences are usually judged on an objective basis, meaning that courts will look at whether a reasonable person would have acted the same as the accused in the exact same situation.[4] On the other hand, offences that require the intent to commit the offence are often judged on a subjective basis. Canadian law usually requires that the court examine what was going on in the mind of the accused at the time in question.[5] There are different levels of *mens rea* required by different offences. These can be divided into three categories: subjective *mens rea* (what was in the mind of the accused at the time of the crime is looked at), objective *mens rea* (when the accused's actions are marked departure from what the reasonable person would have done, and their state of mind is not looked at), and offences based on predicate offences.[6]

There is much disagreement as to the difference between specific intent and general intent offences. Specific intent offences are those that require that the prohibited conduct be committed with intent to achieve a particular result.[7] Stuart asserts that the best definition of specific intent is contained in *R v George,* where the Supreme Court of Canada stated that specific intent acts are "acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object", which are the "product of preconception and are deliberate steps towards an illegal goal".[8] By

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[4] D. Stuart, *Canadian Criminal Law: A Treatise* 7th ed (Toronto: Carswell, 2014) at 282 (hereinafter *Stuart*). See also *R v Creighton* 83 CCC (3d) 346 (SCC) (hereinafter *Creighton*), where the majority of the Court held that objective liability is the minimum *mens rea* standard for all crimes, so long as the crimes are not "stigma" offences. Thus, for crimes of negligence, the question is what would the reasonable person have done in the circumstances? First, the court examines whether the *actus reus* has been established. This requires that the negligence constituted a *marked* departure from the standard of the reasonable person. Second, the court looks at whether the *mens rea* for objective foresight of risking harm has been established. Finally, if these two cases have been made out, a third question must be asked: Did the accused have the capacity to appreciate the risk flowing from his conduct? However, the standard of care for manslaughter and negligence will not vary with the degree of experience, education and other personal characteristics of the accused.

[5] However, in *Creighton,* the Supreme Court of Canada indicated the minimum *mens rea* standard for all crimes, so long as the crimes are not stigma offences (e.g., crimes where there is a stigma attached to a conviction therefore or to the available penalties), is objective liability. In other words, it is constitutionally valid for Parliament to define a crime with an objective basis of liability as long as it is not a stigma offence. See: C. Schmitz, "SCC Settles *Mens Rea* Requirements for Manslaughter, Negligence Offences" (1993) 13(9) *Lawyer's Weekly* 1, 27.

[6] A predicate offence is a crime that is a component of a more serious criminal offence (e.g., offences underlying money laundering or terrorist finance activity). Stuart at 298.

[7] Stuart, at 271.

[8] [1960] SCR 871.

contrast, general intent acts are those, "done to achieve an immediate end, not done by accident or through honest mistake", and that may be "the purely physical products of momentary passion." This definition was approved and restated in *R v Bernard,* where the Supreme Court of Canada stated:

> The general intent offence is one in which the only intent involved relates solely to the performance of the act in question with no further ulterior intent or purpose. The minimal intent to apply force in the offence of common assault affords an example. A specific intent offence is one which involves the performance of the *actus reus*, coupled with an intent or purpose going beyond the mere performance of the questioned act. Striking a blow or administering poison with the intent to kill, or assault with intent to maim or wound, are examples of such offences.[9]

Colvin provides a list of some offences as classified either as specific intent or general intent by the various courts of appeal (see next page):[10]

[9] (1988), 45 CCC (3d) 1 (SCC) 24-25 (hereinafter *Bernard*).
[10] E. Colvin, *Principles of Criminal Law* 3rd Edition (Toronto: Carswell, 2007) at 306-7 (hereinafter *Colvin*).

Offences of Specific Intent

- Murder (s 229)
- Theft (s 322)
- Robbery (s 343)
- Possession of a weapon for a purpose dangerous to the public peace (s 88)
- Offering Money with Intent to Bribe a Police Officer (s 120 (*b*))
- Breaking and entering with intent to commit an indictable offence (s 348(1)(a))
- Breaking and entering and committing an indictable offence (s 348 (1)(b)) where the offence is one of specific intent (e.g., theft)
- Being unlawfully in a dwelling-house with intent to commit an indictable offence (s 349)
- Aiding an offence (s 21(1)(b))
- Abetting an offence (s 21(1)(c))
- Secondary participation under the common unlawful purpose rule (s 21(2))

Offences of General Intent

- Manslaughter (s 222(4))
- Assault (s 265(1))
- Assault causing bodily harm (s 267)
- Sexual assault and sexual assault causing bodily harm (ss 271, 272)
- Dangerous Driving (s 249)
- Having care and control of a motor vehicle while impaired (s 253)
- Breaking and entering and committing an indictable offence (s 348 (1)(b)) where the offence committed is one of general intent (e.g., assault)
- Pointing a Firearm (s 876 (1))

This list is not complete, but it shows the major divisions. In light of some recent

developments in the Supreme Court of Canada, it is not clear whether the distinction between general intention offences and negligence offences has become somewhat blurred.[11] However, this list may be useful when analyzing some of the following legal decisions.

III. Mental Disability—Lack of Specific Intent, Planning and Deliberation

Although the concept of "specific intent" has been criticized as being "unnecessary and logically indefensible", it is relevant to the defence of a person with a mental disability.[12] Even though the accused may not be successful in relying upon the *Criminal Code* s 16 exemptions for persons with a "disease of the mind", evidence of a mental disability may be used to negative the specific intent requirement for the charged offence. There are several cases in which mental disorder was relevant in reducing a charge of murder to manslaughter.[13] Indeed, many accused will seek to rely upon evidence of mental disability, even if they are found guilty, as it may result in a lower sentence.[14]

Evidence of mental disability has been most successfully used to negate the specific intent required for murder, or to prove that the murder was not planned and deliberate. There have been a few cases in which lack of specific intent has been argued

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[11] See, for example, *R v Hundal,* [1993] 1 SCR 867, where the Supreme Court of Canada held that the mental element in dangerous driving (s 249(4)) is to be assessed objectively, but in the context of the events surrounding the incident. The question to be asked is whether viewed objectively, the accused exercised the appropriate standard of care, not whether the accused subjectively intended the consequences of her actions. See also: *R v DeSousa* (1992), 15 CR (4th) 66 (SCC), where the Court held that the mental element required for the offence of unlawfully causing bodily harm (s. 269) consists of the mental element required of the underlying unlawful act and the objective foresight of bodily harm.

[12] Stuart, at 273.

[13] See, for example: *R v Swain*, [1991] 1 SCR 933 (SCC); *R v Blackmore* (1967), 1 CRNS 286; *R v Baltzer* (1974), 27 CCC (2d) 118 (NSCA); *R v Hilton* (1977), 34 CCC (2d) 206; *R v Bring* (1976), 34 CCC (2d) 200; *A v Wright* (1979), 11 CR (3d) 257; *R v Rabey* (1977), 37 CCC (2d) 461, 486 (upheld by the Supreme Court, 1980 CanLII 44 (SCC), 1980 CanLII 44 (SCC), (1980), 2 SCR 513); *R v Meloche* (1975), 34 CCC (2d) 184; *Lechasseur v R* (1977), 38 CCC (2d) 319 (Que CA); *A v Fournier* (1982), 30 CR (3d) 346 (Que CA); *Allard v A* (1990), 57 CCC (3d) 397*; R v Hilton* (1977), 34 CCC (2d) 206 (Ont CA); *R v Godfrey* (1984), 39 CR (3d) 97 (Man CA), leave to appeal dismissed (1984), 11 CCC (3d) 233n (SCC)*; R v Browning* (1976), 34 CCC (2d) 200 (Ont CA); *R v Fiddler* (1981), 58 CCC (2d) 517 (Alta CA); *R v Listes* (1994), 95 CCC (3d) 178 (Que CA) where the court ordered a new trial based primarily on grounds that the trial judge erred in providing the jury with a clear explanation for a possible reduction in criminal responsibility (i.e., manslaughter) premised on the accused's mental condition at the time of the offence.

