UK Criminal Law – Background Information

Adapted lecture handout

The Appeal Structure in Criminal Cases

Note: this is background information only. You are not examined on it, but you will understand things better if you have grasped the basics of the court structure. Please note that from 1 October 2009 the final court of appeal has not been the HL, but the SC, on which see below.

Less serious offences (eg battery, assault) are known as **summary** offences, and are tried in the **Magistrates Court**. Mostly Magistrates are "Justices of the Peace". These are lay people (ie with no legal qualification) who sit in a bench of three. They are advised on questions of law by the Clerk to the Court, who is a qualified lawyer. In the larger cities there are "District Judges" (until recently known as "Stipendiary Magistrates") who are qualified lawyers and sit alone. In either case, these people decide on both questions of law and fact.

Serious offences (eg murder, rape) are known as **indictable** offences, and can only be tried in the **Crown Court**. Here there is both judge and jury, other than in exceptional cases where a judge may try the case alone. The judge will be either a High Court judge, a Circuit Judge or a Recorder (part-time judge). The judge rules on questions of law. The jury decides on questions of fact.

Offences of intermediate seriousness (eg theft) are known as "either-way" offences and can be tried by either summary or indictable procedure, according to the circumstances.

(A very roughly similar, but far from identical, distinction, between misdemeanours and felonies was abolished by the Criminal Law Act 1967. You may come across these terms in older cases. They are still the relevant terms in the USA).

Appeals in Summary Cases

There are two different procedures, depending upon whether the appeal is on a question of fact or a point of law. The following is a description only of the procedure on a point of law.

Either the prosecution or the defendant can appeal to the Divisional Court (DC) on the ground that the Magistrates/District Judge made a mistake of law which resulted in a wrongful acquittal/conviction. This is known as appeal by 'case stated', since the Magistrates/District Judge are required to state for the DC the essential facts of the case and the propositions of law upon which they relied. The DC is asked if the propositions of law are correct. If the DC decides that they are, the original verdict stands. If it

decides that they are wrong, the case is sent back to the lower court with a direction to convict/acquit.

Appeal by case stated can also sometimes come from the Crown Court, where that court was sitting as an appeal court from magistrates.

Further appeal, which can be by either the prosecution or the defendant, goes straight to the Supreme Court (SC). Note, therefore, that appeals in summary cases never go through the Court of Appeal (CA).

Appeals in Indictable Cases

Appeals on either fact or law go to the CA. The general proposition is that only a defendant can appeal against a trial verdict. The prosecution has no general right to appeal against an acquittal. Further appeal, which can only be on a point of law, is to the SC. The prosecution can appeal against the quashing of a conviction by the CA. The CA has the power to continue the defendant's detention in custody, even if they have allowed his appeal, if the prosecution intend to appeal to the SC. The CA also has the power to allow an appeal but order a retrial.

The Criminal Justice Act 2003 introduced a limited right for the prosecution, subject to the consent of the DPP, to appeal against an acquittal at the original trial and ask for a retrial. The CA must be satisfied that there is new and compelling evidence against the defendant and that it would be in the interests of justice to order a retrial. The provisions apply only to a specific list of serious offences, all of which have a maximum penalty of life imprisonment.

Under the 2003 Act the prosecution now also has the right to appeal against a ruling by the judge at the trial which has the effect of terminating proceedings against the defendant or which significantly weakens the prosecution case by ruling certain evidence against him inadmissible. There must be leave to appeal from the trial judge or from the CA. Appeal against evidence rulings applies only to a specific list of serious offences, all of which have a maximum penalty of life imprisonment. If the CA upholds the ruling of the trial judge it must order an acquittal. If it reverses or varies the trial judge's ruling it may order the original trial to continue, order a retrial or grant an acquittal.

Until quite recently the Lord Chief Justice was head only of the Criminal Division of the CA and rarely sat in civil cases. However, due to changes made by the Constitutional Reform Act 2005, the Lord Chief Justice now has responsibility for the legal system in England and Wales as a whole, civil as well as criminal. As a result, there was created the new post of President of the Queen's Bench Division. Now, in the most important CA criminal hearings it is either the Lord Chief Justice or the President who is likely to preside.

Appeals from the DC/CA to the SC

Obviously, not every contested case can end up being appealed, so there are filter systems to determine when a case can be heard by a higher court. There is a particularly important filter system at SC level in criminal cases. An appeal can be heard by the SC if two conditions are satisfied:

(1) The DC/CA granted a "certificate of a point of law of general public importance", and
(2) The DC/CA granted leave to appeal to the HL/SC.

If the DC/CA grants (1) it may also grant (2), but not infrequently it grants (1) but not (2). This can happen if it thinks the point of law is an important one but that it is not seriously disputable as to what the correct answer is. In that case the prosecution/defendant can ask the SC itself to grant leave to appeal. If the SC Appeal Committee (3 Law Lords/Justices) grants leave then the case will be heard later by a full Appellate Committee/panel (usually 5 Law Lords/Justices). If the DC/CA refuses to grant (1) or refuses to grant leave and so does the SC, the case can go no further.

The SC has jurisdiction to hear appeals from England and Wales, and from Northern Ireland. It does not have jurisdiction to hear appeals from Scotland in criminal cases, although it does in civil ones.

(Until 1960 no appeal in a criminal case could go to the HL from the DC at all, and none could go from the CA unless it had the consent of the Attorney-General ("A-G"). That explains why there are very few decisions of the HL in criminal cases before that date.)

The Supreme Court of the United Kingdom ("SC")

The HL was, technically, a Committee of Parliament, the Lords of Appeal in Ordinary (usually known as "Law Lords") being specially appointed life peers and, therefore, also members of the House of Lords in its legislative capacity. Under changes made by the Constitutional Reform Act 2005, the judicial functions exercised by the HL and, in part, by the PC were, as of 1 October 2009, transferred to the Supreme Court. It will not sit, as the HL did, in the Palace of Westminster itself, but in a building on the other side of Parliament Square.

The SC's jurisdiction is largely the same as that of the former HL. As far as criminal law is concerned, the SC hears appeals from England and Wales and from Northern Ireland, but not from Scotland. However, it also hears appeals on devolution issues (which may involve criminal law matters) formerly heard by the PC. The PC continues as a separate body to hear appeals from those few British Commonwealth countries which do not have their own final courts of appeal.

There are 12 judges of the SC at any one time, one of whom is the President, and one of whom is the Deputy President. They are officially styled "Justices of the Supreme Court".

Previously the High Court and the CA were together known as "The Supreme Court of England and Wales". To avoid confusion with the SC, they are now known as "The Senior Courts of England and Wales".

Further information about the SC can be found on the Ministry of Justice website http://www.justice.gov.uk/about/supreme-court-about.htm.

Attorney-General's References

As mentioned above, the prosecution generally cannot appeal against an acquittal on an indictable offence. However, the Criminal Justice Act 1972 introduced a method of clarifying the law in some cases. If the prosecution believes that a defendant may have been acquitted only because of a mistaken view of the law by the trial judge it can ask the A-G to state a reference for the CA. If the A-G agrees, s/he will refer specific questions of law arising out of the case to the CA. The opinion of the CA on the questions is prospective only. The original acquittal is unaffected, but the CA ruling stands as a precedent for the future. It is possible, but unusual, for an A-G's Reference to go from the CA to the SC for their further view of the law.

European Court of Human Rights

Since the passing of the Human Rights Act 1998, which incorporated the European Convention on Human Rights ("ECHR") into UK law, ECHR questions can be raised at any point in the trial/appeal procedure. Whether a violation of the ECHR leads automatically to an acquittal/quashing of a conviction depends upon the nature of the violation.

A defendant cannot bring a case directly in the ECtHR in Strasbourg unless s/he has exhausted the appeal procedure in the UK. A ruling by the ECtHR that there was a violation of the ECHR does not directly affect a defendant's conviction, but may lead to the quashing of the conviction by the DC/CA/SC.

Criminal Cases Review Commission ("CCRC")

This body was set up the Criminal Appeal Act 1995. It is to deal with cases where the defendant lost his/her appeal in the CA/HL but there are subsequent grounds for believing that there may have been a miscarriage of justice. If the CCRC refers a case to the CA it must hear a fresh appeal against conviction and allow/dismiss it. Further appeal to the HL/SC is possible.

Privy Council

The Judicial Committee of the PC consists of essentially the same judges as the SC, though sometimes current or retired judges of the CA and other Commonwealth appeal courts sit. Although the PC in former times used to hear appeals from all over the British Empire (later Commonwealth), in more recent times it has had two, rather limited, jurisdictions for criminal purposes.

(1) It is the final court of appeal for those parts of the British Isles that are not part of the United Kingdom (the Channel Islands and the Isle of Man) and for the few Commonwealth countries which do not have final courts of appeal in their own country. Much of the remaining jurisdiction went when New Zealand set up its own Supreme Court in 2004 and the Caribbean Court of Justice became operational in 2005. However, a few Caribbean countries have decided that they will continue with the old system. The PC sits as a court of the country from which the appeal is being heard. Its decisions are therefore not binding on English courts, but can be persuasive.

(2) Under Acts of the 1990's which devolved some legislative powers to the Scottish Parliament and to the Welsh and Northern Irish Assemblies, the PC had jurisdiction to determine whether the power in question is devolved or remains with the UK Parliament at Westminster. So far as Scotland is concerned, this included ECHR questions, since this was incorporated into Scots law by the devolving Act, not by the Human Rights Act. Therefore, although there is no appeal from Scotland to the SC in criminal cases, such cases could be heard by the PC if they involved an ECHR issue. This part of the PC's jurisdiction will now be taken over by the SC.

The Court of Justice of the European Union ("ECJ")

It is possible, but relatively unusual outside the economic sphere, for a criminal case to involve a matter of EU law. The interrelationship of English and EU law will be discussed in the course on EU law

Criminal Law: A Conceptual Map

1. Common elements of the major offences	2. Major offences	3. Defences (including partial defences)	4. additional
mens rea intention recklessness negligence *actus reus* acts omissions causation	homicide - murder - voluntary manslaughter - involuntary manslaughter - corporate manslaughter non-fatal offences - battery - assault - 'actual bodily harm' - 'wounding/ grievous bodily harm' - 'wounding/ grievous bodily harm with intent' sexual offences - rape - sexual assault property offences - theft - fraud - criminal damage	automatism insanity diminished responsibility provocation self-defence duress necessity	complicity inchoate offences -attempt -conspiracy

Part 1

A. Introduction: What is a crime?

This course examines the characteristics of the laws that determine what behaviour or action is, or ought to be, criminal.

Some definitional difficulties

Like some parts of private law that you will in due course be studying, such as the law of tort, the criminal law looks back at what someone has done, and passes official judgment on it.

However, in the case of the criminal law, the primary purpose of so doing is no longer to compensate the victim (as it sometimes was 1,500 years ago) (JH Baker, An Introduction to English Legal History, 4th edn, 2004). The purpose of passing official judgment on someone's conduct in the criminal courts is to set out a legal basis on which to decide whether punishment should be imposed, and if so, how much.

In that regard, the understanding of 'crime' is a much contested issue, as you might expect. Some theorists have defined a crime in terms of court proceedings: if proceedings are taken against you in the Magistrates' or in the Crown Court, then these must be 'criminal' proceedings. This can in some respects appear to be an unhelpful approach (although a version of it is relied on below). To begin with, these courts also handle some civil proceedings. Secondly, the approach is circular: it does not tell us *why* some legally wrong conduct can be followed by 'criminal' proceedings, but not other legally wrong conduct (like breaking a contract).

Accordingly, some writers focus on the nature of the conduct itself. It is common to suggest that 'conduct which is criminal…usually involves a public wrong and a moral wrong' (S&H 10).

However, the meaning of 'public' here may be misleading. Most crimes will still be crimes if committed in private. The link with moral wrongdoing may also be problematic. Many immoral and indeed illegal acts are not crimes, like breaking a contract. Conversely, some acts are crimes without involving immorality, such as keeping an antique firearm not exempted by the Firearms Act 1968.

To confuse things further, the courts have held some conduct, such as unwittingly selling a lottery ticket to someone under 16 years of age, to be 'not really criminal', even though upon conviction the offender can be sentenced to up to two years in prison: Harrow London Borough Council v Shah [1999] 2 Cr App R 457; [1999] 3 All ER 302 (DC).

In modern times, the debate has had to accommodate the fact that it is not only the Government that can be the direct source of offences. Quasi-autonomous bodies, such as trading standards or animal welfare authorities, can themselves create offences in their own specialised sectors..

Despite all this complexity, it would not be far wrong to describe the focus of this course as being:

> **conduct of a kind that may be subject to proceedings in which the tribunal is *required* to determine whether that conduct was of a kind**

respecting which the tribunal is legally *empowered* to impose official censure (a finding of guilt) and consequently to impose punishment.

Other kinds of law within the criminal justice 'family'.

Criminal law is commonly distinguished from three other areas within what can broadly be thought of as 'criminal justice', although they all overlap and intersect.

First there is the *law of evidence*. In very general terms, the law of evidence is concerned with what kinds of evidence - be it oral testimony or so-called 'real' evidence (such as a DNA sample, or a bloody knife) - are admissible in legal proceedings, and on what terms. It is also concerned with the burden and standard of proof in such proceedings.

Secondly, there is the *law of criminal procedure*. Criminal procedure is a vast subject. It is concerned with the bureaucratic means by which someone is taken through the criminal justice system. So, it begins with the law governing criminal investigation, arrest, detention and charge. It then covers the prosecution process, the way that different courts handle criminal charges, the way in which judges reach sentence, and ends with the criminal appeal process and procedures for any later investigations of miscarriages of justice.

Thirdly, there is the *law of sentencing.* This is really a sub-division of criminal procedure. It concerns the kinds of sentences (and alternatives to sentence) that are available following conviction, and role of judges, barristers, and the probation and support services in reaching the right sentence in an individual case.

Fourthly, there is the law governing so-called *civil penalties*. These are penalties imposed by Government Departments or their agencies, by local authorities, or by quasi-autonomous bodies such as the Financial Services Authority. The most commonly encountered example is the parking fine, but more serious wrongdoing may also attract a civil penalty, such as employing an illegal migrant worker. Typically, in civil penalty cases, the agency or quasi-autonomous body decides whether the offence is proved, and specifies the level of fine as well. It may also have its own appeal system. The Financial Services Authority is an example: see: http://fsahandbook.info/FSA/html/ handbook/DEPP. Penalties are typically fines, but one should include under this heading the withdrawal of a licence to do something, such as possess a shotgun. In the latter case, it is the Chief Police Office who decides if, because someone has broken their licence conditions, they should lose their shotgun licence.

Separating these issues, as we do on university courses, is somewhat artificial. For example, much argument about what should be covered by the law of murder (a criminal law issue) is shaped by the knowledge that, upon conviction for murder, the mandatory life sentence will be passed (a sentencing issue).

However, you will find that the study of what behaviour is and ought to be criminal (subject to official censure) is complex and quite demanding enough without going into the detail of these other areas in a single course. To become a barrister or a solicitor, as well as to pass into our second year, you need to have passed an accredited exam (such as ours) in criminal law.

We do not even try to study *all* behaviour that is or ought to be criminal. In fact we focus on a rather small proportion of all crimes, including the best-known crimes like

murder, manslaughter, rape, assault and battery, theft etc. Strict liability offences account for over half of the roughly 8,000 offences in English criminal law.

B. Three Key Issues in the Criminal Law

1. Codification, Proliferation of Offences and Judicial Law-making.

By way of contrast with many other countries, there is no code of criminal law in the law of England and Wales. Between about 1830 and 1920, most countries around the world codified their criminal law, if they had not done so already. That did not happen in England and Wales. Ironically, the most significant criminal codes drawn up for England and Wales (those of Macaulay and Stephen, in the 19th century) were 'exported' to India, Australia and Canada, but never made it to the statute book here.

English law (as the law of England and Wales is commonly referred to) is a mixture of offences created by the legislature over many years, the earliest still in existence having been passed in 1351, and of offences developed by the judiciary: so called 'common law' offences. By way of contrast, for example, in New Zealand all criminal offences and defences are to be found in the Crimes Act 1961.

Common law offences are few in number but of considerable significance in practice. They include murder, manslaughter, public nuisance, and conspiracy to defraud (although Parliament has tinkered with the law of murder and manslaughter, and overlaid conspiracy to defraud with the Fraud Act 2006). The judiciary also still largely controls the development of some defences at common law, such as insanity, duress and necessity.

The absence of any obligation to include new criminal offences or defences in a specific 'Crimes Act', or its equivalent, may to some extent explain why the criminal law has been permitted by Parliament to expand so rapidly in recent times: the true extent of the expansion simply goes unnoticed when new crimes or defences are created in lots of individual statutes, many of which may not be primarily about crime.