[14] See Chapter Twelve, Sentencing.

for theft and robbery, with mixed results. There are very few decisions where the accused relied upon a mental disability to negate a general intent offence. It should be noted that introducing evidence of mental disability to show lack of intent leaves the door open for the Crown to argue, or the judge to decide, that the accused is not criminally responsible on account of mental disorder, which may not be desired by the accused.

Generally, the onus is on the accused to prove mental disorder in order to successfully invoke s 16. However, when evidence of mental disability is being used to negate specific intent, the onus remains with the Crown to prove all elements of the offence, including that the accused had the requisite intent.[15]

Although the statutory law in England recognizes the concept of diminished responsibility in murder offences, Canadian statutes do not expressly do so.[16] The English law permits a charge of murder to be reduced to manslaughter because of diminished capacity. The *Criminal Code* of Canada does not recognize the defence of diminished capacity. However, provocation may reduce murder to manslaughter.

Nevertheless, there are some who argue that there is an "unarticulated form of diminished responsibility existing in Canada, in the sense that evidence of mental disorder short of legal insanity is considered in determining specific intent together with any other relevant factors."[17] There are several cases in Canada that allowed evidence of a mental disorder to negative *mens rea,* as well as some authorities to the contrary. Even though the accused may have been mentally ill at the time of the offence, he or she is technically (sane) criminally responsible if he or she was able to distinguish right from wrong.[18] However, where the accused is charged with an offence that requires

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[15] *R v Meloche* (1975), 34 CCC (2d) 184 (Que CA) (hereinafter *Meloche*).

[16] *Homicide Act, 1957*.

[17] E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada,* 2d (Aurora: Canada Law Book Inc., 1987) at 22-8. There are some authors who feel that the defence of lack of specific intent caused by mental disorder does not exist or should not exist in Canada. See: J.J. Walsh, "The Concepts of Diminished Responsibility and Cumulative Intent: A Practical Perspective" (1990-91) 33 Crim LQ 229 and authors cited therein.

[18] *Chartrand v R,* [1977] 1 SCR 314; See also: *R v Romeo* (1991), 117 NBR (2d) 271 (QB). In this new trial ordered by the SCC in (1991), 119 NR 309, the court held that evidence of insanity was not sufficient to negative the necessary criminal intent to murder a police officer and convicted the accused of first degree

proof of a specific intent, evidence that the accused was suffering from a mental disorder, though falling short of proof of circumstances that warrant application of the section 16 exemption, may negative the required intention or level of intention.[19] In this way, the case law has the effect of introducing a concept similar to that of diminished responsibility through the analysis of the intent of the individual. In *R v Damin*, the accused stabbed his wife 127 times in the middle of the night, fearing that she would leave him and make him leave their home. The accused was suffering from depression at the time, and could not remember the incident when asked about it by the police and by psychiatrists. The Crown tried to argue that there was no defence of diminished capacity in Canadian common law, and therefore any evidence of the accused's incapacity was irrelevant to the Court. In response, the Court stated that while there is no defense of diminished capacity, considering whether the accused had an inability to form intent, "does not create the notion of diminished capacity" but "simply recognizes that if the accused was suffering from sort of mental condition at the time of the offence, that mental condition is a circumstance that might affect whether or not he formed the specific intent".[20]

The elements of planning and deliberation are related to, but not the same as, the issue of specific intent. The *Criminal Code* recognizes differing degrees of murder (a specific intention offence) for the purposes of sentencing (section 231). For example,

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murder; and *R v RS,* [1997] OJ No 593 (Ont Prov Div) where the court, although agreeing with psychiatric opinion that the accused was mentally disordered, held that on the date of the crime he could distinguish right from wrong.

[19] *Macdonald v The Queen* (1976), 29 CCC (2d) 257 (SCC) at 260 (hereinafter *Macdonald)*. See also *R v Worth* (1995), 40 CR (4th) 123 (Ont CA) where the court held that if the defendant proves that s/he is suffering from a disease of the mind that renders him/her incapable of knowing that his/her act was legally or morally wrong then s/he will be exempt from criminal responsibility. This decision was later affirmed by the Supreme Court: [1996] SCCA No 314; *R v Bailey* (1996) 111 CCC (3d) 122 (BCCA) where the Court of Appeal ordered a new trial on the basis that the trial judge erred in failing to instruct the jury explicitly that evidence of mental disorder was to be considered along with all the other evidence in determining whether the accused had the requisite intent for murder. The British Columbia Court of Appeal dismissed the appeal by the accused and held that the trial judge's failure to further explain the irrelevance of the accused's post-offence conduct did not amount to misdirection. Although the language of the trial judge's instructions did not limit the concept of consciousness of guilt to the question of mental disorder, the jury would no doubt have had it in mind, having just heard the addresses of both counsels. Moreover, even if the jury had rejected the mental disorder defence, they could have concluded that the accused's post-offence conduct demonstrated that his thoughts were so disordered that it gave rise to a reasonable doubt that the accused had the requisite intent for the offence of murder.

[20] *R v Damin* (2011), BCSC 723, Carswell BC 1349, at para 33.

murder that is "planned and deliberate" is first-degree murder (subsection 231(2)) and is subject to harsher sentencing. In a first-degree murder charge, the issue of mental disability is relevant to the issues of intention, planning and deliberation. If the *mens rea* and the *actus reus* for murder have been proved, and if a further mental process is present, such as planning and deliberation, the accused will be guilty of first degree murder and subject to a harsher sentence (see section 745). However, a person could possess the intent to murder, but may not have made a planned and deliberate decision to murder because of a mental disability. In that case, she may be guilty of second-degree murder and will be subject to a lesser sentence with earlier parole eligibility. Thus, although the issues of intention, planning and deliberation are related, they are not synonymous.

The leading case on planning and deliberation is *More v The Queen.*[21] The accused was charged with capital murder (Canada no longer has this particular offence.) At issue was whether the murder was "planned and deliberate". The accused shot his wife through the head while she was asleep. He wrote a number of letters explaining that he had done it because he was in financial difficulty and did not want his wife to suffer from it. Later that day, he attempted suicide by shooting himself. Two days before the shooting he bought the murder weapon, a rifle and a box of shells, with the intention of taking his own life. At trial, the accused did not raise the defence of insanity, but two medical doctors testified that at the time of the shooting he was suffering from a depressive psychosis resulting in an inability to make a decision in a normal way. The trial judge instructed the jury that evidence of experts was of slight weight. The accused was convicted of capital murder. Although the majority of the Manitoba Court of Appeal thought that there had been misdirection as to the weight to be given to the medical evidence of the accused's state of mind at the time of the offence, it held that there had been no substantial wrong or miscarriage of justice and dismissed the accused's appeal.

The Supreme Court of Canada ordered a new trial because it was possible that

[21] [1963] SCR 522 (hereinafter *More*).

the accused could have been found guilty of the lesser charge of non-capital murder if the jury had been properly instructed on the medical evidence. In analyzing the issue of the appropriate meaning for "planned and deliberate", the Supreme Court held that they were separate elements that each had to be proved for capital murder. Premeditation is required for both. The word "deliberate" meant "considered, not impulsive".[22] The evidence of the psychiatrists as to the mental condition of the accused at the time of the act had a direct bearing on whether the accused's act was planned and deliberate, because the court must determine whether the accused's actions were considered rather than impulsive. It should be noted that the "planned and deliberate" requirement still exists today under the first-degree murder provision (section 231). The definition of "planned and deliberate" established in *More v the Queen* went on to be confirmed and applied to section 231 in *R v Smith*.[23]

In several decisions, the court analyzed whether a mental disability prevented the accused from forming the specific intent to commit murder or whether the elements of planning and deliberation were affected by a mental disability. In *R v Schonberger,* the accused was charged with murder.[24] At issue was whether the accused could rely on amnesia as a defence. The Saskatchewan Court of Appeal held that amnesia itself is not a defence to the charge of murder but it may be evidence of a state of mind that might be used as a defence to the charge. Further, if the amnesia were emotional or hysterical (failure to recall without organic cause), it would not be evidence of a state of mind that could be used as a defence because the amnesia only took effect after the event and would not indicate a lack of capacity to form the specific intent at the time of the offence. On the other hand, if the accused had experienced organic amnesia, that would be evidence that the accused was deprived of the power of conscious reasoning during the commission of the offence and was therefore incapable of forming the specific intent necessary to commit murder.

In *R v Allard,* the accused was charged with first-degree murder in the poisoning

[22] *More,* at para 534.
[23] *R v Smith,* 2015 SCC 34, [2015] 2 SCR 602.
[24] (1960), 33 CR 107 (Sask CA).

death of her husband.[25] The accused relied on the testimony of a psychiatrist to show that she suffered from a manic-depressive psychosis and was unable to appreciate the consequences of her act under s. 16. The Crown's psychiatrist testified that the accused had a personality disorder, but knew what she was doing. The trial judge directed the jury to consider the defence of insanity, but if the accused failed to demonstrate that she was insane at the time of the offence rendering her incapable of forming the requisite intent for murder, they were told to disregard that defence completely. The accused was convicted of first-degree murder.

The Quebec Court of Appeal ordered a new trial. The court discussed the appropriate procedure for the application of evidence of mental disability as follows:

> If [the] appellant was insane at the time, the jury was bound to acquit her. But if her defence of insanity failed, the jury was none the less required to bear in mind all the evidence—*including the expert evidence as to her mental condition*—in considering the live issues of intention, planning and deliberation.
>
> Thus, if the jury concluded that [the] appellant was sane and therefore *capable of forming* the requisite intent for murder, it still had to consider whether for any reason she *in fact* did not have that intent. If there was reasonable doubt on that issue, the proper verdict was *not guilty of murder, but guilty of manslaughter.*
>
> If the murder was intentional, but not planned and deliberate [the] appellant could be convicted of second degree murder, but she had to be acquitted on the charge as laid.
>
> Appellant's mental condition, I repeat, was relevant not only to her *capacity to form* and the *existence in fact* of an intent to cause death, but also to the additional and separate elements of planning and deliberation [citations omitted]. Moreover, the burden was on *the Crown* to prove each of these elements *beyond a reasonable doubt.* And this burden on the prosecution, I emphasize, *did not depend in any way*

[25] (1990), 57 CCC (3d) 397 (Que CA) (hereinafter *Allard*).

> *on [the] appellant's onus in relation to the defence of insanity* [emphasis original]. [26]

Thus, evidence that falls short of negating an intent to kill may suffice to negate planning and deliberation.[27]

The existence of a mental illness does not necessarily remove the murder from the category of first degree murder, however. In *R v Kirkby*, the accused was charged with the first-degree murder of his friend. A number of psychiatrists testified that although the accused suffered from a serious mental illness, he was capable of appreciating the nature and quality of the act and of knowing that it was legally wrong.[28] One psychiatrist testified that the accused suffered from the delusion that he was a special "biker" type person and that he was entitled to respect from the deceased, which he felt he had not received. He therefore believed that he was justified in executing the deceased for being disrespectful. The psychiatrist testified that the accused was nevertheless capable of appreciating the nature and quality of his act and of knowing that it was legally wrong. The trial judge refused to put the defence of insanity to the jury. The accused was convicted of first degree murder.

At the Ontario Court of Appeal, the accused argued, among other things, that the trial judge had not properly instructed the jury as to the effect of a mental disorder (and intoxication) on the accused's intention to commit first degree murder. In dismissing the appeal, the Ontario Court of Appeal discussed whether the existence of a mental disorder would reduce first degree murder to second degree murder in every case. Martin JA, speaking for the court, stated:

> It is, I think, clear on the authorities that the words 'planned and deliberate' should be given their ordinary meaning. Mental disorder may, of course, negative planning and deliberation, but if the murder is, in fact, both planned and deliberate, the existence of mental disorder does not *per se* remove the murder from the category of first degree murder. Mental disorder may or may not negative the elements of planning

[26] *Allard*, at para 401.
[27] See also: *R v Hem* (1989), 72 CR (3d) 233 (BC Co Ct).
[28] This decision took place before the word "wrong" was extended to mean morally wrong.

> and deliberation, depending upon the nature of the mental disorder and the effects produced by it. The fact that the offender suffers from a mental disorder is not, however, *necessarily* incompatible with the commission by him of the kind of murder which Mr. Gold described as a 'cold-blooded' murder. On both occasions in which the Supreme Court of Canada has directly considered the relevance of mental disorder, not amounting to insanity under s. 16 of the *Code*, on the issue whether the murder was 'planned and deliberate', the Supreme Court held that mental disorder may tend to indicate that the killing was impulsive rather than considered and hence not 'deliberate' [citations omitted]. I find no suggestion in those authorities that, in the case of a person who is sane within s. 16 of the *Code*, the word 'deliberate', in addition to requiring that the killing be considered rather than impulsive, imports, as counsel for the appellant contended, a qualitative assessment of the reasonableness of the offender's mental processes in making a decision to kill the victim. I do not think that Parliament, by using the word 'deliberate', imported a requirement that the offender's previous determination to kill the victim must be the result of reasonable or normal thinking or must be rationally motivated, provided the Crown has established that the killing was planned, and that the act of killing was considered and not the result of sudden impulse. [29]

In *R v Jacquard*, the Supreme Court of Canada considered the appropriate charge to the jury regarding mental disorder and the elements of planning and deliberation.[30] The court held that a trial judge is not required to instruct a jury about the "subtle differences between the manner in which evidence of a mental disorder can negative 'intention' versus 'planning and deliberation'".[31] Rather, it is sufficient if, when read as a whole, the trial judge's instructions: (a) make the jury aware that evidence of the accused's mental disorder must be considered on each issue, and (b) do not mislead the jury into thinking that a finding of intention is necessarily followed by a finding that

[29] *R v Kirkby* (1985), 21 CCC (3d) 31 (Ont CA), leave to appeal to SCC refused [1986] SCR vii, at 66-7.
[30] *R v Jacquard*, [1997] 1 SCR 314, 113 CCC (3d) 1.
[31] *Jacquard* at para 30.

there was planning and deliberation.[32]

Therefore, the presence of a mental disorder may be relevant to the issues of specific intention, planning and deliberation.[33] If the accused's mental disorder did not affect her ability to form the requisite intention, he or she may be found guilty of murder.[34] However, the accused's mental disorder may affect his or her ability to plan and deliberate and therefore may be relevant to the sentence she receives.[35]

IV. Lack of Capacity to Form Intent Due to Mental Disability

While the case law is clear that, in appropriate circumstances, the accused may negative intention with evidence of a mental illness, there is some disagreement as to whether the accused's mental disorder will affect her *capacity* to form the specific intent to commit murder or whether it merely affects whether the accused acted with intent in the circumstances. *R v MacKinlay* established a two-step inquiry.[36] First, the court examines whether the accused had the capacity to form the specific intent. Then, they examine whether the accused actually acted with intent.[37] Other courts limit their analysis to whether evidence of mental disability will negate the allegation that the accused actually acted with intent.[38] This two-step analysis was rejected in *R v Canute*,

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[32] *Jacquard* at para 30.