For example, the law governing self-defence and prevention of crime was placed on a statutory footing in what was otherwise a reform of immigration law: the Criminal Justice and Immigration Act 2008, an Act which also made it an offence to possess extreme pornography. The Coroners and Justice Act 2009 is another example. It contains provisions about the law of murder, although it is mainly about reforming the law governing Coroners' courts. In 2001, a reform of bribery law was brought about by the Anti-terrorism, Crime and Security Act.

The courts also have considerable freedom to affect the impact of criminal statutes through the interpretation they give to the laws passed by Parliament.

The European Court of Human Rights has held that, 'the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the ECHR cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.' SW v UK (1995) 21 EHRR 363, para 35.

2. The need for harm or a threat of harm?

The American Law Institute's Model Penal Code is a useful starting point for our

reflection. It is cited at the start of S&H (p3) and, though not uncontroversial in places, many criminal lawyers would accept these principles as stating accurately the aims of English law, even if those aims are not always realized. It will be useful for you to bear these in mind as the course progresses. The purposes of the criminal law, according to the Model Penal Code from the USA are:

> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
>
> (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
>
> (c) to safeguard conduct that is without fault from condemnation as criminal;
>
> (d) to give fair warning of the nature of the conduct declared to be an offense;
>
> (e) to differentiate on reasonable grounds between serious and minor offences.

A recent English statute has had something to say on the issue of how courts are to gauge the seriousness of a crime. The Criminal Justice Act 2003 s143 states:

> 'In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intending to cause or might foreseeably have caused.' (cf. S&H 5-6)

Let us look in turn at two key ideas stated in this quotation, harm and culpability or fault, as we shall describe it.

1. Harm

One key idea is that criminal conduct can be identified in terms of a definition of what causes or risks *harm* in society. There are many attempts to elaborate and rationalise such an idea (see e.g. C&K 3-26; PCL 27-43; S&S 637-657; HER 20-28).

The following four principles are formulated by Joel Feinberg, inspired by the nineteenth century philosopher, John Stuart Mill. In Feinberg's view only (1) and, at a stretch (2) should be the basis for criminalization. (3) and (4), he believes, should not be. What is your view?

1. Harm Principle

> 'It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and that there is no other means that is equally effective at no greater cost to other values.'

2. The Offense Principle

> 'It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it probably a necessary means to that end…

*3. Legal Paternalism***:**

> 'It is always a good reason in support of a prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself and

that there is probably no other means that is equally effective at no greater cost to other values'**.**

*4. Legal Moralism***:**

It 'can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or to others.'

Does a case like Brown [1994] 1 AC 212; [1993] 2 All ER 75 (HL) suggest that English criminal law extends to 3. and 4. above?

What about the offence of paying for sex under the section 53A of the Sexual Offences Act 2003, created by the Policing and Crime Act 2009?

Something of importance to note about 1. above is that the justification for criminal liability is given in terms of 'preventing', 'reducing', or 'eliminating' harm. It follows that it may be justified to create criminal offences that impose liability on those who take risks of causing harm, and well as on those who have actually caused harm. A well-known example is the offence of dangerous driving, contrary to the Road Traffic Act 1988, which is committed whether or not any harm is done by the driving. However, the extent to which the criminalisation of risky conduct, however remote the risk, has come to dominate the criminal law contribution to the statute book has been criticised sharply by the Law Commission: Law Commission, 'Criminal Liability in Regulatory Contexts' (Consultation Paper 195, 2010): see www.lawcom.gov.uk. The Commission gives an example from 2008 when one

Department alone, The Department for the Environment, Food and Rural Affairs, created over 100 offences to deal with transmission of BSE in food, not one of which was concerned with harm actually caused. The criminal law would be vastly reduced in scope if it was concerned only with harm actually done; but would that be a step in the right direction?

2. Fault

A second key idea is that of *individual fault* respecting the commission of an offence.

There are many offences of 'strict' liability, where a conviction may be obtained by proving no more than that the defendant did the act or caused the result in question, whether hr or she was at fault in so doing or not. However, the offences we will be studying in any detail all require some element of fault. For example, no one commits criminal damage unless the damage was caused intentionally or recklessly (Criminal Damage Act 1971).

The Model Penal Code (MPC) sets out four kinds of fault: *intention, knowledge, recklessness and negligence*. Broadly understood, these cover most fault elements employed in English law. However, the lack of a modernised code in England and Wales has meant that there is a variety of words used to express these concepts, and not only in older statutes. For example:

The 'malicious' infliction of harm, under the Offences Against the Person Act 1861 means harm inflicted either intentionally or recklessly. Driving 'without due care and attention', contrary to the Road Traffic Act 1988, is a form of negligent driving.

'Gross negligence' manslaughter is obviously an aggravated form of negligence. The absence of a reasonable belief that the victim is consenting, in rape, is also really a kind of negligence fault element.

However there will be some fault terms (or more broadly, adjectives and adverbs defining or qualifying the scope of an offence) that cannot be quite captured by the four kinds of fault set out in the MPC. 'Dishonesty' in theft and fraud offences is a clear example. 'Dangerous' driving provides another example, as someone can be guilty of this offence without any negligence or other kind of fault on their part.

Notoriously, some important legal concepts, primarily concerned with objectively determined conduct, or states of affairs, have given the courts trouble when it comes to interpreting legislation. This is because they appear to carry with them an implication of fault of some kind. Here are two examples:

1. Am I '*in possession*' of illegal drugs if someone slips some into my bag when I am not looking?
2. Do I '*permit*' effluent to pour into the river from my factory, if the leakage was caused by a vandal overnight, but I only notice and stop it when I come in to work?

C. Relating Conduct to Fault Elements

The existence of a distinction between 'harm', on the one hand, and 'fault' on the other is not a criminal law principle of some kind. It is simply a way of explaining often separate elements of a crime. It is important to bear in mind some key points about the harm or the conduct element (the '*actus reus*' as you will frequently see it described) and the fault element (the '*mens rea*').

1. Sometimes conduct and fault elements are bound up in one action, such as 'conspiring', or 'attempting' to commit a crime.

2. The conduct element need not in itself involve harm-doing; it can be conduct that, for example, poses a risk of harm-doing, like dangerous driving.

3. The conduct element may have what is sometimes called a 'consequence element' attached to it, usually involving harm done. An example is causing death (the consequence element) by dangerous driving (the conduct element).

4. A conduct or consequence element may have what is sometimes called a 'circumstance' element on which criminality depends. An example is the offence of engaging in sexual activity (the conduct element) with someone under the age of 16 (the circumstance element).

5. A 'conduct' element may go beyond an action or omission. It may include a 'state of affairs' such as being 'in possession' of something.

6. The conduct and fault elements of a crime must occur together in the right way. Suppose D sets off in her car with the intention of killing V by shooting, and accidentally runs someone over who turns out to be V. This is not murder, even though D killed V and at that moment intended to kill V. The conduct/consequence element and the fault element do not occur together in the right way because the running over of V was not an action in itself meant to give effect to the intention to kill. However, what started as an accident can, if the causing of harm continues, have a fault element superimposed on it: see *Fagan* (1969) 1 QB 439; *Miller* [1983] 2 AC 161; *Kaitmaki* [1985] AC 147.

Part 2

Causation and Omissions

(There are THREE concepts to be discussed concerning actus reus: causation, omissions and acts. We deal with *only* causation and omissions at this point.
Acts have to be *voluntarily done*, and where they are not, the defence of *automatism* may be available. Where the automatism arises from mental disorder it may fall under the different defence of *insanity*. We discuss this next semester).

A. Causation

1. Introduction

The need for causation: White [1910] 2 KB 124 (CCA)

State of the law: 'hitherto the judges have made little progress in establishing the principles of imputation' (Williams)

Flexibility of approach:

'The first point to emphasise is that commonsense answers to questions of causation will differ according to the purpose for which the question is being asked.'
Environment Agency v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; [1998] 1 All ER 481 (HL), per Lord Hoffman

2. Principles of Causation

The minimum requirement: "but for" causation – some causal impact on the outcome, even if there are other causes too:

> "As a matter of law, it was sufficient if the prosecution could establish that it was a cause, provided that it was a cause outside the de minimis range, and effectively bearing upon the acceleration of the moment of the victim's death."
> (Cato (1976) 62 Cr App R 41; [1976] 1 All ER 260 (CA))

> 'The but for cause is sometimes referred to as the factual cause, or the de facto cause, or the scientific cause. The important thing is to distinguish it from cause in another sense, the 'imputable' (or 'legal' or 'effective' or 'direct' or 'proximate') cause ....' (Williams)

Negated where

(a) The Causal Chain is broken (1): the unconnected event:

> an 'Abnormal or Coincidental Event' (Hart and Honoré)
> (What do you think makes an event 'abnormal' or 'coincidental'?)

(b) The Causal Chain is broken (2): the intervening human action:

a ‘New Intervening Voluntary Act’ (Hart and Honoré)
(What does ‘voluntary’ mean?)

*Kennedy (No 2) [2008] 1 AC 269; [2007] 4 All ER 1083; [2008] Crim LR 222 (HL)

D supplied V with a syringe containing heroin, with which V then injected himself and died. Held, D did not cause V’s death. The fully-informed act of a responsible adult person (V) broke the causal chain from D’s act of supply.

3. When is the Causal Chain NOT broken?

(a) when the unconnected event is not an abnormal occurrence

(i) medical treatment

*Jordan (1956) 40 Cr App R 152 (CCA)
treatment ‘not normal’ and ‘palpably wrong’ broke causal chain

*Smith [1959] 2 QB 35; [1959] 2 All ER 193 (CMAC)
treatment ‘thoroughly bad’ and 75% chance of recovery, but causal chain not broken. Jordan distinguished as ‘a very particular case dependent upon its exact facts’ (what does that mean?)

‘if at the time of the death the original wound is still an operating and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.’

Malcherek (1981) 73 Cr App R 173; [1981] 2 All ER 422 (CA)

"There is no evidence in the present case here that at the time of conventional death, after the life support machinery was disconnected, the original wound or injury was other than a continuing, operating and indeed substantial cause of the death of the victim, although it need hardly be added that it need not be substantial to render the assailant guilty."

*Cheshire (1991) 93 Cr App R 251; [1991] 3 All ER 670 (CA)

Contrast these two different versions of the cause of death. Is one more accurate?

(*x*) death was 'due to a condition which was produced as a result of treatment to provide an artificial airway [in the throat] in the treatment of gunshot wounds of the abdomen and leg. In other words, I give as the cause of death cardio-respiratory arrest due to gunshot wounds of the abdomen and leg.' (pathologist for the Crown)

(*y*) 'the cause of his death was the failure to recognise the reason for his sudden onset and continued breathlessness..., the severe respiratory obstruction, including the presence of stridor.' (consultant for the defence)

'when the victim of a criminal attack is treated for wounds or injuries by doctors or other medical staff attempting to repair the harm done, it will *only be in the most extraordinary and unusual case* that such treatment can be said to be *so independent* of the acts of the accused' as to be regarded as the cause of death.

The test:

'the accused's acts need not be the sole cause or even the main cause of death, it being sufficient that his acts contributed significantly to that result. Even though negligence in the treatment of the victim was the immediate cause of death [it is only if] the negligent treatment was *so independent* of his acts, and *in itself so potent* in causing death' that it will be regarded as supervening the acts of the accused.

(ii) when not an unforeseeable reaction to D's conduct

(b) when the intervening act is not 'voluntary'

(i) compelled by self-defence: *Pagett (1983) 76 Cr App R 279 (CA)

(ii) amounts to justifiable force: Pagett, supra

(iii) "innocent": Michael (1840) 9 C&P 356 (CCCR)

(c) An anomalous case: 'take the victim as you find her'.

(i) physical weaknesses (the 'eggshell skull rule')

(ii) when the victim refuses to undergo medical treatment

"It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the casual connection between the act and death."

(Can this case, or the eggshell skull rule generally, be reconciled with the principle that an abnormal act or event will break the causal chain?

5. Reform

Draft Criminal Code, clause 17:

> "(1) Subject to sections (2) and (3), a person causes a result which is an element of an offence when
>
> (a) he does an act which makes a more than negligible contribution to its occurrence;
>
> (b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.
>
> (2) A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs
>
> (a) which is an immediate and sufficient cause of the result;
> (b) which he did not foresee; and
> (c) which could not in the circumstances reasonably have been foreseen."

B. Omissions

1. Introduction

Acts and Omissions: are they significantly different? Morally? Factually? See

*Airedale NHS Trust v Bland [1993] AC 789; [1993] 1 All ER 821 (HL)

2. The Law of Omissions

There is a duty to act where there is:

(a) Close blood relationship

How close?
*Stone and Dobinson [1977] QB 354; [1977] 2 All ER 341 (CA)

(b) Prior agreement to support another

*Instan [1893] 1 QB 450 (CCCR) Gibbins and Proctor (1918) 13 Cr App R 134 (CCA)

medical duties:

*Airedale NHS Trust v Bland, above:

> 'In general it would not be lawful for a doctor ... to stop treatment if its continuance would confer some benefit on the patient. But a doctor was under no duty to continue to treat such a patient where a large body of informed and responsible medical opinion was to the effect that no benefit at all would be conferred by its continuance.'

(c) Duty under contract

Pittwood (1902) 19 TLR 37 (QB)

(d) Prior dangerous act

*Miller [1983] 2 AC 161; [1983] 1 All ER 978 (HL) (cf Fagan, above)

Khan and Khan [1998] Crim LR 831 (CA)
*Evans [2009] EWCA Crim 650

(e) Duty under modern welfare/ administrative statute

e.g. omissions re maintenance and education of children are offences: Children and Young Persons Act 1933 s.1
Education Act 1944 s.39
omission of driver to report a road accident causing damage or injury within 24 hours: Road Traffic Act 1988 s.170

3. A General Duty to Act?

'A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.' (Stephen)

See: Vermont statute:
'A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.'

4. Consent by V: can it negate a duty to act?

Consent as a defence more generally will be dealt with later in the course.

However, a question worth addressing here is whether V can, in law, consent specifically to their own death, such as to exonerate D of murder or related offences. The issue is whether, if V refuses treatment, omitting to treat that person with the result that they die will be a non-criminal omission:

Re B (adult: refusal of medical treatment) [2002] 2 All ER 449 (Fam)

In this case it was held that it would not be unlawful (assisting suicide) for doctors to withdraw medical treatment at V's request, meaning V would, as they and she knew, die But was there a mere 'refusal' (omission) to treat someone in this case, or an actual withdrawal (action) of treatment? Does that matter?

See, for a partial solution, the Mental Capacity Act 2005, s.25(5), and 25(6).

Can you see the relevance of the refusal of treatment point to Blaue (above)

Part 3

Motive and Intention, Murder

A. Motive and Intention

A. Motive

We will be using a discussion of the crime of murder to cast light on two fault elements of importance to the criminal law: intention and knowledge:

> 'Small children think of wrongness as any disobedience to rules, irrespective of intention. Later they learn the relevance of wrongful intent, and defend themselves by saying 'I didn't mean to do it'. (Glanville Williams)

Contrast this mental state with 'motive', which refers to the agent's *longer-term* or *more fundamental* aims or desires and which lead to the formulation of intentions. According to Jerome Hall:

> 'A consideration of motives requires and indicates a much more advanced level of ethical criticism than is involved in appraisals based only on the fact that a harm was inflicted intentionally, not by accident'.
>
> 'A crime may be committed from the best of motives and yet remain a crime.' (Williams)

The position summarised and explained more fully:

> 'Sometimes, when we speak of motive we mean an emotion such as jealousy or greed, and sometimes we mean a species of intention. For example, D intends (a) to put poison in his uncle's tea, (b) to cause his uncle's death and (c) to inherit his money. We would normally say that (c) is his motive.
>
> Applying [a] test of 'desired consequence' (c) is certainly also intended. The reason why it is considered merely a motive is that it is a consequence ulterior to the *mens rea* and the *actus reus*; it is no part of the crime.... [I]t follows that motive, by definition is irrelevant to criminal responsibility....' (S&H)

B. The Mental Element in Murder

1. Murder: a common law crime.

Murder remains a crime at common law and is defined as killing, under the Queen's peace, and with malice aforethought, a human being who was born alive.

(There used to be a requirement for all forms of homicide that the death had to occur within a year and a day of the act or omission initiating death. The

Law Reform (Year and a Day Rule) Act 1996 abolished this archaic rule. The only restriction which now exists is that if death has occurred more than 3 years after the initiating act/omission, or there has been a previous conviction of D for the injury which ultimately resulted in death, the Crown Prosecution Service must obtain the consent of the A-G for a prosecution.)

In this lecture we consider the *mens rea*, 'malice aforethought'.

2. 'Malice aforethought'

The formal name for the *mens rea* of murder, under section 1 of the Homicide Act 1957. 'Malice' has a special meaning, and in modern law there is no need for forethought (contrast eg US or French law).

The key term: *intention*.

Malice aforethought = (i) intention to kill or
(ii) intention to do grievous bodily harm ("GBH").