[33] *Jacquard.*

[34] See also: *R v Mulligan* (1976), 28 CCC (2d) 266 (SCC), Dickson J. in dissent; *R v Allen* [1994] NJ No 203 (Nfld CA).

[35] See *R v Levy,* [1997] OJ No 3505 (Ont CA). In this case, the accused suffered from depression, a schizoid personality disorder, substance abuse and headaches. The Court of Appeal held that the sentences given at trial were excessive in light of the accused's age and mental condition.

[36] *R v MacKinlay* (1986), 28 CCC (3d) 306 (Ont CA).

[37] This issue has also caused difficulty in the area of intoxication. The long-standing rule, in *DPP v Beard,* [1920] AC 479, held that the Crown only had to prove that the accused had the capacity to form the intent to commit the crime. In *R v MacKinlay* (1986), 28 CCC (3d) 306 (Ont CA), the court held that the jury should first be told to consider the accused's capacity and then the accused's actual intent. In *R v Korzepa* (1991), 64 CCC (3d) 489 (BCCA), the court held that *Beard* prevented the jury from considering the accused's actual intent. Finally, in the case, *R v Canute* (1993), 20 CR (4th) 312 (BCCA), the BCCA held that the rule in *Beard* violated *Charter* s 7 and s 11 because it obviated the necessity of the Crown proving that the accused had the specific intent to commit the offence. Thus, evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts in order to determine whether he had the required intent.

[38] R. Rogers and C. Mitchell, *Mental Health Experts and the Criminal Courts* (Toronto: Thomson Prof. Pub., 1991) at 129, argue that the inquiry should now focus on whether the intent was actually formed or not and not on whether the accused had the capacity to form the intent.

which stated that it was unnecessary to analyze an accused's capacity to form intent, when, in the end, the jury was simply going to analyze whether they had the intent at all.[39] However, in *R v Robinson*, the Court stated that a two-step analysis may still be appropriate in some cases when looking at the question of intent, and that the first step can serve as a threshold test for the jury.[40]

An example of a case where the court analyzed the accused's *ability* to form the intent was *R v Baltzer.*[41] The accused raised the defence of insanity to a charge of murdering his girlfriend. Two years before the murder, the deceased had a child by the accused and the child had been given up for adoption. The relationship between the accused and the deceased had cooled afterward. After the accused shot the deceased, he drove to a police station and asked to be charged with murder. At trial, a psychiatrist testified that the adoption had triggered a severe depression and "identity crisis" in the accused and that he was suffering from schizophrenia at the time of the offence. The accused was convicted of murder.

In ordering a new trial, the Nova Scotia Court of Appeal held that the trial judge should have explained to the jury how the accused's mental illness may have affected his ability to form the specific intent required for murder, and stated:

> It has always seemed to me however, that where there is evidence that the accused was suffering from mental illness or mental disorder at the time the alleged offence was committed then if such offence requires a specific intent, and includes a lesser offence [manslaughter] in which the specific intent is not necessary, then even if insanity is the main, or indeed the only, defence raised, it would be prudent for a trial Judge to deal with such other included offence because the jury may find that although the accused was suffering from mental illness or mental disorder, such was not of a nature to bring the case within s. 16 of the *Code*. Yet such evidence of mental illness or mental disorder may be relevant to the issue whether the accused, although he appreciated the nature and quality of his act, and knew it was wrong, had the mental capacity to formulate the specific intent. Applying such proposition to a

[39] *R v Canute* (1993), 80 CCC (3d) 489 (BCCA), at paras 418-419.
[40] *R v Robinson,* [1996] 1 SCR 683 (SCC), at para 48.
[41] (1974), 27 CCC (2d) 118 (NSCA) (hereinafter *Baltzer*).

> charge of murder, specific intent is essential in such charge; however, no specific intent is necessary for manslaughter.[42]

The Court of Appeal stated that it was not bringing into our jurisprudence the law of diminished responsibility. Rather, if there is evidence of mental illness or mental disorder, and if the offence requires specific intent, the jury should be told how the mental illness or mental disorder might affect the ability of the accused to formulate the specific intent.[43]

On the other hand, other courts of appeal have stated that while the accused's mental disorder is relevant to the issue of intent, the issue of capacity to form intent is best dealt with under a section 16 analysis. The Alberta Court of Appeal discussed this issue in *R v Wright.*[44] In this case, the accused had been asked by the victim to assist in her suicide. The victim took the scarf from her head and put it around her neck and told the accused to pull it. The victim was found the following day, dead of strangulation. The accused was charged with second-degree murder. An expert testified that the accused was suffering from a manic-depressive illness. After leaving the verdict of manslaughter open to the jury, the court entertained and granted a Crown motion to withdraw manslaughter from the jury because there was no evidence that the accused lacked the specific intent for murder. The accused was convicted of second-degree murder.

On appeal, the Alberta Court of Appeal held that subsection 16(4) [now subsection 16(2)] provided the Crown with the presumption that the accused had the mental capacity to form the intent requisite to the particular crime. However, it did not necessarily follow that the person who had the *capacity* to form the intent to commit the offence actually formed the requisite intention in any particular case. The jury

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[42] *Baltzer*, at paras 140-141.

[43] *Baltzer*, at para 141. For other cases which analyze the role of capacity in negating *mens rea* see *R v Mitchell,* [1965] 1 CCC 155 (SCC); *R v Browning* (1976), 34 CCC (2d) 200 (Ont CA); *R v Lachasseur* (1977), 38 CCC (2d) 319 (Que CA); *R v Charest* (1990), 76 CR (3d) 63 (Que CA); *R v Leblanc* (1991), 4 CR (4th) 98 (Que CA); *R v JM (No 2),* [1995] NJ No 274 (Nfld Prov Ct).

[44] (1979), 11 CR (3d) 257 (Alta CA), leave to appeal refused (1979), 29 NR 623n (SCC) (hereinafter *Wright*); followed in *R v Jacobson* (1985), 61 AR 254 (Prov Ct) and in *R v Fowler* (1984), 48 N & PEIR 175.

should have been instructed that if they entertained any reasonable doubt as to whether the accused had the requisite intent, they should have found him guilty of manslaughter. The presence or absence of the requisite intent is a question of fact for the jury. Evidence of the accused's mental disorder is not relevant to the issue of his capacity to form the requisite intention. When the defence of insanity is put forward and rejected, the same defence may not be advanced in relation to the issue of intent merely by placing it before the jury in different words. The Court of Appeal ordered a new trial.

Thus, evidence that is adduced on the issue of mental disorder may be relevant to the issue of intent, not for the purpose of showing that the accused did not have the capacity to form the intent, but for the limited purpose of showing he did not in fact form the requisite intent.[45] The cases are divided as to whether the court should use evidence of mental disability to negative the requisite intention or whether mental disability should be used to show that the accused did not have the capacity to form the intention in the first place.

V. Specific Intent and Offences other than Murder

For offences other than murder, the courts have shown some willingness to recognize that mental disability may negative specific intention. For example, in *R v Rabey,* the accused was charged with causing bodily harm with intent to wound.[46] The Ontario Court of Appeal, in providing instructions for a new trial, stated that if the defence of insanity is rejected by the trial judge, the evidence of the expert would be relevant in relation to the specific intent required to be proved to constitute the offence charged. To the contrary, in *Macdonald*, the Supreme Court of Canada refused to overturn a conviction for robbery. The accused had been tried before a Special General Court Martial and psychiatric evidence was admitted to show that the accused was not capable of forming the requisite intent. The psychiatrist testified that the accused had a

[45] *Wright*, at para 272.
[46] (1977), 40 CRNS 46 (Ont CA), aff'd (1980), 32 NR 451 (SCC) (hereinafter *Rabey*).

marked adjustment reaction of adolescence, manifested by low self-esteem and marked dependency needs that were defended by acting out behaviour, rebelliousness and a tendency to suicide. Although the Special General Court Martial Judge had not given reasons for his decision to convict the accused, the majority of the Supreme Court of Canada refused to overturn the conviction as it was satisfied that the trial Judge had apprehended the legal issue before him.[47]

There are a few cases involving the specific intent offence of theft. Occasionally, persons suffering from minor mental and emotional disorders have successfully defended charges of shoplifting or theft by producing evidence that shows that due to their mental state they did not form the specific intent to steal. On the other hand, even if a person with a mental disability is found guilty of theft, it is possible for the judge to take his mental condition into account when sentencing. Under some circumstances, an absolute discharge is available.

In *R v Rogers,* the accused was a diabetic. He was charged with the theft of a movie projector from a department store. When he was apprehended by store security guards, the accused struggled and threw the projector at them. His defence was that he was in a state of diabetic shock or insulin shock and being in that state his mental processes were so confused that he was unable to control his actions. In upholding the Magistrate Court's conviction, the Court of Appeal stated that it could not say that the Magistrate had erred in his conclusion that the accused formed the intent to steal and would know that what he was doing was wrong. It is interesting to note, however, that insulin shock was considered as a possible defence.[48]

In *R v Clarke,* the accused had diabetes, was very depressed and forgetful. At trial, the recorder had decided that the testimony of the experts called by the accused to substantiate her claim that she lacked the requisite intent to steal should be applied to the argument that the accused was not guilty by reason of insanity.[49] The accused, not wishing to be found not guilty by reason of insanity, quickly changed her plea to

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[47] *Macdonald*, at para 261.
[48] (1965), 48 CR 90 (BCCA).
[49] A recorder refers to a magistrate.

guilty and was convicted. The English Court of Appeal overturned the conviction. The Court of Appeal was of the opinion that the evidence fell short of insanity and said that the jury should have been instructed that they had to decide whether the accused had the necessary intent to sustain the charge.[50]

Mental disorder may be relevant in constructive murder—for example, death caused by a person while committing or attempting to commit certain offences (section 230)—as it may affect the person's intent to commit the underlying offence.[51] In *R v Gorman,* the accused was charged with constructive murder—an offence involving homicide in the course of a robbery.[52] At trial, the accused was convicted of non-capital murder and was sentenced to life in prison. On appeal the sole issue was whether the judge should have instructed the jury on the offence of manslaughter. Statements of the accused that were filed as part of the Crown's case indicated that the accused may not have had the capacity to form the intent to commit theft, one of the ingredients of robbery. In ordering a new trial, the Court of Appeal stated:

> In our opinion there was some evidence here which might have raised a question in the minds of the jury as to this man's capacity to form the intent to commit theft, whether by violence or otherwise. Counsel for the Crown fairly concedes that if there was evidence of that nature upon which a jury was entitled to act there was an erroneous omission from the charge if the trial Judge failed to charge the jury upon that aspect of the case. Admittedly no such instruction was given to the jury and, in our opinion, this was non-direction amounting to misdirection which might well have occasioned a substantial wrong or miscarriage of justice.[53]

In *R v Rybarsky,* the accused was convicted at trial for 16 indictable offences, including theft of money, forgery of cheques and obtaining merchandise by fraud. The

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[50] [1972] 1 All ER 219 (CA).

[51] *Criminal Code* s 230(a) and (c) have recently been declared to infringe *Charter of Rights* s 7 because they permit a conviction for murder without proof of subjective foresight of death. However, these sections have not been repealed or amended. See: *R v Sit* (1991), 9 CR (4th) 126 (SCC). See also: *R v Vaillancourt,* [1987] 2 SCR 636.

[52] [1972] OJ No 815, (1972), 9 CCC (2d) 318 (Ont CA) (hereinafter *Gorman*).

[53] *Gorman,* at para 320.

accused admitted that she had performed the physical acts that constituted the offences, but argued that because of a multiple personality disorder she did not have the required level of intent to render her guilty.[54] The accused had no recollection of the offences and her psychiatrist testified that this lack of memory was consistent with her disorder and was "perfectly possible". The trial judge held that although the accused had the "real possibility" of a mental condition, it did not raise a reasonable doubt as to the accused's knowledge and understanding that she was committing the acts at the time that she committed them. The offences were specific intent offences that required planning and sophistication. Therefore, the trial judge was satisfied that the accused knew what she was doing at the time of the offences. The accused's psychiatric disorder and her possible lack of memory were considerations that went to sentencing. The Nova Scotia Court of Appeal dismissed the accused's appeal, holding that there was no error on the part of the trial judge in finding that the accused had the necessary intent to commit the offences charged.

There are also decisions where the accused has a condition causing him to become irrational on occasion, thus being unable to form the requisite intent. Premenstrual syndrome has been successfully argued as a defence in some shoplifting cases, for example.[55] Similarly, an anorexic accused was found guilty but was absolutely discharged.[56] Also, expert evidence as to the effect of ingesting drugs was important in an acquittal from theft charges where it was found that the consumption affected the ability to form the requisite specific intent.[57]

The area of specific intent and mental disorder is quite complex. The intention

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[54] (1992), 117 NSR (2d) 193 (CA) (NSCA).

[55] *R v Nikoniuk* (March 22, 1984) unreported oral decision, (Alberta Prov Ct) (cited in Knoll). See also: "Criminal Law: Premenstrual Syndrome in the Courts?" (1984), 24 Washburn Law Journal 54-77; E. Meehan and K. MacRae, "Legal Implications of Premenstrual Syndrome: A Canadian Perspective" (1986), 133 CMAJ 601 and a reply by Dr. Robinson in (1986), 135 CMAJ 1340 ("the association between PMS and violent, impulsive or criminal acts is by no means firmly established"). (Discussed in D. Stuart & R.J. and S. Coughlan, *Learning Canadian Criminal Law* 13th Edition. (Toronto: Carswell, 2015) at 845.

[56] *R v Dover* (February, 21, 1986) unreported oral decision (Alberta Prov Ct) (cited in Knoll).

[57] *R v Croteau* (1983), 9 WCB 209 (Ont Dist Ct); *R v Varcoe* (1996) 104 CCC (3d) 449 (Ont CA); *R v Cooke* (1996) NBJ No 481 (NBCA). In *Cooke* the court looks at the mixed effect of drug consumption and alcohol and its impact on the accused's ability to form the requisite intent for murder; *R v Vickberg* [1998] BCJ No 1034 (BCSC).

argument may be raised in cases where an accused appears to have a mental disability short of the provisions of section 16 of the *Criminal Code* but did not form the requisite intent. The lack of specific intent argument may be attractive for many reasons. First, the burden of proof remains with the Crown, unlike the situation with a section 16 argument. Second, the accused may, on occasion, have a total defence that results in an acquittal. Alternatively, the accused's maximum sentence liability may be reduced significantly if she does not have the requisite intention. However, once evidence of the accused's mental ability is entered, the Crown may raise the issue of mental disability for the purposes of arguing that the accused should be found not criminally responsible on account of mental disorder under section 16.