The history of (ii):

Smith [1961] AC 303, 335; [1960] 3 All ER 161 (HL) (see now Criminal Justice Act 1967, s 8)
Hyam [1975] AC 55; [1974] 2 All ER 41 (HL)
Cunningham [1982] AC 566; [1981] 2 All ER 863 (HL)

3. Definition of Intention

The law sometimes – and murder is a good example – appears to distinguish between kinds of intention. For convenience sake, these can be called 'direct' and 'indirect' (also known as 'oblique') intention, although you should be warned that the cases neither use these terms nor distinguish formally between 'two kinds' of intention.

'Direct' intention = *aim or purpose*.

'Indirect' intention = what may be inferred from the fact that *someone knew a circumstance or consequence would occur*, if they went ahead with what they aimed (their direct intent) to do. So, if my aim is to shoot someone, and I know that doing so will involve making a loud noise when the gun goes off, I may be found to have (indirectly or obliquely) intended to make a gun-shot noise, even though that was not what I was aiming to do, which was shoot someone.

4. Indirect intention

(a) Two aspects

First, the accused must have *actually* foreseen the side-effect/consequence. The previous approach of the HL in Smith, above, that it was sufficient that a *reasonable man* would have seen it, was reversed by s8 of the Criminal Justice Act 1967, which provides:

"A court or jury in determining whether a person has committed an offence,

(a) shall not be bound to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances."

Second, there is a question about how *likely* or *certain* the foreseen side-effect/consequence must be in order to count as being intended. After a period of uncertainty English law now seems to be clear that something, if it was not aimed at by D, must have been seen by him as virtually certain to occur if it is to count as intended by him.

(b) An illustration of the dominant approach

> 'A man who, at London Airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit. The possibility that the plane may have engine trouble and be diverted to Luton does not affect the matter. By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, *because it is a moral certainty* that that is where he will arrive.'

(Lord Bridge in *Moloney [1985] AC 905, [1985] 1 All ER 1025 (HL) - emphasis added. But was Lord Bridge confused? Isn't this a case of direct intention subject to constraint, rather than indirect intention?)

'Foresight of *moral certainty*' means foreseeing that something that will happen 'unless something unexpected supervenes to prevent it':

> 'the probability of the consequence taken to have been foreseen must be *little short of overwhelming* before it will suffice to establish the necessary intent'. (Moloney)

The CA in Nedrick (1986) 83 Cr App R 267; [1986] 3 All ER 1 confirmed this, but substituted the idea of 'foresight of *virtual* certainty' for the more opaque '*moral* certainty' in Moloney. With some comparatively minor modifications, this has been approved by the HL in Woollin, below.

(c) The subsidiary approach

Disapproved in Moloney is the older case of Hyam, above, under which *foresight of a (highly) probable consequence* was enough where there was no direct intention to kill or cause GBH.

(d) The battle between the two approaches: the Moloney Guidelines

Moloney also provided guidelines for trial judges to direct juries, and it was these that caused difficulties. They were told that they should direct juries:

> 'First, was death or really serious injury ... a *natural consequence* of the defendant's voluntary act? Second did the defendant *foresee* that consequence as being a natural consequence of his act? The jury should then be told that if they answer Yes to both questions it is a proper inference for them to draw that he intended the consequence.'

The problem was that something could be a *natural* consequence of D's act (in the sense of being something which was not totally unexpected) without it having been antecedently probable, far less highly probable or virtually certain.

This gave rise to the appeal in Hancock & Shankland [1986] AC 455; [1986] 1 All ER 641 (HL). The HL upheld the main thrust of the judgement in Moloney, namely that murder required *intention* to kill or cause GBH, but said that the guidelines to trial judges at the end of Lord Bridge's speech were misleading, because, per Lord Scarman:

> "They require an explanation that *the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended*. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence.' (emphasis added).

The HL nevertheless declined to provide any revised guidelines and said that it did not think it was necessarily a good idea for the CA to attempt to do so either.

Not surprisingly, the CA promptly ignored the suggestion that trial judges did not need formal guidelines, and provided them in *Nedrick, above.

Giving the judgement of the Court in that case Lord Lane CJ said:

"Where the charge is murder and in the rare case where the simple direction on intent is not enough,

> '(A) it may be helpful for a jury to ask themselves two questions.(1) How probable was the consequence which resulted from the defendant's … act? (2) Did he foresee that consequence?…

> (B) the jury should be directed that they were not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a *virtual certainty* (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.'

(e) All Clear Now?

As mentioned, the HL has now, subject to some minor changes, given its seal of approval to the decision in Nedrick.

*Woollin [1999] 1 AC 92; [1998] 4 All ER 103 (HL)

It thought, however, that the full direction was unduly complicated, and that part (A) could generally safely be omitted:

> 'it is unlikely if ever to be helpful to direct the jury in terms of the two questions set out in (A) [in Nedrick] … these questions may detract from the clarity of the critical direction in (B).' (Lord Steyn)

In (B), the HL said that it would be better to direct the jury in terms of 'finding' intention rather than 'inferring' it.

But the case leaves at least one unresolved issue. If D's foresight of a consequence as being certain to occur counts in law as intending it why does the HL say only that the jury are *entitled* to find intention? Shouldn't they be *obliged* to find intention? Is this because the legal position is still, strictly, one of when, as a matter of evidence, intention can be found, and not a definition of what, in law, 'intention' actually means? The HL, by replacing 'infer' with 'find' seemed to be moving more in the direction of holding that this is a definition of intention in law.

It was so interpreted by the CA (Civil) in

Re A (Children), above

where the majority held that if the death of the weaker child, although undesired, was seen as virtually certain there was no alternative but to hold that it was, in law, intended.

But in

Matthews and Alleyne [2003] 2 Cr App R 461; [2003] Crim LR 553 (CA)

the court held that Woollin laid down only a rule about *evidence* of intention.

This latter position is, arguably, difficult to understand. If foresight of a virtual certainty is not, in law, intention, but only evidence of intention, what is it that

the jury are to find from this evidence? It can't be direct intention, because any question of indirect intention arises only if the jury thinks there was not, or may not have been, direct intention. So what is it?

5. Transferred Malice

The general principle is that if D intends to cause a harm to V but, in trying to do so, by accident causes the same harm to W then he is treated in law as if he intended to cause it to W.

Latimer (1886) 17 QBD 359 (CCCR)

A highly unusual variant on this arose in:

A-G's Reference (No 3 of 1994) [1998] AC 245; [1997] 3 All ER 936 (HL)

D stabbed V, intending to cause her GBH. V was pregnant at the time. The shock of the stabbing induced premature birth of her child, which then died as a result of its prematurity. The HL held that D could be convicted only of manslaughter of the child, not of murder. Given that intent to cause GBH is sufficient MR for murder, that D intended to cause GBH to V and that, by accident, he caused the death of W (the child), why should this be so?

C. Knowledge, belief, and the law of Murder

There is a lot of learning on so-called 'oblique' or 'indirect' intention. This is generated by the contentious claim that oblique/indirect intention is indeed a form of intention. A less common but arguably more attractive approach is to say that the person who sees death as an inevitable side-effect of his or her action 'knows' or 'believes' that the death will occur, even if he or she does not intend it to occur; and such knowledge/belief is enough to convict of murder: it is a form of 'malice' under the Homicide Act 1957.

To decide whether or not this is an attractive approach, we need to consider the meaning of 'knowledge' and of 'belief' in criminal law. These are important concepts in some other crimes that we will be studying, such as conspiracy.

"I conclude that the necessary and sufficient conditions for knowing that something is the case are first that what one is said to know to true, secondly that one be sure of it and thirdly that one should have the right to be sure" (AJ Ayer, The Problem of Knowledge, at 35).

The six characteristics of belief: it must about something; true or false; open to revision; fallible; there must be commitment to it; it must depend for its identity on other related beliefs (Shute, in Shute and Simester, Criminal Law Theory, 195)

Question A: can one 'know' the future? See:

Saik [2007] 1 AC 18; [2006] 4 All ER 866 (HL)

Question B: if you close your mind to something's existence do you 'know' that something exists? See:

Westminster City Council v Croyalgrange Ltd (1986) 83 Cr App R 155, at 164; [1986] 2 All ER 353 (HL)

Draft Criminal Code, clause 18(1)(a): a person acts knowingly, 'with respect to a circumstance only when he is aware that it exists or will exist but also when he avoids taking steps that might confirm his belief that it exists or will exist.'
On belief, see:

Hall (1985) 81 Cr App R 260 (CA).

Now, go back to the murder cases in which the courts have struggled to find an 'intention'. Does the learning on 'knowledge' and belief help us to analyse them in a new way, without the need to concern ourselves with 'oblique intention'?

6. Reform

Draft Criminal Code, clause 54:

"A person is guilty of murder if he causes the death of another
(a) intending to cause death; or
(b) intending to cause serious personal harm and being aware that he may cause death…"

More recently there has been:

Law Commission No 304: *Report on Murder, Manslaughter and Infanticide*, 2006

This substantial report recommends far-reaching changes to the law of homicide. It proposes that murder would be split into two categories: first-degree murder and second-degree murder. Only first-degree murder would attract the mandatory life sentence. Second-degree murder would attract a discretionary sentence up to a maximum of life.

First-degree murder would encompass:

(1) intentional killings, and
(2) killings with intent to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death (para 2.79)

Second-degree murder would encompass:

(1) killings intended to cause serious injury: or

(2) killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death; or

(3) killings intended to kill or to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death but successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact (para 2.70).

It will be seen that first-degree murder would be narrower than present murder, because an intent to do GBH would not be sufficient unless D was also aware of a serious risk of causing death. This is very similar to what the Draft Code proposed for murder as a whole, except that the new version refers to awareness of a *serious* risk of causing death.

Second-degree murder, on the other hand, would be wider than present murder. Not only would it, in (1), cover intent to do GBH, but, in (2), cases that are currently classified as involuntary manslaughter, and in (3), ones that are currently classified as voluntary manslaughter. (See further under lectures 4 and 8.)

Part 4

Voluntary Manslaughter – Provocation, Diminished Responsibility & Suicide Pact

Voluntary manslaughter - applies where the defendant had the mens rea for murder but has a partial defence which reduces the conviction from one of murder to one of manslaughter. It is distinguished from

Involuntary manslaughter – where the defendant did not have the mens rea for murder, but only a less blameworthy state of mind (intention to commit an unlawful and dangerous act, gross negligence or, perhaps, subjective recklessness.

Voluntary Manslaughter has THREE forms: where the defendant was subject to **provocation**, or **diminished responsibility**, or participated in a **suicide pact** which s/he survived.

Note that no-one is ever *charged* with voluntary manslaughter. The *charge* is one of murder, but if the defendant is successful in his/her partial defence their *conviction* is of manslaughter.

Apart from labelling, the crucial difference between a murder and a manslaughter conviction is the sentence. In murder the judge *must* impose a life sentence, by virtue of the Murder (Abolition of Death Penalty) Act 1965. In manslaughter (either voluntary or involuntary) the judge has discretion in sentencing up to a *maximum* of life imprisonment.

1. Provocation

Homicide Act 1957 s.3

> 'Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have had on a reasonable man'.

'the question . . . shall be left to the jury'

Johnson (1989) 89 Cr App R 148; [1989] 2 All ER 839 (CA)

'whether by things done or by things said or by both together'

Doughty (1986) 83 Cr App R 319 (CA)
Johnson, above
Baillie [1995] 2 Cr App R 31 (CA)

2. The Subjective Question

'to lose his self-control'

Duffy [1949] 1 All ER 932n (CCA)
Ibrams (1982) 74 Cr App R 154 (CA)
Thornton (No. 1) (1992) 96 Cr App R 112; [1992] 1 All ER 306 (CA)
Pearson [1992] Crim LR 193 (CA)
*Ahluwalia (1992) 96 Cr App R 133; [1992] 4 All ER 889 (CA)
*Thornton (No. 2) [1996] 2 Cr App R 108; [1996] 2 All ER 1023 (CA)

3. The Objective Question

'everything both done and said according to the effect which, in their opinion, it would have had on a reasonable man'

Bedder (1954) 38 Cr App R 133; [1954] 2 All ER 801 (HL)
which did not allow any personal characteristics of D to be taken into account in the objective part was overruled by:

*Camplin [1978] AC 705; [1978] 2 All ER 168 (HL)

'the judge should . . . explain to [the jury] that the reasonable man . . . is a person having the power of self-control to be expected of an ordinary person of the age and sex of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him'.

Newell (1980) 71 Cr App R 331 (CA)
Ahluwalia, above
*Morhall [1996] 1 AC 90; [1995] 3 All ER 659
(HL) Humphreys [1995] 4 All ER 1008 (CA)

The effect of Camplin seemed relatively clear, but led to a conflict of authority between the CA and the PC on the question of whether any mental disorder of D could be taken into account in the objective part of the test. The CA held that it could, and the PC held that it generally could not.

Dryden [1995] 4 All ER 987 (CA)
Luc Thiet Thuan [1997] AC 131; [1996] 2 All ER 1033 (PC)
Campbell (No 2) [1997] 1 Cr App R 199 (CA)

The HL attempted to resolve this conflict, but, at the same time, created other unclarities:

Smith (Morgan) [2001] 1 AC 146; [2000] 4 All ER 289

The general effect of the decision was to uphold the CA decisions:

> ‘the judge should not have directed the jury … that the effect of Smith’s depression on his powers of self-control was ‘neither here nor there’. They should have been told that whether they took it into account in relation to … whether the behaviour of the accused had measured up to the standard of self control which ought reasonably to have been expected of him was a matter for them to decide.’ (Lord Hoffman)
>
> Lord Hoffman disapproved of judges directing juries in terms of “the reasonable man with such-and-such characteristics”. But the Homicide Act itself uses the term “reasonable man”. It was also said that it was up to the jury, not the judge, to decide what characteristics of D should be taken account of in the objective part of the test.

However, there has been a further important development.

*Holley [2005] 2 AC 580; [2005] 3 All ER 371; [2005] Crim LR 966 (PC)

In this case nine Law Lords, sitting as the Judicial Committee of the PC, hearing an appeal from Jersey in the Channel Islands, held by a 6:3 majority that Smith (Morgan) was wrongly decided and Luc Thiet Thuan was rightly decided.

The majority reasoning was that the highly subjectivised approach laid down in Smith (Morgan) to the objective part of the test was simply incompatible with the reference in s3 of the Homicide Act to “the reasonable man”.

Mental disorder of D, they held, could of course be relevant to the subjective part of the test, ie as evidence that D was actually provoked to lose self-control. Following Morhall, this could also, in some circumstances, be relevant to the objective part. That is, if D was taunted *about* a mental disorder from which s/he suffered, the question for the jury would be whether a person of reasonable self-control suffering from that mental disorder would have reacted as D did.

However, if the provocation did not relate to the mental disorder (eg D suffered from schizophrenia, but was not taunted *about* this) then it was irrelevant as regards the objective part. The test in such a case could not be one of the reaction of a “reasonable person with D’s mental disorder”. If D wished to rely on mental disorder, as well as provocation, s/he would have also to plead diminished responsibility.

Although a decision of the PC cannot generally overrule one of the HL, it was held by a five-judge CA in:

James, Karimi [2006] QB 588; [2006] 1 All ER 759; [2006] Crim LR 629 (CA)

that in this particular instance the Law Lords had indicated to the lower courts that their PC decision was to be preferred to their HL one and therefore the CA should, unusually, follow the PC one.

Mancini [1942] AC 1; [1941] 3 All ER 272 (HL)
Camplin, above

'the question is not merely whether [the reasonable man] . . . would in like circumstances be provoked to lose his self-control but also react to the provocation as the defendant did'

Clarke [1991] Crim LR 383 (CA)

4. Reform of the Provocation Defence

Draft Code, cl.58

'A person who, but for this section, would be guilty of murder is not guilty of murder if: (a) he acts when provoked (whether by things done or things said or both together and whether by the deceased person or another) to lose his self-control; and (b) the provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control.'

Law Commission No 290: *Report on Partial Defences to Murder*, 2004

proposed (para 3.168) that the defence be retained in modified form, with more of a justificatory element, along the following lines (which are suggested as statements of principle, rather than a statutory formulation):

"1) Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to

(a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or

(b) fear of serious violence towards the defendant or another; or

(c) a combination of (a) and (b); and

a person of the defendant's age and of ordinary temperament, ie ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.

2) In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

3) The partial defence should not apply where

(a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence, or

(b) the defendant acted in considered desire for revenge.

4) A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered the fear.

…

6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply."

In 2006, as mentioned in the material for the preceding lecture, the Commission produced its *Report on Murder, Manslaughter and Infanticide*. What it now proposes is that intentional killing under provocation would be labelled as second-degree murder, rather than manslaughter.