Thus, although there are fewer reported decisions involving offences other than murder, the general rule that evidence of mental disorder may negative specific intention appears to apply to other specific intention offences.

VI. General Intention Offences and Mental Disorder

It is generally considered that defences such as intoxication do not apply to offences requiring a general intention.[58] The reason that voluntary intoxication cannot

[58] See, for example, *Bernard*, at para 35. In *R v Daviault* (1994) 93 CCC (3d) 21 (SCC) the Supreme Court of Canada held that disallowing voluntary intoxication as a defence to a general intent offence violates section 7 and section 11(d) of the *Canadian Charter of Rights and Freedoms* [*Charter*]. However, in 1997 Parliament enacted section 33.1 of the *Criminal Code* in response to the ruling in *Daviault*. Section 33.1 applies only to offences under the *Criminal Code* or other federal enactment that include, as an element, an assault, or any other actual or threatened interference by a person with the bodily integrity of another. For these offences, it is no defence that the defendant, by reason of self-induced intoxication, lacked the general intent or voluntariness required to commit the offence where the defendant, in a state of self-induced intoxication that rendered him or her unaware or incapable of consciously controlling his or her behaviour, voluntarily or involuntarily interfered or threatened to interfere with the bodily integrity of another. In a recent case, the British Columbia Supreme Court held that although section 33.1 violates section 7 and 11(d) of the *Charter*, it was saved by section 1 (see case cited *R v Vickberg supra* note 48). In *R v Bouchard-Lebrun*, [2011] 3 SCR 575, 275 CCC (3d) 145 (hereinafter *Bouchard-Lebrun*), the Supreme Court of Canada held that the application of ss 16 and 33.1 are mutually exclusive. This means that in order for s 33.1 to apply, the court must determine that, due to self-induced intoxication, the accused lacked the general intent or voluntariness to commit the offence. The absence of intent or voluntariness would therefore preclude the court from finding that the accused lacked capacity to commit the offence due to a disease of the mind. In contrast, if the accused establishes that he or she was not capable of appreciating the nature or quality of his or her acts due to mental disorder, then the fact that he or she was intoxicated at the time of the offence cannot support a s 33.1 finding. In *Bouchard-Lebrun*, it was established that if the accused raises mental disorder in a case that also involves intoxication, the court should first consider

be relied upon in a general intention offence is that there is a general rule that judges or juries may infer *mens rea* from the act itself.[59] Second, where the accused was so intoxicated as to raise doubt about the voluntary nature of his conduct, the Crown can prove blameworthiness by proving that the intoxication was self-induced.[60] However, in some cases, a mental disability may affect one's ability to form the required general intention for a criminal offence.[61] For example, where there is extreme intoxication, bordering on insanity or automatism, there may be room to negative the inference that the minimal intent to apply force was present.[62] Thus, there has been at least an indirect recognition that a mental disability may be so severe as to negative general intent.

In *R v Gottschalk,* the accused was charged with theft and assault causing bodily harm.[63] He had entered a store, picked up some tapes and some aspirin, paid for the aspirin, then left without paying for the three tapes. A security guard followed the accused, identified herself to the accused and the accused began to run. The security guard pursued the accused who then threw her to the ground. The accused testified that he did not remember taking the tapes. He said that he panicked when he heard the word "security" and he did not intend to hurt the security guard. He had a very bad headache at the time and police officers testified that he appeared to be in a state of shock. A neurologist testified for the defence that the accused's health history indicated that he could have taken the tapes without intending to and that the assault could have been the result of fear and therefore could have been a reflex action. A psychiatrist testified that, in his opinion, the accused had chronic anxiety and depersonalization, that he was confused and disoriented at the time, and that his assault was a reflex and not done intentionally. In acquitting the accused, the Provincial Court held that theft was a specific intention offence and assault was a general intention offence and stated:

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whether s 16 applies. Only after the court determines that s. 16 does not apply should they consider s 33.1.

[59] See *Bouchard-Lebrun*.

[60] *Bernard,* at para 35.

[61] Indeed, in *Creighton,* the Supreme Court of Canada indicated for manslaughter and negligence offences, the court must ask whether the accused had the capacity to appreciate the risk flowing from his conduct. An argument could be made that this test should also apply to other types of criminal offences.

[62] *R v Swietlinski* (1978), 44 CCC (2d) 267 at 294 (Ont CA), aff'd 55 CCC (2d) 481 (SCC).

[63] (1974), 22 CCC (2d) 415 (Ont Prov Ct) (hereinafter *Gottschalk*).

> And on the basis of those opinions formed by the two medical experts as a result of the material supplied to them from various sources, I am satisfied and would be satisfied on a charge of theft that there was no intention on the part of this accused, Werner Gottschalk, to steal the tapes...
>
> What has caused me greater concern is whether or not despite the opinion of the doctors there still was reason to find that there was at least a *general* intention to apply force in connection to the charge of assault causing actual bodily harm. A specific intention is not necessary for assault but only a general intention....I find that the defence has properly raised, by competent medical evidence, a sufficient doubt in my mind, and it is a doubt which is reasonable on the basis of the evidence, as I comprehend it to be, as to whether the accused actually, in fact, committed the act or whether there was no conscious thinking behaviour in connection with it at all. I believe as a result of that doubt being raised and the onus being upon the Crown where the defence of non-insane automatism is raised properly with sufficient evidence to justify its reception and consideration, that I must dismiss the charge on which the accused has been tried of assault causing actual bodily harm. The defence of non-insane automatism has been established, at least to that extent, of raising a reasonable doubt and the charge is accordingly dismissed.[64]

This case is interesting because a general intent offence was successfully defended by raising a reasonable doubt that the accused had formed any intent to commit assault. Many academics and judges feel that the distinction between general and specific intent is open to serious question in any event. Consequently, it may be possible to argue that a person's mental disability could affect her *general* intention. This will be a more difficult argument to make when the accused has a mental illness, however, because when the accused's mental disorder is short of section 16 requirements, typically, the courts have concluded that the accused often had the requisite general

[64] *Gottschalk,* at 431-2. See also *Leclair v R* (1979), 11 CR (3d) 287 (Ont CA), where the Court of Appeal held that the trial judge must determine whether the accused has the capacity to form the necessary specific intent to constitute theft.

intention.[65]

Thus, in cases where the accused has been charged with a specific intention offence, courts appear willing to consider that, although the accused did not have a mental disorder for the purposes of *Criminal Code* section 16, he or she was unable to form the intent required. This may result in an acquittal or in conviction of a lesser included offence. In cases where the accused is charged with an offence requiring general intention, it is more difficult to argue that the accused who does not meet the section 16 requirements could not have formed the general intention to commit the offence. The successful use of mental disability to negate intention therefore depends upon the nature of the offence.

VII. Lack of Intent and Mental Handicap

A. Canada

Evidence of mental disability not only applies in situations where the accused suffers from a psychiatric difficulty, but also when the accused has a mental handicap. Mental handicap may affect one's ability to form the specific intent required by the particular offence.