This is obviously controversial, but the Commission says "The primary importance of partial defences should be seen as lying in the impact they have on sentence rather than on verdict…Therefore, in our view, the argument for partial defences that is based on fair labelling – avoiding the label 'murderer' – is of secondary importance compared to the sentence mitigation principle" (para 2.147).

On 28 July 2008 the Ministry of Justice issued a Consultation Paper entitled *Murder, manslaughter and infanticide: proposals for reform of the law*. (CP19/08).
It can be downloaded from www.justice.gov.uk/publications/cp1908.htm. (Be advised that it runs to 64 pages and includes also consideration of complicity, which we shall not be touching upon until next semester.)

The Paper leaves aside the Commission's proposals for separate categories of first- and second-degree murder, but it considers, and to an extent adopts, their proposals for reform of provocation and diminished responsibility. The Consultation Paper led to the new law that is on the statute book, in virtue of the Coroners and Justice Act 2009, but is not yet in force. It will be assumed, for the purposes of your examination, that it is in force, although I am afraid that des not exempt you from having to know the existing (soon-to-become-"old") law.

As regards 'provocation', the partial defence under that name is abolished, and replaced with a new partial defence of "loss of control", in the following elaborate terms:

Partial defence to murder: loss of control resulting from fear of violence etc

54 Partial defence to murder: loss of control

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—

(a)D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b)the loss of self-control had a qualifying trigger, and

(c)a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2)For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3)In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4)Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5)On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6)For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7)A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8)The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55Meaning of "qualifying trigger"

(1)This section applies for the purposes of section 54.

(2)A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3)This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4)This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—

(a)constituted circumstances of an extremely grave character, and

(b)caused D to have a justifiable sense of being seriously wronged.

(5)This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6)In determining whether a loss of self-control had a qualifying trigger—

(a)D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b)a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c)the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7)In this section references to "D" and "V" are to be construed in accordance with section 54.

56 Abolition of common law defence of provocation

(1)The common law defence of provocation is abolished and replaced by sections 54 and 55.

(2)Accordingly, the following provisions cease to have effect—

(a)section 3 of the Homicide Act 1957 (c. 11) (questions of provocation to be left to the jury);

(b)section 7 of the Criminal Justice Act (Northern Ireland) 1966 (c. 20) (questions of provocation to be left to the jury).

5. Diminished Responsibility

This partial defence existed at common law in Scotland and was introduced into English law by:

Homicide Act 1957 s2(1)

'Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility….'

Reduces murder to manslaughter.

*Byrne, above - 'a partial insanity or being on the borderline of insanity'
(but this dictum should treated with caution. It was a phrase used by the Scots judges, but Scots Law has a broader conception of insanity than English Law. In England, diminished responsibility and insanity are defences based on rather different criteria.)

Coherence of the defence? Two requirements:

'abnormality of mind' – question for psychiatric testimony:

Sanderson (1993) 98 Cr App R 325 (CA): paranoid psychosis = abnormality of mind if resulting from abuse as child and not just drug-taking

'as substantially impaired his mental responsibility….' – moral question for jury

A case of 'compassionate pragmatism rather than … rarefied verbal analysis too frequently encountered in English criminal law' (Ashworth)? *Or* 'One person's 'rarefied verbal analysis' is another's technical precision in the use of legal terms' (Norrie).

cf provocation where there is a mental characteristic affecting the accused's general provocability: should this be treated as DR?

Ahluwalia, above (DR may be used as fallback for the 'battered woman' where provocation hard to prove, but carries stigma of mental incapacity)

When alcoholism capable of amounting to DR

Where both intoxication and DR present

6. Reform of Diminished Responsibility

More recently the Law Commission has recommended that a successful plea of DR would lead to a conviction for second-degree murder, rather than one of manslaughter. The Ministry of Justice 2008 Consultation Paper (above), while, as mentioned, not addressing the issue of first- and second-degree murder, proposed a reform of the defence that found its way into the Coroners and Justice Act 2009:

52 Persons suffering from diminished responsibility (England and Wales)

(1)In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute—

"(1)A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—

(a)arose from a recognised medical condition,

(b)substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and

(c)provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A)Those things are—

(a)to understand the nature of D's conduct;

(b)to form a rational judgment;

(c)to exercise self-control.

(1B)For the purposes of subsection (1)(c), an abnormality of mental functioning

provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

(2)In section 6 of the Criminal Procedure (Insanity) Act 1964 (c. 84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for "mind" substitute "mental functioning".

Notice how much simpler the definition of diminished responsibility is, compared with the defence of loss of self-control. The definition of diminished responsibility is drawn largely from the Law Commission's original proposals in 2006, with one important exception. The Commission had recommended that 'developmental immaturity' be, in itself, a basis for reducing murder to manslaughter under the heading of diminished responsibility. The Government rejected this view, as it thought developmental immaturity was adequately catered for under the definition just given in terms of 'abnormality of mental functioning''.

By way of contrast, the provocation defence, as recommended by the Commission, was much altered, in particular by the perceived need to remove certain kinds of provocation (principally evidence of infidelity) from the scope of the loss of self-control defence.

7. Suicide Pact

Homicide Act 1957, s.4

(1) 'It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other . . . being killed by a third person.

(2) Where it is shown that a person charged with the murder of another killed the other or was a party to his . . . being killed, it shall be for the defence to prove that the person charged was acting in pursuance of a suicide pact between him and the other'.

Related legislation: Assisting suicide: refer to Lecture 20 (Complicity)

Suicide Act 1961, s.2

(1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years. . .

(4) . . . no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions'.

Part 5

Self-Defence and Mistake

Self-defence/justifiable/necessary force

1. Justifiable force

Operates as *complete* defence. Justifiable force in self-defence existed as a defence at common law and will often overlap with the defence of prevention of crime under:

Criminal Law Act 1967 s.3, which provides:

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the common law on the question whether force used for a purpose mentioned in the subsection is justified by that purpose.

Until recently the working-out of these principles was contained solely in the case law, but it has now been placed on a statutory basis by:

Criminal Justice and Immigration Act 2008 s76, which came into force on 14 July 2008, and states:

"**Reasonable force for purposes of self-defence etc.**

(1) This section applies where in proceedings for an offence –

(a) an issue arises as to whether a person charged with the offence ('D') is entitled to rely on a defence within subsection (2), and

(b) the question arises whether the degree of force used by D against a person ('V') was reasonable in the circumstances.

(2) The defences are –

(a) the common law defence of self-defence; and

(b) the defences provided by section 3(1) of the Criminal Law Act 1967.

…

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have a particular belief as regards the existence of any circumstances –

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely upon it for the purposes of subsection (3), whether or not –

(i) it was mistaken, or
(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication which was voluntarily induced.

(6) The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case) –

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

(9) This section is intended to clarify the operation of the existing defences mentioned in subsection (2).

(10) In this section –

(a) 'legitimate purpose' means –

(i) the purpose of self-defence under the common law, or

(ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);

(b) references to self-defence including acting in defence of another person; and

(c) references to the degree of force used are to the type and amount of force used."

2. The provisions of the statute are not intended to change the law, which are to be found in the following authorities.

(a) Common law

Cousins [1982] QB 526; [1982] 2 All ER 115 (CA)

(b) Pleading self-defence/justifiable force

Palmer [1971] AC 814; [1971] 1 All ER 1077 (PC)
Bird (1985) 81 Cr App R 110; [1985] 2 All ER 513 (CA)
Field [1972] Crim LR 435 (CA)
A-G for NI's Reference (No 1 of 1975) [1977] AC 105; [1976] 2 All ER 937 (HL)
*A-G's Reference (No 2 of 1983) [1984] QB 456; [1984] 1 All ER 988 (CA)
*Beckford [1988] AC 130; [1987] 3 All ER 425 (PC)
Owens v HM Advocate 1946 JC 119 (HCJ)

2. Reasonableness - subjective/objective

3. Mistake

*Morgan [1976] AC 182; [1975] 2 All ER 347 (HL) – if a crime requires, in law, a *mens rea* of intention or subjective recklessness, then an honest mistake negatives *mens rea.* The reasonableness of a mistake will be relevant only evidentially as to whether the jury believe D when s/he asserts that s/he was mistaken.

*Williams (1983) 78 Cr App R 276; [1987] 3 All ER 411 (CA) – mistake as to need for self-defence, law follows Morgan, honest mistake will do

Ashley v Chief Constable of Sussex Police [2008] 1 AC 962; [2008] 3 All ER 573 (HL), per Lord Scott at paras [16] - [20] and Lord Rodger at [50] – [53] on why it is not inconsistent to hold that factual mistakes in self-defence must be reasonable in civil law but need only be honest in criminal law.

4. Excessive use of force in self-defence

5. Reform

Law Commission No. 290, *Report on Partial Defences to Murder*, 2004; Coroners and Justice Act 2009 (on loss of self-control defence). Acting on the Law Commissions recommendations (in broad terms), the 2009 Act includes within the defence of loss of self-control the case in which D 'goes too far', because of a loss of control, in defending him or herself, thus addressing – at least to some extent - the problems adverted to by their lordships in Clegg (above). Arguably, the new defence would not have assisted Clegg himself, on the facts.

Part 6

A. RECKLESSNESS

1. Recklessness as a form of liability

Recklessness under a modern criminal statute:

Criminal Damage Act 1971 s.1:

(1) A person who without legal excuse destroys or damages any property belonging to another intending to destroy or damage any such property *or being reckless* [thereto] shall be guilty of an offence.

(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another:

(a) intending to destroy or damage any property *or being reckless* [thereto]; and

(b) intending by the destruction or damage to endanger the life of another *or being reckless*

[thereto] shall be guilty of an offence.

(3) [D]estroying or damaging property by fire shall be charged as arson.]

2. Was the risk justified?

Was the conduct sufficiently risky to be regarded as criminal given the positive value in it? An *objective* question: compare surgery and Russian roulette.

(a) Advertent ('Subjective')

*Cunningham [1957] 2 QB 396; [1957] 2 All ER 412 (CCA)

This case involved the meaning of the word 'malicious' under the Offences Against the Person Act 1861

The court said that (a) 'malicious' means 'with intention or recklessness' and (b) 'recklessness' means that the accused has foreseen the particular harm that might occur and has gone on to take the risk of it.

This was followed in Stephenson [1979] QB 695; [1979] 2 All ER 1198 (CA)

distinguish advertent recklessness from negligence (risk-taking without awareness, but obvious to reasonable person)

Parker (1977) 63 Cr App R 211; [1977] 2 All ER 37 (CA). Impulsive act of accused who claimed risk of the harm did not occur to him. Can this really be considered 'advertent recklessness'?

*G and another [2004] 1 AC 1034; [2003] 4 All ER 765; [2004] Crim LR 369 (HL).

(b) Inadvertent ('Objective')

Caldwell [1982] AC 341; [1981] 1 All ER 961 (HL)

'a person charged with an offence under s.1(1) of the Criminal Damage Act 1971 is [reckless] if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.'

'obvious *and serious* risk' Lawrence [1982] AC 510; [1981] 1 All ER 974 (HL)

Stephenson, above, was overruled.

*G and another, above

In this case, another one involving criminal damage, the House held that Caldwell had been wrongly decided, and it was formally overruled. The HL decided the case primarily on the ground that it was a misinterpretation of the Criminal Damage Act 1971, although it also thought there were arguments against the earlier decision at the level of principle.

Arguments against Caldwell?

[a] not everyone capable of reaching the standard of the reasonable person?:

*Elliott v C (1983) 77 Cr App R 103; [1983] 2 All ER 1005 (DC): *not* sharing the characteristics of the accused

Reid (1992) 95 Cr App R 391; [1992] 3 All ER 673 (HL)

[b] taken with Cunningham, liability for recklessness became haphazard?

'if D takes an air rifle and, not even considering the possibility that it might be loaded (as is the fact), aims and fires it at P, breaking P's spectacles and destroying his eye, D will be liable for causing criminal damage to the spectacles but will not be criminally liable at all for the destruction of the eye. The law appears to give greater protection to spectacles than to eyes. Yet although D has committed no crime by destroying P's eye, it appears that he will be guilty of manslaughter.' (S&H)

[c] Caldwell also meant that in the case of every offence which turned on recklessness the courts had to decide whether it was of the objective or subjective variety, with the following results:

Objective

criminal damage, including criminal damage with reckless endangerment of life, and an uncertain number of regulatory offences not covered in this course

Subjective

assaults requiring 'maliciousness' under OAPA: W (a minor) v Dolbey (1983) 88 Cr App R 1 (DC)

other assaults: Savage, Parmenter [1992] 1 AC 699; [1991] 4 All ER 698 (HL)
rape under the old Sexual Offences Act 1956: Satnam and Kewal (1982) 78 Cr App R 149 (CA) ('couldn't care less and pressed on regardless')

4. The End of the Story?

[a] The particular form of objective liability which was Caldwell recklessness seems to be truly dead and buried as a result of G. However that does not settle the issue, at the level of principle, of when crimes should have as their fault element one of recklessness or one of negligence. As we shall see later in the course, while the HL has often tended to go in a more subjectivist direction (eg with regard to offences previously regarded as ones of strict liability), the legislator has sometimes gone in a more objectivist one (eg with regard to the fault element in the sexual offences).

[b] Was there a better way to solve the problems to which Caldwell gave rise than those adopted in G? cf. Antony Duff on Practical Indifference
'An appropriate general test of recklessness would be - did the agent's conduct
(including any conscious risk-taking, any failure to notice an obvious risk created by her action, and any unreasonable belief on which she acted) display a seriously culpable practical indifference to the interests which her actions in fact threatened?'

B. INTOXICATION

1. Introduction

"[T]he law … complicated and difficult to explain". (Law Commission No. 229, *Report on Legislating the Criminal Code: Intoxication and Criminal Liability*, 1995)

Basic problem: intoxication may, if sufficiently severe, negate *mens rea* (*or* the voluntariness of an act) BUT it is a serious social problem generating much crime:

'It is almost trivial for me to observe that a man is not excused from crime by reason of his drunkenness. If it were so, you might as well at once shut up the criminal courts, because drink is the occasion of a large proportion of the crime which is committed.' (Stephen J, 19C judge and historian of the criminal law)

Lack of *mens rea* a prerequisite.

"A drunken intent is nevertheless an intent." (Sheehan (1975) 60 Cr App R 308; [1975] 2 All ER 960 (CA), per Lord Widgery CJ)

*Kingston [1995] 2 AC 355; [1994] 3 All ER 353 (HL) – drugged with view to blackmail, 'paedophiliac tendencies' brought out by intoxication, but still had *mens rea*

Prior Fault in getting intoxicated in first place?

2. Voluntary intoxication and the Majewski rules.

The Main Distinction: Crimes of Basic and Specific Intent

*Majewski [1977] AC 443; [1976] 2 All ER 142 (HL)
Lipman [1970] 1 QB 152; [1969] 3 All ER 410 (CA)

Can the distinction be maintained?

In Majewski the HL adopted the term 'specific intent' from the earlier decision in Beard [1920] AC 479 (HL) and contrasted it with crimes of"'basic intent'. But the meaning of 'specific intent' in Beard was not clear, and Majewski was not conspicuously successful in being clearer. There are three possible interpretations of the case, of which (iii), below, is the most generally accepted, and the one which the Law Commission takes to represent the current law.

(i) Specific intent means 'ulterior intent'

The intent extends 'beyond' the *actus reus*
eg 'wounding or causing grievous bodily harm *with intent to do GBH* or *to resist arrest*' (s18 OAPA 1861)
or, 'damaging property *with intent to endanger life*' (s.1(2) Criminal Damage Act 1971)

BUT s1(2) criminal damage is an offence of basic intent: Caldwell [1982] AC 341 (HL)

Murder? Always recognised as an offence of specific intent, yet the *mens rea* (intention to kill or do GBH) does not go beyond the *actus reus* - indeed it can fall short of it.

(ii) Functional or 'policy' argument

Williams: "Reasoning based on the idea of specific intent is phoney."

On this interpretation, an offence is one of specific intent if, on a charge of that offence, there is a lesser one of which D can be convicted. For example, if D is charged with murder he can be convicted of manslaughter; if charged with s18 OAPA 1861 he can be convicted of s20.

But it has usually been thought possible for intoxication to be, in principle, a defence to crimes such as theft, even though there is here (usually) no 'lesser included offence' of which D could be convicted.

(iii) Basic Intent Offences Are Ones where the *mens rea* is less than Intention

On this view, crimes of specific intent are ones which require intention as *mens rea*, and crimes of basic intent are ones which can be committed by recklessness or negligence.

In Caldwell Lord Diplock said that

"[C]lassification into offences of 'specific' and 'basic' intent is irrelevant where being reckless as to whether a particular harmful consequence will result from one's act is a sufficient alternative *mens rea*."

Thus, murder and s18 OAPA would be crimes of specific intent since they require intention, and nothing less. But assault and criminal damage would be crimes of basic intent, since they can be committed recklessly.

(But compare changing interpretations of *mens rea* for murder. At the time Majewski was decided the leading case on the *mens rea* of murder was Hyam, which seemed to say that recklessness *was* sufficient *mens rea* for murder.)

Recklessness as alternative rationale for fault (prior fault):

'the element of guilt or moral turpitude is supplied by the act of self-intoxication reckless of possible consequences' (per Lord Russell of Killowen, Majewski)

3. Voluntary Intoxication and Dutch courage?

"If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill."

Gallagher [1963] AC 349; [1961] 3 All ER 299 (HL), per Lord Denning.

4. Mixed MR Elements

Even if 2 (iii) is, overall, the best, and most generally accepted, interpretation of Majewski, there are still problems. Some crimes involve intention as to one element of the offence but recklessness or negligence as to another. Rape is an example. It requires intention as to penetration but, under the Sexual Offences Act 2003, negligence as to consent (recklessness under the old Sexual Offences Act 1956).

In Fotheringham (1988) 88 Cr App R 206 (CA)

it was held that rape was a crime of basic intent, even though D's defence was that he was so drunk that he thought that the woman with whom he was having intercourse was his wife and not in fact the 14 year-old baby-sitter. At that time a man could not (generally) rape his wife.

Yet a further complication has been added by the decision in

Heard [2008] QB 43; [2007] 3 All ER 306; [2007] Crim LR 654 (CA)

In this case, one of sexual assault, the CA reverted to an interpretation of the specific/basic distinction more like (i), but with the added twist that a crime would be one of specific intent if its definition included *any* further MR element beyond the AR, even recklessness. An obvious objection to this analysis is that it does not fit murder, which has always been regarded as a crime of specific intent. What is said in the case as to the specific/basic distinction is regarded by the Law Commission in its 2009 report (see below) as an aberration.

5. Involuntary intoxication

Note: involuntary intoxication may affect *mens rea* or the voluntariness of the *actus reus* – see later on *automatism.*

Emphasis on prior fault in taking drug

Under Medical prescription

> Quick and Paddison [1973] QB 910; [1973] 3 All ER 347 (CA) – mis-taking of insulin by diabetic not necessarily at fault
>
> Bailey (1983) 77 Cr App R 76; [1983] 2 All ER 503 (CA) – not foreseen that insulin would lead to blackout

Unintentional Consumption
Unforeseen reactions

> Allen [1988] Crim LR 698 (CA) - quantity of alcohol in home-made drink. Effect not foreseen, but no defence where alcohol involved.

Addiction

6. Voluntary intoxication, mistake and defences.

7. Presence of Both Intoxication and Diminished Responsibility

8. Reform

The *Report of the Committee on Mentally Abnormal Offenders* (Butler), Cmnd 6244, 1975, recommended the abolition of any special rules relating to intoxication. It proposed instead that there should be a new offence of being dangerously intoxicated. Although the Law Commission was originally favourably disposed to the Butler proposals, it changed its mind in Law Commission No. 229: *Report on Intoxication and Criminal Liability* and instead proposed a statutory formulation along the lines of the existing common law, but clarifying some of the obscurities.

Its Draft Bill was, however, criticised by the Home Office as being too complex, and it was never acted upon. The Commission has now revisited the topic and produced a new report, Law Commission No. 314: *Report on Intoxication and Criminal Liability*, 2009.

It adopts the same approach as the previous report. In essence, the distinction between crimes of specific and basic intent would continue, but not under those labels. The crimes to which intoxication *could* be a defence would be those that require intention, or a small number of other *mens rea* states, such as knowledge.

Perhaps controversially, the Report recommends statutory endorsement of the rule laid down in O'Grady. That is, if intoxication leads to a mistake in regard to a *defence*, such as such as self-defence, D cannot rely on that mistake even if the offence itself is one which would currently be classified as one of specific intent.

The relevant provisions of the Commission's new Draft Bill are set out below, omitting those relating to intoxication as it bears on liability as an accessory or under the offences in Part 2 of the Serious Crime Act 2007. Intoxication as it affects these offences will not be covered in this course.

DRAFT CRIMINAL LAW (INTOXICATION) BILL

PART 1

VOLUNTARY AND INVOLUNTARY INTOXICATION: BASIC RULES

1 Application and interpretation of Part 1

(1) This Part applies where—

(a) there are proceedings against a person ("D") for an offence,

(b) D's liability for it requires proof of a fault element which depends upon D's state of mind,

(c) it is alleged that the fault element was present at any material time, and

(d) at that time D was intoxicated.

(2) In subsection (1), references to a fault element include any fault element which the prosecution must prove (regardless of how the offence is defined), except

one which arises when either of the following issues is raised—

(a) whether or not D is entitled to rely on the common law defence of self-defence,

(b) whether or not D used reasonable force for the purposes of section 3(1) of the Criminal Law Act 1967 (c. 58) (use of force in making arrest etc.).

(3) In this Part—

(a) "D" is the person referred to in subsection (1),

(b) "the allegation" means the allegation referred to in subsection (1)(c),

(c) references to acts, and related expressions, include omissions and similarly related expressions.

2 Involuntary intoxication

If D's intoxication was involuntary, evidence of it may be taken into account in determining whether the allegation has been proved.

3 Voluntary intoxication: liability of perpetrator

(1) This section applies unless the proceedings against D are for aiding, abetting, counselling or procuring the commission of an offence (for which see section 4).

(2) This section applies only if D's intoxication was voluntary.

(3) Where this section applies, the general rule is that in determining whether the allegation has been proved, D is to be treated as having been aware at the material time of anything which D would then have been aware of but for the intoxication.

(4) There are five cases in which the general rule does not apply: in those cases, evidence of D's intoxication may be taken into account in determining whether the allegation has been proved.

(5) The five cases are that the allegation is, in substance, that at the material time—

(a) D intended a particular result (but this does not include merelyntending to do the acts which constitute the conduct element of the offence),

(b) D had any particular knowledge as to something (but this does not include knowledge as to a risk),

(c) D had a particular belief, amounting to certainty or near-certainty, that something was then, had been, or would in future be, the case,

(d) D acted fraudulently or dishonestly,

(e) D was reckless for the purposes of subsection (5)(a)(ii) or (b)(ii) of section 47 of the Serious Crime Act 2007 (c. 27) (concerning proof for the purposes of that section that an act is one which, if done by another person, would amount to the commission of an offence by that other person).

(6) Paragraph (e) of subsection (5) applies only if liability for the offence mentioned in that paragraph would (if there were proceedings against the other person for it) require proof of an allegation against that person which is of any kind mentioned in paragraphs (a) to (d) of that subsection.

PART 2

OTHER PROVISIONS

5 Mistaken beliefs and intoxication

(1) This section applies if—

(a) there are proceedings against a person ("D") for any offence,

(b) D was at any material time intoxicated, and

(c) by way of defence, or in support of a defence, D relies on having at that time held a particular belief as to any fact.

(2) In this section, "defence"—

(a) does not include anything which, if raised as an issue, imposes the burden of proving a fault element falling within section 1(1) on the prosecution, but

(b) does include the defences referred to in section 1(2)(a) and (b).

(3) In determining D's liability for the offence—

(a) if D's intoxication was involuntary, D's actual belief, whether mistaken or not, is to be taken into account, but

(b) if D's intoxication was voluntary, D's actual belief is to be taken into account only if D would have held the same belief if not intoxicated.

(4) If evidence is adduced which is sufficient to raise an issue to the effect that D would have held the same belief if not intoxicated, it is to be taken that D would have held that belief unless the prosecution proves beyond reasonable doubt that D would not.

(5) Any enactment or provision of subordinate legislation (whatever its terms) by virtue of which the holding of a particular belief provides, or supports, a defence to a criminal charge has effect subject to this section.

6 Meaning of voluntary and involuntary intoxication

(1) For the purposes of this Act, an intoxicated person ("D") is involuntarily intoxicated if D's intoxication was entirely, or almost entirely, involuntary.

(2) Otherwise, for the purposes of this Act D is voluntarily intoxicated.

(3) If D's intoxication results from taking an intoxicant because of an addiction, it counts as voluntary.

(4) Intoxication resulting from either of the following is an example of involuntary intoxication—

(a) administration of an intoxicant to D without D's consent,

(b) taking an intoxicant under duress.

(5) If D's intoxication results from either of the following, it counts as involuntary—

(a) taking an intoxicant which D reasonably believed was not an intoxicant,

(b) taking an intoxicant for a proper medical purpose.

(6) D is to be regarded as taking an intoxicant for a "proper medical purpose" only if it was a drug or medicine properly authorised or licensed by an appropriate authority and—

(a) D took it in accordance with the advice of a suitably qualified person, or

(b) D took it in accordance with the instructions accompanying it, or

(c) if D took it otherwise than as mentioned in paragraph (a) or (b), it was reasonable for D to have done so.

Part 7

'Involuntary' Manslaughter

Two forms of involuntary manslaughter undoubtedly exist in English law. These are constructive manslaughter and gross negligence. It is argued by some that a third form, manslaughter by subjective recklessness, exists.

A. Constructive (unlawful and dangerous act) manslaughter

'unlawful'
'dangerous'

*Church [1966] 1 QB 59; [1965] 2 All ER 72 (CCA)
'act . . . such that all sober and reasonable people would inevitably recognise must subject the other person to, at least the risk of some harm resulting therefrom, albeit not serious harm'.

what is the *mens rea* of unlawful act manslaughter?

Any additional requirements or simply general ones of causation?

B. Gross Negligence Manslaughter

The traditional position

Bateman (1925) 19 Cr App R 8 (CCA)
Andrews (1937), above
Stone and Dobinson [1977] QB 354; [1977] 2 All ER 341 (CA)

A 12-year aberration

During the period when the HL was intent on expanding the scope of Caldwell recklessness, it was held that that was the correct test to apply in this kind of manslaughter

But in *Adomako [1995] 1 AC 171; [1994] 3 All ER 79 (HL)

it was held that these cases were wrongly decided. Juries should not be directed in terms of Caldwell recklessness. Instead they should be directed in terms of the traditional tests laid down in Bateman and Andrews.

Is the definition of the offence so vague that it is a violation of the ECHR? It has been held not.

Misra and Srivastava [2005] 1 Cr App R 21; [2005] Crim LR 234 (CA)

Duty of care – a question of law or fact?

Khan and Khan [1998] Crim LR 830 (CA)
Singh [1999] Crim LR 582 (CA)
Willoughby [2005] 1 Cr App R 29; [2005] Crim LR 389 (CA)

The above cases gave conflicting answers on the issue of whether the existence of a duty to V was one of law for the judge, or of fact for the jury. The matter must now be taken to be governed by the following decision of a five-judge CA, which will be too recent to be in most of the books:

*Evans [2009] EWCA Crim 650 (CA)

The judgement is in accordance with general principle, and says that the existence of a duty of care is essentially one of law, but that sometimes the duty's existence in a particular case will depend on disputed questions of fact, and it is for the jury to determine whether those facts obtain.
"In some cases, such as those arising from a doctor/patient relationship where the existence of the duty is not in dispute, the judge may well direct the jury that a duty of care exists…But if, for example, the doctor were on holiday at the material time, and the deceased asked a casual question over a drink, it may very well be that the question whether a doctor/patient relationship existed, and accordingly whether a duty of care arose, would be in dispute. In any cases where the issue is in dispute, and therefore in more complex cases, and assuming that the judge has found that it would be open to the jury to find that there was a duty of care, or a duty to act, the jury should be directed that if facts a + b/or c or d are established, then in law a duty will arise, but if facts x or y or z were present, the duty would be negatived." *per* Lord Judge CJ, giving the judgement of the court.

To whom duty owed?

C. Cunningham Reckless Manslaughter?

Clearly, in the light of Adomako, there is no longer any such thing as manslaughter by Caldwell recklessness. But could there be such a thing as manslaughter by Cunningham recklessness? The question arises because of the HL's overruling of Hyam in Moloney. Suppose D sees a risk of death/GBH to V, but does not directly intend it or see it as virtually certain. If s/he is not guilty of murder, should s/he not be guilty of manslaughter?

A number of academic writers have argued for the existence of this kind of manslaughter and it may receive some support from

Lidar [2000] 4 Archbold News 3 (CA)

But, if it exists, its practical importance seems to be very limited, since there would be few examples of situations under it which would not, in any event, be ones of constructive or gross negligence manslaughter.

Proposals for reform

Law Commission No. 237, Legislating the Criminal Code: Involuntary Manslaughter (1996)

'1. The accused ought reasonably to have been aware of a significant risk that his conduct could result in death or serious injury.

2. His conduct fell seriously and significantly below what could reasonably have been

demanded from him in preventing the risk, once in being, from resulting in the prohibited harm'.

More recently, in its 2006 *Report on Murder, Manslaughter and Infanticide,* previously mentioned, the Law Commission has proposed that manslaughter would encompass:

(1) killing another person through gross negligence ("gross negligence manslaughter"); or

(2) killing another person:

(a) through the commission of a criminal act intended by the defendant to cause injury, or

(b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury ("criminal act manslaughter"). (para 2.163).

It will be seen that this would confirm, in essence, the existence of the two main forms of involuntary manslaughter. The Commission does not recommend the inclusion of a third form, namely reckless manslaughter, because to a large extent this would become second-degree murder under its proposals.

It should be noticed that 2(b) would, however, involve a significant change to the present law of constructive manslaughter. Under the Church test, the risk of harm to another is an objective one. This proposal would make it subjective.

Part 8

Strict and Corporate Liability

The Law Commission's Consultation Paper, *Criminal Liability in Regulatory Contexts* (No. 195, 2010) will provide a good deal of important information about both of these topics.

A. Strict Liability

1. Where there is no *mens rea* requirement in respect of one or more elements of the *actus reus*

("..half the offences serious enough to be tried in the Crown Court have a strict liability element…" Ashworth PCL 170)

Should such offences be interpreted literally or with an imported presumption of *mens rea*?

2. A Presumption of *mens rea*(?): 'Real' crimes

Tolson (1889) Cox CC 629 (CCCR)

'Whosoever, being married, shall marry any other person during the life of the former [spouse] shall be guilty of an offence' (Offences Against the Person Act 1861 s57)

*Sweet v Parsley [1970] AC 132: [1969] 1 All ER 347 (HL)
Being concerned in the management of premises used for the purpose of taking drugs (Dangerous Drugs Act 1965 s5)

*B [2000] 2 AC 428; [2000] 1 All ER 833 (HL)
Inciting a girl under 14 to commit an act of gross indecency (Indecency with Children Act 1960 s1)

Lord Nicholls of Birkenhead "..the starting point for a court is the established common law presumption that a mental element…is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by *necessary* implication. (emphasis added).

(Cf Prince (1875) Cox CC 138 (CCCR) Taking a girl under 16 out of her parents' custody without their consent (Offences Against the Person Act 1861 s55 - later under Sexual Offences Act 1956 s20). Held to be strict liability as to the girl's age. Apparently disapproved in B as to much of its reasoning, but not formally overruled.)

K [2002] 1 AC 462; [2001] 3 All ER 897 (HL)
Kumar [2005] 1 Cr App R 34; [2005] Crim LR 470 (CA)

(For discussion of B or K, or both, see Smith, JC, Commentary in [2000] Crim

LR 403; Campbell, K, 'New Directions in Strict Liability', (2000) 11 KCLJ 261; Horder, J, 'How Culpability Can, and Cannot, be Denied in Under-Age Sex Crimes', [2001] Crim LR 15; Smith, JC, Commentary in [2001] Crim LR 993.)

3. Presumption Rebutted: the regulatory offence

*Gammon (Hong Kong) Ltd v A-G of Hong Kong [1985] AC 1; [1984] 2 All ER 503 (PC)
Lord Scarman: "..only situation in which the presumption *can* be displaced …where statute concerned with an issue of *social concern…public safety* is such an issue…" (emphases added)

Lim Chin Aik [1963] AC 160; [1963] 1 All ER 223 (PC)

"..where the punishment of an individual will not promote the observance of the law either by the individual or others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended." On the same point see Gammon, above.

Examples of cases where presumption rebutted:

Pharmaceutical Society of Great Britain v Storkwain Ltd (1986) 83 Cr App R 359; [1986] 2 All ER 635 (HL) pharmacist

Harrow London Borough Council v Shah [1999] 2 Cr App R 457; [1999] 3 All ER 302 (DC) corner shop owner

Alphacell v Woodward [1972] AC 824: [1972] 2 All ER 475 (HL)
pollution offence under Rivers (Prevention of Pollution) Act 1951 s.2(1): offence 'not criminal in any real sense, but acts which in the public interest are prohibited under penalty'

4. Reasons for strict liability?

-difficulty of proving mental states with companies
-enforcement agencies are weak
-penalties are low
-enforcement agencies work with prosecution as last resort

Note, in this context, the importance of the Law Commission's argument that so-called 'civil penalties', rather than criminal offences, are more effective as well as fairer in dealing with misconduct in regulatory matters (Part 3 of the CP above). It may not seem as unfair to employ strict liability for civil penalties as for criminal offences.