Unfortunately, there are very few reported Canadian cases that address the issue of specific intent and mental handicap. In *R v Stevenson,* the accused was convicted of second degree murder for the shooting death of his boss.[66] The accused had had a disagreement with his boss earlier in the day and took a sawed-off shotgun to his boss's apartment. As his boss came out of the washroom, the accused waved the shotgun at him. It discharged, fatally wounding the victim. The defence adduced evidence from psychologists who were of the opinion that the accused was of subnormal intelligence, had poor control of his emotions and a history of aggressiveness and impulsivity. The Crown's experts testified that the accused had an antisocial personality but that he had the capacity to plan and deliberate. The accused appealed his conviction on a number of grounds, including that the charge to the jury on the issue

[65] Rogers and Mitchell, at para 129.
[66] (1990), 58 CCC (3d) 464 (Ont CA) (hereinafter *Stevenson*).

of intent was flawed. In ordering a new trial, the Ontario Court of Appeal stated that the appellant was guilty at least of manslaughter. The issue was whether the Crown had proven one of the intentions required for murder and whether the murder was planned and deliberate. The Court of Appeal held that the trial judge erred when he did not instruct the jury, "that the evidence of the mental disorder should have been considered along with all the other evidence in determining whether the accused had the intent for murder."[67]

In *R v Nelson,* the argument that the accused, a person with diminished intelligence, did not have the specific intention to commit murder was unsuccessful at trial.[68] However, one issue was the availability of self-defence to a charge of second-degree murder. The accused had suffered a serious accident as a child that resulted in arrested mental development. Subsection 34(2) of the *Criminal Code* provides a defence where the accused causes death or grievous bodily harm after an unprovoked assault by the deceased and is under a "reasonable apprehension of death or grievous bodily harm" and that "he cannot otherwise preserve himself from death or grievous bodily harm." The trial judge charged the jury that when considering whether the accused had reasonable and probable grounds, they should consider what a reasonable person in the accused's situation might believe about the extent and imminence of the danger and the force necessary to defend himself against the danger. The accused was convicted and appealed.

One ground of appeal was that the diminished intelligence of the accused should have been a factor taken into account when considering self-defence. The Ontario Court of Appeal relied on *R v Lavallee* (the battered-wife case) for the holding that the accused's apprehensions and beliefs could not be fairly measured against the perceptions of an "ordinary man".[69] In *Lavallee*, the Supreme Court of Canada held that the issue is what *an accused* reasonably perceives, based on her situation and her experience. Similarly, the arrested mental development of the accused in this case

[67] *Stevenson*, at para 48. The accused in this case did not suffer from a mental handicap.
[68] (1992), 71 CCC (3d) 449 (Ont CA) (hereinafter *Nelson*).
[69] (1990), 55 CCC (3d) 97 (SCC).

might equally affect his perception of and reaction to events. The Court of Appeal acknowledged that it could not be said that any variation below normal intelligence would entitle an accused to have his intellectual deficit taken into account when considering whether her actions were reasonable under s. 34(2). However, "where the accused ha[d] an intellectual impairment, not within his or her control, which relate[d] to his or her ability to perceive and react to events—an impairment that clearly [took] him or her out of the broad bank of normal adult intellectual capacity—...the deficit should be taken into account."[70] The Court of Appeal ordered that the accused have a new trial. Although the trial judge had referred to the accused's low intelligence with respect to the issues of what was a reasonable amount of force and the ability to form the intent for murder, he had not referred to it with respect to the reasonableness requirement in subsection 34(2).

In the case of *R v Kagan*, the appellant was convicted by a jury of aggravated assault as a result of pepper spraying and stabbing his roommate.[71] As in *Lavallee*, the accused claimed he had acted in self-defence. At trial, a forensic psychiatrist testified that the appellant suffered from features of Asperger's Syndrome, a form of high-functioning autism that may have affected his perception of the situation. At trial, the judge did not refer to the evidence of the psychiatrist as relevant to the issues of the appellant's reasonable apprehension of death or grievous bodily harm or his reasonable belief that there was no other way to protect himself. The Nova Scotia Court of Appeal allowed the appeal and ordered a new trial on the basis that the failure to refer to the psychiatrist's evidence as relevant to the elements of self defence amounted to reversible error.[72]

Although *Nelson* deals with the issue of self-defence, it may indicate a possible trend towards analyzing an accused's mental handicap in reference to the capacity to form the required level of intention. At the least, it recognizes that a person's mental handicap can affect her/his capacity and should be taken into account.

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[70] *Nelson*, at para 469.
[71] 2003 NSSC 153, 215 NSR (2d) 189.
[72] 2004 NSCA 77, 185 CCC (3d) 417.

B. MENTAL HANDICAP AND INTENTION IN THE UNITED STATES

In many states, mental handicap may be relevant at three stages of the criminal trial. First, evidence of a mental handicap may be used to argue that the accused lacked the intention to commit the crime.[73] Second, evidence of mental handicap may result in a mitigated sentence. Finally, mental handicap may prevent the death penalty from being executed on an accused.[74]

In the last 30 years, the few reported cases in the United States addressing the criminal responsibility of individuals with mental disabilities have focused on the relationship between the insanity defence and mental disability. For example, Under the *Durham* test, a person was not guilty by reason of insanity if his acts were the product of a mental disease or defect.[75] "Defect" signified a permanent condition, either congenital, the result of an injury, or the residual effect of mental or physical disease.[76] In *McDonald v United States,* the test was narrowed to those whose condition of the mind substantially affected mental or emotional processes and substantially impaired behaviour controls.[77] Subsequent to this was the American Law Institute (ALI) test, which required that the mental defect resulted in the defendant's lack of capacity to appreciate the criminality of his conduct or to change his conduct in order to conform to the requirements of the law. Courts employing this test held that the term "mental defect" included mental handicap.[78] However, the *American Bar Association's (ABA) Criminal Justice Standards on Mental Health* currently refer to persons with a mental handicap (formerly referred to as “mentally retarded” in US law) as having “developmental disabilities that affect intellectual and adaptive functioning”.[79] The

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[73] However, according to Morse (1998), mental disorder virtually never negates the defendant’s intention, knowledge, or conscious awareness of the risk. Their motivation for acting in such a manner may be irrational, but their intention is rational.

[74] Eleven states and the United States federal government have banned the execution of people with mental retardation (Keyes and Edwards, 1997).

[75] *Durham v United States,* 214 F 2d 862 (DC Cir 1954) 874-5 (hereinafter *Durham).*

[76] *Durham*, at 875.

[77] 312 F 2d 847 (DC Cir 1962) 851 (hereinafter *McDonald*).

[78] J. Ellis and R. Luckasson, "Mentally Retarded Criminal Defendants" (1985) 53(3-4) George Wash Law Rev 414 at para 437.

[79] (Washington, DC: American Bar Association, 2016) (hereinafter ABA Criminal Justice Standards on Mental Health), Standard 7-1.1(a).

definition of "mental nonresponsibility" set out by the American Bar Association (ABA) is:[80]

> A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disorder, that person was unable to appreciate the wrongfulness of such conduct.

This differs from the ALI test as it is a modified version of the *M'Naghten* test that requires that the person was, as a result of a mental disease or defect, unable to appreciate the wrongfulness of the conduct.[81]

The *ABA Criminal Justice Mental Health Standards* and the ALI go a step further, however. Both recognize that a person's mental state may affect her intention to commit the crime (*mens rea*). The Model Penal Code produced by ALI provides that evidence concerning a defendant's mental condition should be admissible at a criminal trial whenever it is relevant to prove that a defendant did or did not have the state of mind required for conviction.[82] The ABA provides that:[83]

> (c) 'Mental health evaluation,' appearing throughout the Standards as 'evaluation,' means an evaluation by a mental health professional of an individual accused of, charged with, or convicted of a criminal offense or detained by the police for the purpose of assessing:
>
> i. mental competence, as defined in (f),
>
> ii. mental state at the time of the offense as it relates to the insanity defense and other criminal responsibility issues, including mitigation at sentencing,
>
> iii. risk for reoffending referred to as "risk assessment" herein) or
>
> iv. treatment needs.
>
> …
>
> (f) 'Mental competence,' appearing throughout the Standards as 'competence,' is defined in detail in Parts IV and V of these Standards, but at a minimum **r**equires present understanding of the likely consequences of a particular course of action. A valid 'assent' requires only this minimal level of

[80] ABA Criminal Justice Standards on Mental Health, Standard 7-6.1(a).
[81] (1843), 10 Cl & Fin 200, 8 ER 718 (HL).
[82] *ALI Model Penal Code,* § 4.01(1).
[83] ABA Criminal Justice Standards on Mental Health, Standard 7-1.1.

> competence, accompanied by an affirmative indication of agreement with a particular course of action, after an explanation of the likely consequences of the action.

As of 1989, eleven states had adopted laws that provide for admission of evidence of mental condition whenever it is relevant to prove any subjective mental state. Several other states adopted this rule through legal decisions.[84] Some admit evidence of the defendant's mental condition in order to prove that the defendant did or did not have a specific intent required for conviction. Several states refuse to admit such evidence, and eight have not addressed the issue. Idaho, Montana and Utah had abolished the insanity defense, replacing it with the intention rule.

The American Bar Association takes the view that evidence of mental illness or mental handicap should be considered as a possible mitigating factor in sentencing a convicted offender.[85] For example, evidence of mental disability should not be the basis for a denial of probation.[86] ABA Standard 7.9-1 deals with mental disorder and capital cases. While the ABA does not take a position on whether the death penalty should be an available sentencing alternative, Standards 7-9.1 through 7-9.9 address the unique issues that arise when a person with a mental disorder is sentenced for a capital crime in those jurisdictions that retain the death penalty.

In the United States, a person's mental disability is relevant to the issue of intention, especially when the accused is faced with the death penalty.[87] There are some state death penalty statutes in which the presence of a mental disability is considered a mitigating factor.[88] In the case of Johnny Paul Penry, Penry was convicted of the stabbing murder of a woman he had raped in her home. At trial, he was found

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[84] American Bar Association, *Mental Health Standards,* 1989, at 348 - 9. Note this version pre-dates the 2016 version relied on elsewhere in the report.
[85] *ABA Criminal Justice Standards on Mental Health,* Standard 7-8.5. However, the ABA does not take a specific stand on capital cases.
[86] *ABA Criminal Justice Standards Mental Health,* Standard 7-8.6.
[87] As of 1998, 35 people in the United States had been executed having I.Q.'s in the 50's (Edwards, 1998).
[88] Per the *ABA Mental Health Standards,* 1989: Florida and Ohio. Note also that in Tennessee, Arkansas and New Mexico if the court determines pre-trial that a defendant does not have mental retardation, the defendant still may raise the issue of mental retardation as a mitigating factor (Keyes and Edwards, 1997).

guilty and was given the death penalty.[89] The constitutionality of the penalty was considered by the United States Supreme Court. The American Association on Mental Retardation (among others) (AAMR) argued that persons with mental disabilities lack the blameworthiness required in order to invoke the death penalty. They argued that all people with mental handicaps should be exempted from the death penalty because they have reduced capacity and could not have the level of culpability (criminal intention) required to receive the death penalty. The AAMR argued that the Eighth Amendment of the Constitution of the United States, which prohibits cruel and unusual punishment, requires that in order to be executed, a person's mental state must be blameworthy enough to deserve the penalty.[90]

The Supreme Court overturned Penry's death sentence and returned the case to the trial court for re-sentencing. It held that insufficient attention had been given to the effects of Penry's mental handicap; however, the majority of the Supreme Court rejected the argument that the death penalty is unconstitutional for all persons with mental disabilities.[91]

While the Supreme Court ruled that being mentally handicapped does not automatically prevent one from receiving the death penalty, the Court did not specify which criteria should be examined when determining whether a person has the required level of culpability. Some commentators argue that in a capital case involving a mentally handicapped person, the level of culpability could be measured by certain minimum abilities, such as "moral reasoning ability, cause-effect concepts, foresight of behavioural outcomes, strategic planning, intellectual flexibility and impulse control."[92]

The ABA Criminal Justice Standards on Mental Health Standard 7-9.2 states the following with respect to the execution of people with certain mental conditions:

> (a) Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in

[89] *Penry v Lynaugh*, No 87-6177, US Supreme Court (1988, October).
[90] T. Calnen and L. Blackman, "Capital Punishment and Offenders with Mental Retardation: Response to Penry Brief" (1992) 96(6) American J on Mental Retardation 557 at 562.
[91] Calnen and Blackman, at 557 - 559.
[92] Calnen and Blackman, at 560.

> conceptual, social, and practical adaptive skills, resulting from intellectual disability, dementia, or a traumatic brain injury.
>
> (b) Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity:
> (i) to appreciate the nature, consequences or wrongfulness of their conduct,
> (ii) to exercise rational judgment in relation to conduct, or
> (iii) to conform their conduct to the requirements of the law.
>
> (c) A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.
>
> (d) Eligibility for exemption from the death penalty under (a) should be determined at a hearing prior to trial. Eligibility for exemption from the death penalty under (b) should be determined by the judge at the capital sentencing proceeding after the presentation of evidence but before deliberation on a verdict, unless the defense requests a pretrial hearing on the issue. The defendant should bear the burden of proving both exemptions by a preponderance of the evidence.
>
> (e) A finding of criminal responsibility at trial should not bar a finding of eligibility for the exemption in (a) or (b), and a finding of eligibility for the death sentence under (a) or (b) should not preclude finding a mitigating circumstance at sentencing, even if the language defining the relevant criteria is identical.

In non-capital cases in the United States, some lawyers have argued that a mentally handicapped adult who has the "mental age" equivalent to that of a child is incapable of committing a crime. Following the widespread use of intelligence tests early in this century, defendants frequently sought to use the "mental age" component of test results to argue that the legal rules governing children should apply to those who were mentally challenged. In other words, if a child of 7 could not be held legally responsible for a crime, neither should an adult who tested as having the mental capacity of an average 7 year old. This argument was unsuccessful, because the courts reasoned that the presumption that a child does not have the capacity to commit a

crime is due to the fact that he has not lived for very many years, not that his mind is undeveloped.[93]

Although the mental age argument may not be very successful in the United States, the door is certainly open to argue that a person with a mental disability does not have the required intention to commit the crime, and should be found not guilty or should receive a lighter sentence.

VIII. Conclusion

In situations where it may be a viable defence, the argument that the accused lacked the required mental element may be an attractive alternative to the mental disorder defence (section 16). Where the accused's mental condition does not amount to a mental disorder within the meaning of section 16, the lawyer may raise an alternative argument that the accused lacked the capacity to form the required intent or that the accused did not form the required intent. Because a successful defence of lack of mental element may result in an outright acquittal, it is certainly an option worth considering.

In cases where the accused has been charged with a specific intention offence, courts appear willing to consider that although the accused was not mentally disordered for the purposes of *Criminal Code* section 16, he/she was unable to form the intent required. This may result in an acquittal or in conviction of a lesser included offence. In cases where the accused is charged with an offence requiring general intention, it is more difficult to argue that the accused who does not meet the section 16 requirements could not have formed the general intention to commit the offence. The successful use of mental disability to negate intention therefore depends upon the nature of the offence.

On occasion, although evidence of mental disability does not result in an acquittal, it may be applied to mitigate the accused's sentence. The issue of mental disability and sentencing is canvassed in Chapter Twelve.

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[93] Ellis and Luckasson, at 435.

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