5. Due diligence defence

It can be argued that one way around the 'problem' of strict liability is to provide a 'due diligence' defence to strict liability crimes, where the defendant – once it is proved that he or she did the relevant act – must show, on the balance of probabilities, that he or she exercised all due diligence to avoid committing the offence:

Law Commission, Consultation Paper No. 195 (2010), part 6.

B. Corporate Liability

The general position is that corporations can be liable for the same offences as individuals, provided that the offence in question is one for which a corporation can be subject to the penalty. Corporations, for example, cannot be liable for murder because there is no penalty for that crime other than imprisonment. They can, however, be liable for any of the vast number of crimes where a fine is an alternative penalty.

Recently there has been one change to this general proposition. The Corporate Manslaughter and Corporate Homicide Act 2007, which creates a new form of homicide which applies only to corporations, also specifically provides (s20) that they can no longer be liable for gross negligence manslaughter.

Otherwise the usual rules apply. Some crimes which apply to corporations are strict liability ones, so there is no need to establish any *mens rea*. In the case of those offences which do require *mens rea*, the legal difficulty has always been how to establish the fault element for a non-human person. ('No soul to damn, no body to kick.')

Over the years the courts developed rules about this. The principal one is what is known as the 'identification' doctrine, ie in law the mental state of an official of the corporation counts as being the mental state of the corporation itself.

1. Distinctions

Distinguish

(a) the liability of any defendant (corporate or otherwise) under the strict liability rules discussed above
(b) the liability of any defendant (corporate or otherwise) under rules of vicarious liability
(c) the particular rules relating to what counts as the *actus reus* or *mens rea* of a corporation, and which makes it liable either vicariously or directly.

2. A Principal Example of the Current Law

*Tesco Supermarkets Ltd v Natrass [1972] AC 153; [1971] 2 All ER 127 (HL):

Offence ofsellinggoods atprice higher than advertised
Defence that act of selling was by ‘another person’

the directing mind doctrine (‘head and hands’):
a company only liable where criminal acts done by those who ‘represent the directing mind and will of the company and control what it does’

criticism: criminal acts throughout corporation, but no direct link to directing mind

The New Act

Corporate Manslaughter and Corporate Homicide Act 2007

The Act received the Royal Assent on 26 July 2007 and most of it was brought into force on 6 April 2008. It creates a new form of homicide which, although modelled on gross negligence manslaughter, is applicable only to corporations.

The Act has had a long gestation, dating back to:

Law Commission No. 237: *Report on Involuntary Manslaughter*, 1996 which was followed by Home Office, *Reforming the Law on Corporate Manslaughter*, 2000, substantially adopting the Commission’s proposals.

The following are the key sections of this very detailed enactment.

Corporate manslaughter and corporate homicide

1 The offence

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised-

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are-

(a) a corporation;

(b) a department or other body listed in Schedule 1;

(c) a police force;

(d) a partnership, or a trade union or employers' association, that is an employer.

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

(4) For the purposes of this Act-

(a) "relevant duty of care" has the meaning given by section 2, read with sections 3 to 7;

(b) a breach of a duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;

(c) "senior management", in relation to an organisation, means the persons who play significant roles in-

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

(5) The offence under this section is called-

(a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;

(b) corporate homicide, in so far as it is an offence under the law of Scotland.

(6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.

Relevant duty of care

2 Meaning of "relevant duty of care"

(1) A "relevant duty of care", in relation to an organisation, means any of the following duties owed by it under the law of negligence-

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;

(b) a duty owed as occupier of premises;

(c) a duty owed in connection with-

(i) the supply by the organisation of goods or services (whether for consideration or not),

(ii) the carrying on by the organisation of any construction or maintenance operations,

(iii) the carrying on by the organisation of any other activity on a commercial basis, or

(iv) the use or keeping by the organisation of any plant, vehicle or other thing; …

(2) A person is within this subsection if-

(b) he is detained at a removal centre or short-term holding facility;

(c) he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;

(d) he is living in secure accommodation in which he has been placed;

(e) he is a detained patient.

(3) Subsection (1) is subject to sections 3 to 7.

(4) A reference in subsection (1) to a duty owed under the law of negligence includes a reference to a duty that would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law.

(5) For the purposes of this Act, whether a particular organisation owes a duty of care to a particular individual is a question of law.
The judge must make any findings of fact necessary to decide that question.

Gross breach

8 Factors for jury

(1) This section applies where-

(a) it is established that an organisation owed a relevant duty of care to a person, and

(b) it falls to the jury to decide whether there was a gross breach of that duty.

(2) The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so-

(a) how serious that failure was;

(b) how much of a risk of death it posed.

(3) The jury may also-

(a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;

(b) have regard to any health and safety guidance that relates to the alleged breach.

(4) This section does not prevent the jury from having regard to any other matters they consider relevant.

(5) In this section "health and safety guidance" means any code, guidance, manual or similar publication that is concerned with health and safety matters and is mad

or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.

But can it be argued that there was no need to change the law? In the aftermath of the Southall train crash (cf A-G's Ref (No 2 of 1999), above) a fine of £1.5 million was imposed on Great Western Railways under the Health and Safety at Work Act 1974, and unlimited fines are possible under that Act. Does it really matter if a corporation receives the label of being guilty of manslaughter?

Part 9

Non-fatal Offences and Consent

A. Battery

B. Assault

C. Assault Occasioning Actual Bodily Harm

Offences Against the Person Act 1861, 47

D. Maliciously Wounding or Inflicting Grievous Bodily Harm

Offences Against the Person Act 1861, s 20

'Whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence of up to five years].'

Two offences:

(i) unlawfully and maliciously wound any other person
(ii) unlawfully and maliciously inflict grievous bodily harm upon any other person

E. Wounding or Causing Grievous Bodily Harm with

Intent Offences Against the Person Act 1861, s 18

Whoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person or with intent to resist or prevent the lawful apprehension or detainer of any person ....

Four possible offences:

(i) unlawfully and maliciously wound any person with intent

  (a) to do grievous bodily harm to any person, or
  (b) to resist or prevent the lawful apprehension of any person

(ii) unlawfully and maliciously cause grievous bodily harm to any person with intent

(a) to cause grievous bodily harm to any person, or
(b) to resist or prevent the lawful apprehension of any person

Purcell (1986) 83 Cr App R 45; [1986] Crim LR 466 (CA)

Reform

Draft Criminal Code, clauses 70-72:

70(1) A person is guilty of an offence if he intentionally causes serious personal harm to another ...

71. A person is guilty of an offence if he recklessly causes serious personal harm to another

72. A person is guilty of an offence if he intentionally or recklessly causes personal harm to another."

Offences Against the Person Bill 1998: see C&K

F. Consent

G. Attempted Murder

H. Reform

The Law Commission has had two attempts at formulating general principles of consent, the second being: Consultation Paper No.139: *Consent in the Criminal Law* (1995).

It has never produced a final Report on the topic.

Part 10

Sexual Offences

Rape, Assault by Penetration and Sexual Assault

The current law is to be found in the Sexual Offences Act 2003 ("SOA 2003"). This Act supersedes the provisions of the Sexual Offences Act 1956 ("SOA 1956").

SOA 2003 is based upon Home Office Report, *Setting the Boundaries: Reforming the Law on Sex Offences*, 2000. It reforms the law of rape (s1) and sexual assault (s3) (previously called "indecent assault"), and adds an offence of assault by penetration (s2). It also contains a great many other offences which we do not consider in the course.

A. **Rape**

SOA 2003 s1

(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
(b) B does not consent to the penetration, and
(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

1. Rape: Actus Reus

(a) Expansions

During the period of SOA 1956 there were a number of judicial decisions and statutory amendments which expanded the AR elements.

Marital Exemption Eroded/Removed

Kowalski (1988) 86 Cr App R 339; [1988] Crim LR 124 (CA)
R [1992] 1 AC 599; [1991] 4 All ER 481 (HL); subsequently SW and CR v UK (1996) 21 EHRR 363 (ECtHR)

Criminal Justice and Public Order Act 1994 s142

Anal Penetration Added

Criminal Justice and Public Order Act 1994 s142

These expansions were reiterated in SOA 2003 s1(1)(a), which also added oral penetration.

(b) Consent

Consent is crucial to the offence of rape (and to the other two offences we consider). Firstly, it is an AR element. The offence is committed only if there was lack of consent by the victim ("complainant" in the wording of the Act). Secondly, it is an MR element. The defendant is liable only if s/he was negligent as to the victim's lack of consent.

(i) Meaning of Consent

SOA 2003 s74:

> 'For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'

Under SOA 1956 a distinction was drawn between consent and mere submission:

Olugboja [1982] QB 320; [1981] 3 All ER 443 (CA)
Doyle [2010] EWCA Crim 119

(ii) Evidential Presumptions

SOA 2003 attempts to clarify this by creating certain evidential presumptions. Some are rebuttable presumptions and others are conclusive (ie non-rebuttable).

The rebuttable ones - s75.

> (1) If in proceedings for an offence to which this section applies it is proved—
>
> (a) that the defendant did the relevant act,
>
> (b) that any of the circumstances specified in subsection (2) existed, and
>
> (c) that the defendant knew that those circumstances existed, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
>
> (2) The circumstances are that—

(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

On intoxication of the victim with regard to consent where the case does not fall under any of the above provisions see:

Bree [2008] QB 131; [2007] 2 All ER 676; [2007] Crim LR 900 (CA)

Previous law re s75(2)(d)

Larter and Castleton [1995] Crim LR 75 (CA)
Malone [1998] 2 Cr App R 447 (CA)

(iii) The Effect of Fraud on Consent

Now takes the form not of stated rules of law but of 'Conclusive Presumptions about Consent':

SOA 2003 s76

(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—

(a) that the complainant did not consent to the relevant act, and

(b) that the defendant did not believe that the complainant consented to the relevant act.

(2) The circumstances are that—

(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

s76(2)(a): 'nature or purpose of the act'

New law

Jheeta [2007] 2 Cr App R 477; [2008] Crim LR 144 (CA)

Previous law

Flattery (1877) 13 Cox CC 388 (CCCR) – 'surgical operation'
Williams [1923] 1 KB 341 (CCA) – 'way of improving singing'
Linekar [1995] QB 250; [1995] 3 All ER 69 (CA) – sex with prostitute/refusal to pay
Papadimitropoulos (1957) 98 CLR 249 (High Ct Australia) - pretended to have married V
Tabassum [2000] 2 Cr App R 328 (CA) indecent assault ('nature and quality of the act')

s76(2)(b): identity of the actor

(iv) Revocation of Consent

Kaitamaki [1985] AC 147; [1984] 2 All ER 435 (PC) – during act
Cooper and Schaub [1994] Crim LR 531 (CA)

2. Rape: Mens Rea

(i) New Law

As we have seen, the MR of the non-fatal offences under OAPA 1861, as interpreted by the courts, is subjectively based. D has either to intend a result or be reckless as to its occurring. That is also the view of the Law Commission with regard to any reform of them.

The cognitive equivalent of the volitional element of intention is knowledge. Under SOA 1956 that was the position with regard to the sexual offences. D had either to know or be aware of a risk that V was not consenting (see Morgan, below).

It was part of the explicit aim of the Home Office Committee to increase the rate of rape convictions, and, in the belief that it would achieve this result, the MR in SOA 2003 was changed to one of negligence. D is now guilty if he does not *reasonably* believe that the victim is consenting.

SOA 2003 s1, to repeat, says

(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
(b) B does not consent to the penetration, and
(c) A does not *reasonably* believe that B consents. [italics added]

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

B. Sexual Assaults

1 **Assault by penetration**

New Offence:

SOA 2003 s2

(1) A person (A) commits an offence if—
(a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
(b) the penetration is sexual,
(c) B does not consent to the penetration, and
(d) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

Actus Reus: s2(1): note requirements of non-consent and that penetration must be 'sexual': see s78 (below)

Mens Rea: s2 (2): compare s1

Clearly, if a victim is penetrated by the penis this is rape anyway, under s1. So this offence overlaps with s1. It covers, additionally, cases in which the victim is penetrated by, say, the hand or an object wielded by the defendant. Such cases were ones of indecent assault under SOA 1956, but now form a separate category.

2. **Sexual Assault**

previously Indecent Assault

SOA 2003 s3

(1) A person (A) commits an offence if—
(a) he intentionally touches another person (B),
(b) the touching is sexual,
(c) B does not consent to the touching, and

(d) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

Actus Reus

Meaning of 'touching'

H [2005] 2 Cr App R 9; [2005] 2 All ER 859 (CA)

'Sexual'

SOA 2003 s78:

> ….[P]enetration, touching or any other activity is sexual if a reasonable person would consider that -
>
> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
>
> (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

Compare previous requirement that battery/assault must be 'indecent':

> Court [1989] AC 28; [1988] 2 All ER 221 (HL)

Mens Rea

No reasonable belief: see also s1

Need for sexual motive

Part 11

Automatism and Insanity

A. Automatism

A creation of the courts, which has been held within tight bounds. It is a general defence applicable to all offences.

One explanation of the defence is that all human acts, to be truly seen as acts, require a certain minimum of voluntariness. Therefore lack of voluntariness prevents the act from even constituting the AR of an offence. On another explanation, automatism is a substantive defence which, when present, exonerates D even if there was AR.

Meaning of "involuntary"

"No act is punishable if it is done involuntarily and an involuntary act in this context... means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.... [A]n act is not to be regarded as an involuntary act simply because the actor does not remember it... Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it."

Bratty [1963] AC 386; [1961] 3 All ER 523 (HL), per Lord Denning

Loss of Control

Burns v Bidder [1967] 2 QB 227; [1966] 3 All ER 29 (DC), brakes on D's car failed due to no fault of his - defence allowed

Loss of Consciousness

Hill v Baxter [1958] 1 QB 277; [1958] 1 All ER 193 (DC), claimed 'black-out' at wheel of vehicle, but could just have fallen asleep - defence denied on the evidence

Must be total

"[T]he defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough."

A-G's Reference (No 2 of 1992) [1994] QB 91; [1993] 4 All ER 683 (CA)
See also Broome v Perkins (1987) 85 Cr App R 321 (DC)

Distinguish Automatism from Insanity

Where involuntary act results from a 'disease of mind', it is dealt with under the insanity defence: see below

B. Insanity

A general defence, applicable to all crimes.

R (Surat Singh) v Stratford Magistrates' Court [2008] 1 Cr App R 36 (DC)

1. The special verdict

"not guilty by reason of insanity"

Criminal Procedure (Insanity) Act 1964 s1

Acquittal on grounds of insanity

Burden of Proof: on defendant

Rationales

Lack of moral responsibility

'One of the fundamental presumptions of the criminal law and criminal liability is that the defendant is 'normal', i.e. is able to function within the normal range of mental and physical capabilities… A person who is mentally disordered may fall below these assumed standards of mental capacity and rationality, and this may make it unfair to hold him responsible for his behaviour.'

Ashworth, PCL

Social control

'The purpose of the legislation of the defence of insanity, ever since its origin in 1800, has been to protect society against recurrence of dangerous conduct.'

*Sullivan [1984] AC 156; [1983] 2 All ER 673 (HL), per Lord Diplock

'any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind … for which a person should be detained in a mental hospital rather than be given an unqualified acquittal'

*Bratty, above, per Lord Denning

(It should be noted that this often-quoted *dictum* states only what is *sufficient* for mental disorder to amount to insanity. It does not state that it is *necessary* for insanity that it should either (a) manifest itself in violence or (b) be prone to recur. For example, insanity is, in principle, available to a charge of theft, which is not, in itself, a crime of violence. And there is no requirement that the conduct be likely to recur – see Burgess, below.)

Powers of disposal

Criminal Procedure (Insanity) Act 1964 s5, as later amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, and now as substituted by the Domestic Violence, Crime and Victims Act 2004.

Until 1991, if the jury returned the special verdict of 'not guilty by reason of insanity' the judge had no alternative but to order mandatory detention without time limit, subject to the Home Secretary's discretion to release. That was altered by the 1991 Act, which, as subsequently amended by the 2004 Act, varies disposal to include the alternatives of guardianship, supervision and absolute discharge orders in cases other than murder. The purpose of the further 2004 changes was to make the law ECHR-compliant. So, even in murder cases, a judge is not entitled to make a mandatory detention order unless D could be subject to civil detention under the Mental Health Act 1983.

2. The M'Naghten Rules

'[I]t must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know that what he was doing was wrong.'

*M'Naghten (1843) 10 Cl & Fin 200, per Lord Tindal CJ, giving the advice of the QB judges to the HL in its parliamentary capacity

(i) "defect of reason"

'The M'Naghten rules relate to accused persons who by reason of a disease of the mind are deprived of their power of reasoning. They do not apply and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full.'

Clarke (1972) 56 Cr App R 225; [1972] 1 All ER 219 (CA), per Ackner J

(ii) "disease of the mind"

Need not be a disease of the brain

"'[M]ind in the M'Naghten Rules is used in the ordinary sense of the mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act."

Sullivan, above, per Lord Diplock

Kemp [1957] 1 QB 399; [1956] 3 All ER 249 (Assizes)
Burgess [1991] 2 QB 92; [1991] 2 All ER 769 (CA)

The Internal/External Distinction and Insane Automatism

Epileptics, some diabetics and sleepwalkers as 'insane automatons'

Burgess: recurrence of violence unnecessary

The Problem of the Diabetic

Quick and Paddison, above
Hennessy (1989) 89 Cr App R 10; [1989] 2 All ER 9 (CA)
Bingham [1991] Crim LR 433 (CA)

Distinguish
hyperglycaemia (excess of blood sugar due to lack of insulin) and hypoglycaemia (deficiency of blood sugar due to too much insulin)

(iii) The cognitive tests

either 'not to know the nature and quality of the act he was doing'

('he did not know what he was doing' – Sullivan, above)

e.g. killing a person believing you are crushing an ant, or putting a baby on the fire thinking it is a log

or, if he did know it, that he did not know that what he was doing was wrong.'

"notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, or redressing or revenging some supposed injury, or of producing some public benefit, he is nevertheless punished according to the nature of the crime committed, if he knew at the

time of committing such crime that he was acting contrary to law."

M'Naghten, applied in

Windle [1952] 2 QB 826; [1952] 2 All ER 1 (CCA),
where it was held that 'wrong' means 'legally wrong', not 'morally wrong'

That interpretation was confirmed in

Johnson [2008] Crim LR 132 (CA)

(iv) Criticism of the Law

13 **(a) Too narrow (morally under-inclusive) on cognitive tests**

Distinguish 'cognitive' (knowledge defect), 'emotional' or 'moral' (the psychopath), and 'volitional' (the irresistible impulse) insanity:

- only the first comes within M'Naghten.

"[T]he M'Naghten test is based on an entirely obsolete and misleading conception of the nature of insanity. [Insanity] does not only, or primarily affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions."

Royal Commission on Capital Punishment, 1953, p. 80

Kopsch (1925) 19 Cr App R 50 (CCA)
*Byrne [1960] 2 QB 396; [1960] 3 All ER 1 (CCA)

Cases of psychopathy or irresistible impulse (which may now give rise to a defence of diminished responsibility (see below) under Homicide Act 1957, s. 2):

14 **(b) Too broad (morally over-inclusive) on 'disease of the mind'**

'[T]his distinction between internal and external causes is fundamentally flawed. We are forced to conclude that epileptics…will be regarded as insane if they commit offences during epileptic fits, as will sleep-walkers…[T]he harshness of these categorisations is hardly tempered by telling defendants that the label 'insanity' is merely a technical one.'

C&K

In summary

The defence is too broad in its test of 'disease of the mind', but too narrow in the cognitive tests which then have to be applied. The result is that some defendants who are, on any view, mentally highly disordered cannot use the defence, while others (eg sleepwalkers), who would not generally be regarded as insane, have only this defence, and not one of automatism.

See generally *Report of the Committee on Mentally Abnormal Offenders* (Butler), 1975 and Law Commission Report No 177.

Part 12

Theft and Three Offences of Temporary Deprivation

Theft, fraud and related offences belong to the general class of what are known as 'property offences' because they harm the interests of V by adversely affecting his/her proprietary rights.

(We have already come across one such offence when discussing recklessness, namely criminal damage, contrary to the Criminal Damage Act 1971. Although we do not deal with criminal damage as a specific topic in the course you are expected to know about the basic form of it, which is contained in s1 of the 1971 Act.)

The current law on theft and certain other offences closely related to it, such as taking a conveyance without authority, is to be found primarily in the Theft Acts 1968 ("TA 1968") and 1978 ("TA 1978"). TA 1968 is based on Criminal Law Revision Committee Report No.8: *Theft and Related Offences*, Cmnd 2977, 1966. This area was previously dealt with by the Larceny Act 1916, but TA 1968 made such major changes that there is rarely much to be gained by going back to cases on the 1916 Act.

The Basic Definition of Theft

'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'theft' and 'steal' shall be construed accordingly.' TA 1968 s1 (hereafter all references are to this Act, unless TA 1978 is indicated)

5 elements – dishonesty (MR)
appropriation (AR)
property (AR)
belonging to another (AR)
with the intention of permanently depriving the other (MR)

All must be present.

ACTUS REUS

1. Appropriation

'Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.' s3 (1)

The key difficulty in interpreting this section has been whether there can be an appropriation when the owner (V) consented to the taking of the property (whether or not as a result of a misrepresentation by D).

The matter has come before the HL four times.

*Lawrence [1972] AC 626; [1971] 2 All ER 1253 (HL)

V offered taxi driver D his money, D having misrepresented the amount due. Held, unanimously, consent was *irrelevant* to appropriation.

*Morris [1984] AC 320; [1983] 3 All ER 288 (HL)

Label switching in supermarket. Held, unanimously, appropriation involves 'not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights', ie an act *not* consented to.

Involves assumption of 'a' or 'any' right of the owner, not all rights.

HL said it did not think it was saying anything contrary to Lawrence, but the reasoning seemed to contradict it. Posed difficult issues for the lower courts and in a series of cases culminating in:

Dobson v General Accident Fire and Life Assurance Corp plc [1990] 1 QB 274; [1989] 3 All ER 927 (CA, Civil)

(whether something was theft under an insurance policy) the CA said, in effect, that, in its view, the reasoning behind the two cases was irreconcilable.

So the matter came before the HL for a third time:

*Gomez [1993] AC 442; [1993] 1 All ER 1 (HL)

D1, an assistant in a shop, was in league with a rogue D2. D1 told his manager V that D2's cheque was "as good as cash". On this basis V handed over goods to D2. D2's cheque was worthless, as D1 knew. Held (4:1 majority) D1 and D2 guilty of theft. Wrong to say that 'an act expressly or impliedly authorised by the owner could never amount to appropriation'.

There was a lengthy, closely-reasoned, dissenting speech by Lord Lowry, and many commentators thought the HL had taken the wrong path in preferring Lawrence to Morris.

Initially it seemed that the CA, too, did not fully realise the implications of the decision:

Gallasso (1993) 98 Cr App R 284 (CA)

But the Lawrence/Gomez approach has been endorsed by the HL in its most recent decision:

*Hinks [2001] 2 AC 241; [2000] 4 All ER 833 (HL)

D friendly with V, man of limited intelligence. V gave D £60,000 over 6 months. V 'capable of making valid gift' though 'unlikely he could make decision alone'.

Held (3:2 majority) D could be guilty of theft even if V had made a perfectly valid gift, provided D *thought* she was not entitled to the money, and therefore dishonest.

"…[I]t is immaterial whether the act was done with the owner's consent or authority. It is true of course that the certified question in *R v Gomez* referred to the situation where consent had been obtained by fraud. But the majority judgments do not differentiate between cases obtained by fraud and consent obtained in any other circumstances. The ratio [of *Gomez*] involves a proposition of general application. *R v Gomez* therefore gives effect to s3(1) of the 1968 Act by treating 'appropriation' as a neutral word comprehending 'any assumption of the rights of the owner". If the law is as held in *R v Gomez,* it destroys the argument advanced in the present appeal, namely that an indefeasible gift of property cannot amount to an appropriation", per Lord Steyn, for the majority.

To appreciate some of the practical difference between the Lawrence/Gomez/Hinks approach and the Morris one, consider 3 cases.

In Gomez two decisions which applied the Morris approach were held to be wrong, and were formally overruled:

Skipp [1975] Crim LR 114 (CA) (held, appropriated the goods only when deviated from instructed route – now wrong)

Fritschy [1985] Crim LR 745 (CA) (held, appropriated the krugerrands only when deviated from instructions (outside the jurisdiction) – now wrong)

Another case was never mentioned by the HL:

*Eddy v Niman (1981) 73 Cr App R 237 (DC)

D went with friend to supermarket, intending to take articles without paying. Took things off the shelf, but then changed his mind and left with nothing. Held, not guilty of theft because had done nothing not permitted to do and therefore no appropriation. Must now be regarded as wrong.

Other cases:

Atakpu [1994] QB 69; [1993] 4 All ER 215 (CA)

Mazo [1997] 2 Cr App R 518 (CA) - restricted Gomez by holding no appropriation where valid gift – but now wrong as a result of Hinks) Briggs [2004] 1 Cr App R 451; [2004] Crim LR 495 (CA) – break of causal chain where induces act of another

Problems with current approach?

(a) Reduces *actus reus* to almost nothing, and thereby places too much weight on *mens rea* alone.

> "Anyone doing anything … to property belonging to another, with or without the authority or consent of the owner, appropriates it: and, if he does so dishonestly and with intent…permanently to deprive, he commits theft.' (JC Smith)

The conflicting views of the judiciary:

> "The mental requirements of theft are an adequate protection against injustice…A prosecution is hardly likely and, if mounted, is likely to founder on dishonesty: one must retain a sense of perspective. At the extremity of legal rules there are sometimes results which may seem strange…. If the law is restated by adopting a narrower definition of appropriation, [it] is likely to place beyond the reach of the criminal law dishonest persons who should be found guilty of theft'. Per Lord Steyn.

> "Theft [as a result of these decisions] may exist where there is no more than consciously falling below the standards of an ordinary and decent person and may include anything which such a person would think was morally reprehensible. It may be no more than a moral judgment…To treat lawful conduct as criminal merely because it is open to [moral] disapprobation … fails to achieve the objective and transparent certainty required of the criminal law by the principles basic to human rights.' Per Lord Hobhouse of Woodborough, dissenting.

(b) Means that practically every case of obtaining property (other than land) by deception, contrary to (now repealed) s15, is also theft. Can Parliament have intended this?

(c) Conflict between civil and criminal law.

> A offers B £100,000 for B's painting, believing it is a Constable, and he would be getting a bargain. B accepts, knowing it was painted by his sister. The contract is enforceable in *civil* law, but may be theft in *criminal* law.

(d) Breach of fair labelling.

> In Eddy v Niman, above, wouldn't almost anyone say that D ought (at most) to be guilty of *attempted* theft, not theft itself?

But arguments the other way? Catches unscrupulous people who exploit the vulnerable?

Additional appropriation matters

(a) Appropriation and Control

***Pitham and Hehl* (1976) 65 Cr App R 45 (CA)**

> D offered to sell to E the furniture of V, which was in V's house. D knew that V was in prison, and that he had no authority to sell it. Held, the mere offering of the property to E was an appropriation of it.

(b) Appropriation and Bank Accounts: Things in action.

The old Larceny Act required a 'taking and carrying away' of the property. The CRLC wished to widen the definition of property to include intangible things, some of which are known in civil law as 'things in action'. These are things one could hardly 'take and carry away'. That is why it used the broader term 'appropriation'. Time in the lecture will probably not permit discussion of this. But here are some of the relevant cases.

2. Property

s 4 The Act has a rather convoluted definition. It starts with a very broad proposition:

s4(1) "'Property' includes money and all other property, real or personal, including things in action and other intangible property."

Roughly, 'real' property relates to land, and things closely connected with land (like buildings), and 'personal' property is just about everything else. 'Things in action' covers items like debts, and 'other intangible property' would include things like copyright and patents.

This broad proposition is then seriously cut back by the next subsection, 4(2), which says:

"A person cannot steal land, or things forming part of land and severed from it by him or his directions, except in the following cases…"

There then follow three qualifying paragraphs. Of these (a) and (c) are very technical, and we do not cover them. (b) says:

"where he is not in possession of the land and appropriates anything forming part of the land by severing it…

That exception is then itself subject to an exception in s4(3), relating to things growing wild on land.

The general result is the following:

1 One cannot steal land, or things like buildings (except for some cases we do not deal with).

2 One can steal things deliberately cultivated on other people's land, like the farmer's wheat or one's neighbour's roses, if one cuts them down.

3 One cannot steal things which are growing wild on other people's property unless one is doing so for 'reward or sale or other commercial purpose'.

Other property issues

The CLRC foresaw that in civil law electricity was probably not property, so they created a special offence to deal with this:

s13 Abstracting Electricity

That they were right to do so was confirmed in

Low v Blease [1975] Crim LR 513 (DC) – held, electricity not property

Other issues of property still depend upon what the civil law says property is, eg

Oxford v Moss (1978) 68 Cr App R 183 (DC) – confidential information not property (student reads draft exam paper)

Kelly [1999] QB 621; [1998] 3 All ER 741 (CA) – no property in corpse, but corpse parts acquired by skilled dissection for exhibition/teaching by medical college are property

3. Belonging to Another

'Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).' s5(1)

'Possession or Control'

Woodman [1974] QB 754; [1974] 2 All ER 955 (CA) – includes situation where person unaware of possession or control

Turner (No 2) (1971) 55 Cr App R 336; [1971] 2 All ER 441 (CA) - one can steal one's own property where another has possession/control. Garage may have had right in car (lien) for work done, but not necessary to establish because also had 'possession or control' of it.

Proprietary Right or Interest
Ownership and Passing of Property

4. Dishonesty

No general definition, but partial definition in the Act – 3 situations where not dishonest

'A person's appropriation of property belonging to another is not to be regarded as dishonest –
(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it…; or

(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

(c) ….if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.'
s2(1)

One situation where may be dishonest

'A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.' s2(2)

The general test for dishonesty:

*Feely [1973] QB 530; [1973] 1 All ER 341 (CA) – held, a jury question, not one for the judge. But according to whose standards?

*Ghosh [1982] QB 1053; [1982] 2 All ER 689 (CA)

Two-part test

(1) was D dishonest according to 'standards of honest and reasonable people'?

(2) did D realise his/her conduct was dishonest by those standards?

Examples in Ghosh

Tourist from country where public transport free getting onto bus and not paying

'Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified…'

5. Intention to Deprive Permanently

English law has always insisted that D must intend to deprive V *permanently* of the property in order for it to amount to theft.

However, it has also recognised that *temporary* deprivation may sometimes be a sufficiently serious infringement of V's proprietary rights to be regarded as criminal. It has done this in two ways.

Firstly, it has created a few separate offences, not theft, where intention of temporary deprivation is sufficient. These are:

s11 Removal of an Article from a Place open to the Public
s12 Taking a Conveyance Without Authority ('joy riding')
s12A Aggravated Vehicle-Taking

Secondly, there was a watering-down of the literal requirement of intention of permanent deprivation by s6 of TA 1968, which provides:

'A person appropriating property belonging to another without meaning the other

permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.'
s6(1)

There have been a number of cases on this obscure section. The leading one is:

*Lloyd [1985] QB 829; [1985] 2 All ER 661 (CA) - pirate copying of film – no intention of permanent deprivation unless 'all the goodness or virtue has gone'. Held, not theft.

But what of the partially used season ticket? Borrowing and returning a read book from a bookshop?

cf Marshall [1998] 2 Cr App R 282 (CA)

Recently it has been confirmed that a point made only obiter in Lloyd is correct. Where V is required by D to pay to get his own property back this amounts to D 'treating the property as his own to dispose of regardless of the other's rights'.

Raphael [2008] Crim LR 995 (CA)

'where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this … amounts to treating the property as his own to dispose of regardless of the other's rights.' s6(2) - e.g. pawning goods

Part 13

Fraud, Obtaining Services Dishonestly, Making Off Without Payment

Fraud

The law under TA 1968 and TA1978 covered a variety of forms of fraud, such as obtaining property, a pecuniary advantage, services, etc by deception. On the whole, these seemed to work reasonably well, with minor reforming intervention, as in the Theft (Amendment) Act 1996.

Despite that, there was a major reform of the law by the Fraud Act 2006, which is based on Law Commission No 276: *Report on Fraud*, 2002. The Act came into force on 15 January 2007, at which time the existing fraud offences under TA1968 and TA1978 were repealed.

The 2006 Act creates three forms of fraud. The main change is that, whereas the previous offences depended upon D *achieving* something by the deceptive conduct (obtaining property, pecuniary advantage, etc), the new offences consist of making, in certain circumstances, the false representation with the *intention* of gaining, or causing loss to another. It is now mostly irrelevant whether D actually achieves what s/he aims at by the deception. These new offences are therefore more akin to what we normally classify as inchoate ones, such as conspiracy and attempt, ie those which attract penal sanction even if D's aim remained unachieved.

However, the Act also has one offence more like the old ones, namely obtaining services dishonestly, which is similar in many respects to that which existed under TA 1978 s1. Hereafter references are to the new Act, unless otherwise indicated.

s1 Fraud

(1) A person is guilty of fraud if he is breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).

(2) The sections are-

(a) section 2 (fraud by false representation),
(b) section 3 (fraud by failing to disclose information), and
(c) section 4 (fraud by abuse of position)

[The maximum penalty on indictment is 10 years imprisonment]

s2 Fraud by false representation

(1) A person is in breach of this section if he -

(a) dishonestly makes a false representation, and
(b) intends, by making the representation -

(i) to make a gain for himself or another, or
(ii) to cause loss to another or expose another to a risk of loss.

(2) A representation is false if –
(a) it is untrue or misleading, and
(b) the person making it knows that it is, or might be, untrue or misleading.

(3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of –
(a) the person making the representation, or
(b) any other person.

(4) A representation may be express or implied.

(5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

It remains to be seen how much of the case law on the old offences will continue to be referred to, but the following may still be of relevance.

(1) "False Representation" (previously "deception")

Implied representation

*Ray [1974] AC 370; [1973] 3 All ER 131 (HL) – (3:2 majority) remaining at table in a restaurant after eating meal is continuing representation to pay for it

Harris (1975) 62 Cr App R 28 (CA) – booking into hotel is representation of intention to pay at end of stay

Silverman (1987) 86 Cr App R 213 (CA) – excessive work quote in position of trust could be misrepresentation

King [1987] QB 547; [1987] 1 All ER 547 (CA)

Cheques – handing over to V is representing not only that the cheque will be honoured by the bank but also that D has the bank's authority to draw it

Credit/Cheque cards – in presenting D is representing not only that V will be paid but also that D has the authority of the bank/credit card company to use it

Charles [1977] AC 177; [1976] 3 All ER 112 (HL)
Lambie [1982] AC 449; [1981] 2 All ER 776 (HL)

(2) Mens Rea

Dishonesty:

Ghosh, above

Woolven (1983) 77 Cr App R 231 (CA)

s3 Fraud by failing to disclose information

A person is in breach of this section if he-

(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and

(b) intends, by failing to disclose the information –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

s4 Fraud by abuse of position

(1) A person is in breach of this section if he –

(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

(b) dishonestly abuses that position, and

(c) intends, by means of the abuse of that position –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

5 "Gain" and "loss"

(1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.

(2) "Gain" and "loss" –

(a) extend only to gain or loss in money or other property;

(b) include any such gain or loss whether temporary or permanent;

and "property" means any property whether real or personal (including things in action and other intangible property).

(3) "Gain" includes a gain by keeping what one has, as well as a gain by getting what one does not have.

(4) "Loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has.

s11 Obtaining services dishonestly

(1) A person is guilty of an offence under this section if he obtains services for himself or another –

(a) by a dishonest act, and

(b) in breach of subsection (2).

(2) A person obtains services in breach of this subsection if -

(a) they are made available on the basis that payment has been, is being or will be made for or in respect of them.

(b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and

(c) when he obtains them, he knows –

(i) that they are being made available on the basis described in paragraph (a), or

(ii) that they might be,

but intends that payment will not be made, or will not be made in full.

[The maximum penalty on indictment is 5 years imprisonment.]

It will be noted that this offence is unlike the other Fraud Act offences above since it requires that D actually obtains the services. The same requirement in the old deception offences under TA1968 and TA1978 led to a fair amount of case law, since the deception had to cause the prohibited result (ie, be 'operative'). Therefore they may still continue to be referred to by the courts.

Laverty (1970) 54 Cr App R 495; [1970] 3 All ER 432 (CA) –

Changed number plates on car, but no evidence that that this made any difference to purchaser V – held, offence not committed.

Ray, above

Rashid (1976) 64 Cr App R 201; [1977] 2 All ER 237 (CA)

British Rail steward made up own tomato sandwiches and sold to train customers as being BR's. No direct evidence, nor necessary inference, that customers would not have bought if had known were not BR's. Conviction quashed.

Doukas (1978) 66 Cr App R 228; [1978] 1 All ER 1061 (CA)

Wine waiter at hotel brought in own wine and sold to customers as being hotel's.

Said to be necessary inference that customers would not have bought the wine if they had known it to be D's own. Conviction upheld.

(In Corboz [1984] Crim LR 629 (CA) it was said that, if there was any conflict between these cases, Doukas was to be preferred to Rashid.)

King, above

Making Off Without Payment

This was created following amendments to TA 1968 proposed in Criminal Law Revision Committee Report No.13, *S16 of the Theft Act 1968*, Cmnd 6733, 1977.

'a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.' TA 1978 s3 (1)

[The maximum penalty on indictment is 2 years imprisonment.]

Problems with previous law

Part 14

Duress and Necessity

A. **Duress**

1. Introduction: Comparing Duress and Necessity

Threats of serious violence from others (Duress) versus
Threats from natural or social situations (Necessity)

Two sides of same coin, but historically different treatment: the 'apotheosis of absurdity' (Sir Rupert Cross)

More recently: necessity as 'duress of circumstances'

The limits of the defence

Lynch - available to 'principal in second degree' to murder

Abbott [1977] AC 755; [1976] 3 All ER 140 (PC) - not available to 'principal in first degree'

*Howe and Bannister [1987] AC 417; [1987] 1 All ER 771 (HL)
Lynch/Abbott distinction unacceptable: result - not available for murder as either principal or accessory
Gotts [1992] 2 AC 412; [1992] 1 All ER 832 (HL) - not available in attempted murder

Anomalies: s18 assault where victim dies
the shifting line in oblique intention cases

The arguments in Lynch

'miserable and agonising plight' of accused
versus

'charter for terrorists, gang leaders and kidnappers'

reductio argument

> '... a threat to property may in certain circumstances be as potent in overbearing the actor's wish not to perform the prohibited act as a threat of physical harm....
> Would not many ordinary people yield to such threats, and act contrary to their wish not to perform an action prohibited by law? ... Faced with anomaly and uncertainty, may it not be that a narrow, arbitrary and anomalous defence of duress, negativing the crime, is far less acceptable in practice and far less justifiable in juristic theory than a broadly based plea which mitigates the penalty?'

(per Lord Simon of Glaisdale)

Other Limits on the Defence

i. Mistaken duress:

Graham (1982) 74 Cr App R 235; [1982] 1 All ER 801 (CA): reasonable mistake as to facts required

Martin (David Paul) [2000] 2 Cr App R 42 (CA) – given law of honest mistake in self-defence (Williams (Gladstone)) why does same subjective rule not apply in duress and necessity?

Safi [2004] 1 Cr App R 12; [2003] Crim LR 721 (CA)

*Hasan [2005] 2 AC 467 (as 'Z'); [2005] 4 All ER 685; [2006] Crim LR 142 (HL)

ii. Standard of fortitude:

Graham: 'steadfastness reasonably to be expected of the ordinary citizen in his situation'

'sober person of reasonable fortitude sharing the characteristics of the accused'.

(cf Camplin in provocation)

Which characteristics?

Emery (1993) 14 Cr App R (S) 394 Condition of 'dependent helplessness' of abused woman relevant

Hegarty [1994] Crim LR 353 (CA) Characteristics include age, sex, physical health, but not personality disorder leading to emotional instability or 'grossly elevated neurotic state'.

*Bowen [1996] 2 Cr App R 157; [1996] 4 All ER 837 (CA) Low IQ short of mental impairment irrelevant.

Flatt [1996] Crim LR 576 (CA) Drug addiction because self-induced irrelevant

iii. Self-induced duress:

Fitzpatrick [1977] NI 20 (CANI) sought to leave IRA

Sharp [1987] QB 853; [1987] 3 All ER 103 (CA) quit gang of robbers, could not claim duress knowing they were violent

Shepherd (1988) 86 Cr App R 47 (CA) quit gang of shoplifters, could claim duress not knowing they would turn violent

Lewis (1992) 96 Cr App R 412 (CA) – knew fellow robber was violent, but link between knowledge and offence (contempt of court for refusal to give evidence against colleague) remote: decision should have been left to jury

Ali [1995] Crim LR 303 (CA) - violent disposition of drug dealer known to A, so brought duress on himself when he broke drugs deal and robbed banks to get money back

Harmer [2002] Crim LR 401 (CA) – if D knew he would be exposed to risk of violence, but not forced to commit crime, could not claim duress

iv. Nexus between threats and crime

Hudson and Taylor [1971] 2 QB 202; [1971] 2 All ER 244 (CA)
appearance of duressor in courtroom sufficient duress for perjury (disapproved by Lord Bingham in Hasan)

Cole [1994] Crim LR 582 (CA) threats from money lenders insufficiently linked to robberies

B. **Necessity**

1. *Introduction*

Bacon's examples: stealing for hunger, drowning men fighting for a plank, escaping a burning jail not crimes

Contrast Hale: theft 'being under necessity for want of victuals or clothes' a felony

*Dudley and Stephens (1884) 14 QBD 273 (DC)

'subject to terrible temptation ... which might break down the bodily power of the strongest man, and try the conscience of the best'

'[In war] it is a man's duty not to live, but to die'

Judges are 'compelled to set up standards we cannot reach ourselves and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse.'

'the legal cloke for unbridled passion'

compare this with the sentence: death commuted to six months imprisonment

London Borough of Southwark v Williams [1971] 2 All ER 175 (CA)

'If homelessness were once admitted as a defence to trespass, no-one's house could be safe. Necessity would open a door which no man could shut... The plea would be an excuse for all sorts of wrongdoing. So the courts must for the sake of law and order take a stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good.'

2. Necessity as 'Duress of Circumstances'

Conway [1989] QB 290; [1988] 3 All ER 1025 (CA): fear of killing of passenger by third parties approaching car led to reckless driving. Appeal allowed

Martin (Colin) (1989) 88 Cr App R 343; [1989] 1 All ER 652 (CA): wife would have committed suicide unless husband drove son to work. H drove while disqualified. Appeal allowed.

Pommell [1995] 2 Cr App R 607 (CA) 'I took [a loaded submachine gun] off a geezer who was going to do some damage with it.' Appeal allowed: retrial ordered.

Abdul-Hussain [1999] Crim LR 570 (CA) – valid defence to hijacking aircraft contra s1, Aviation Security Act 1982

Shayler [2001] 1 WLR 2206 (CA) (the HL subsequently held that no issue of necessity could arise on the facts [2003] 1 AC 247; [2002] 2 All ER 477)

Quayle [2005] 2 Cr App R 527; [2006] 1 All ER 988; [2006] Crim LR 142 (CA) Altham [2006] 2 Cr App R 127; [2006] Crim LR 633 (CA)

Jones [2007] 1 AC 136; [2006] 2 All ER 741; [2007] Crim LR 66 (HL) - legality of Iraq war not relevant issue

Necessity in Medical Cases – separate cases

Law Reform

(Duress)
Law Commission No 83: *Report on Defences of General Application* (1977) paras 2.1-2.46
Draft Code cls 42 and Commentary paras 12.11-12.19
Law Commission No 218, *Offences against the Person and General Principles*, 1993, cls 25 and Commentary paras 28.1-34.1

(Necessity)
Law Com No 83 paras 4.1-4.33
Draft Code cls 43 and Commentary paras 12.20-12.23
Law Com no 218 cls 26 and Commentary paras 35.1-35.12

Part 15

Complicity

1. Introduction

Liability for Full Crime

Conceptualisation:
- Derivative liability
- 'shadowing' the principal
- participation

2. Forms of Complicity

Accessories and Abettors Act 1861 s8, provides:

"Whosoever shall aid, abet, counsel or procure the commission of any indictable offence…shall be liable to be tried, indicted and punished as a principal offender."

(There is a parallel provision in the Magistrates Courts Act 1980 s44 for summary offences.)

Meaning of terms?
'Assisting or Encouraging'

3. Joint Unlawful Enterprise
4. *Mens Rea* Issues
5. Limits of Liability

Liability of Accomplice where Principal Acquitted

Liability for More Serious Offence than Principal

Repentance of Accessory

7. Encouraging and Assisting Crime under the Serious Crime Act 2007

Complicity under the principles discussed above is what is known as 'derivative', ie the liability of the accomplice derives from that of the principal. It follows that the accomplice is liable only if the principal actually commits the main offence, or at least attempts to do so. The 2007 Act has introduced related forms of encouraging and assisting crime which do not depend in this way upon the principal's conduct.

Law Reform

Law Commission No 305: *Report on Participating in Crime*, 2007

Part 16

Inchoate Offences: Attempt, Conspiracy, Encouraging or Assisting Crime

A. Attempt

1. Introduction

Fault and Harm

Subjectivism versus Objectivism

2. Definition

The Criminal Attempts Act 1981 is largely based upon Law Commission No 102: *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement,* 1980

Criminal Attempts Act 1981, s1(1)

> 'If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence'.

Mens rea:

'with intent to commit an offence'

'intent': *Mohan [1976] QB 1; [1975] 2 All ER 193 (CA)
Pearman (1984) 80 Cr App R 259 (CA)
Walker and Hayles (1990) 90 Cr App R 226 (CA) Fallon [1994] Crim LR 519 (CA)

attempted murder: Whybrow (1951) 35 Cr App R 141 (CA)

diminished responsibility: Campbell [1997] Crim LR 495 (CA)

rape: Khan (1990) 91 Cr App R 29; [1990] 2 All ER 783 (CA)
criminal damage: A-G's Reference (No 3 of 1992) (1994) 98 Cr App R 383; [1994] 2 All ER 121 (CA)

Actus reus:

'does an act which is more than merely preparatory to the commission of the offence'

Robinson [1915] 2 KB 342 (CCA) (under the old common law)
Widdowson (1985) 82 Cr App R 314 (CA)

3. Attempting the Impossible

Criminal Attempts Act 1981 s1(2)

'A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible'.

Criminal Attempts Act 1981 s1(3)

'In any case where -

(a) apart from this subsection a person's intention would not be regarded as having amounted to the intention to commit an offence: but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence'.

B. Conspiracy

1. Statutory Conspiracy

Criminal Law Act 1977, s1 (as amended by Criminal Attempts Act 1981, s1):

The provisions are based upon recommendations made in Law Commission No 76: *Report on Conspiracy and Criminal Law Reform*, 1976

1(1) … [I]f a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

Agreement

'In accordance with their intentions'

2. **Common Law Conspiracies**

You are expected to know the outlines of (a) and (b), but will not be examined on them in detail.

(a) Conspiracy to Defraud

Criminal Law Act 1977 s5(2)

Scott [1975] AC 819; [1974] 3 All ER 1032 (HL)

"…it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

The Law Commission, in its 2002 *Report on Fraud*, recommended that when its proposed reforms were enacted (as they were in the Fraud Act 2006) this offence should be abolished. However, the Fraud Act does not abolish it.

(b) Conspiracy to Corrupt Public Morals or Outrage Public Decency

Shaw [1962] AC 220; [1961] 2 All ER 446 (HL) – publication of 'Ladies' Directory' = CCPM
Gibson [1990] 2 QB 619; [1991] 1 All ER 439 (CA) – earrings made from human foetuses = OPD
Rowley (1992) 94 Cr App R 95; [1991] 4 All ER 649 (CA)

3. Role of Conspiracy

To attack a form of wrongdoing that is inchoate but wrong in itself, or to make it easier to prosecute complete crimes?

'As a general rule …, conspiracy counts have been tacked on by the prosecution because the relaxation of rules of evidence makes a conviction more likely and increases judicial sentencing power.' (Spicer, quoted in LWQ)

C. Assisting or Encouraging Crime

There used to be a third form of inchoate crime at common law, namely incitement, but this was abolished by s59 of the Serious Crime Act 2007. At the same time the Act created three new offences, similar to forms of complicity, but not depending upon the principal having committed, or attempted, the main offence. These provisions came into force on 1 October 2008. The Act is based upon recommendations in Law Commission No 300: *Report on Inchoate Liability for Assisting and Encouraging Crime*, 2006.

The Law Commission's recommendations led to major reform. The straightforward offence of incitement was abrogated and replaced with three rather cumbersome offences.

1. Intentionally encouraging or assisting an offence.
2. Encouraging or assisting an offence believing it will be committed.
3. Encouraging or assisting offences believing one or more will be committed.

s44 Intentionally encouraging or assisting an offence

(1) A person commits an offence if –
(a) he does an act capable of encouraging or assisting the commission of an

offence; and

(b) he intends to encourage or assist its commission.

(2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.

s45 Encouraging or assisting an offence believing it will be committed

A person commits an offence if –

(a) he does an act capable of encouraging or assisting the commission of an offence; and

(b) he believes –

(i) that the offence will be committed; and

(ii) that his act will encourage or assist its commission.

s46 Encouraging or assisting offences believing that one or more will be committed

(1) A person commits an offence if –

(a) he does an act capable of encouraging or assisting the commission of one or more offences; and

(b) he believes –

(i) that one or more of those offences will be committed (but has no belief as to which); and

(ii) that his act will encourage or assist the commission of one or more of them.

(2) It is immaterial for the purposes of subsection (1)(b)(ii) whether the person has any belief as to which offence will be encouraged or assisted.

….

<u>Section 47(5) applies to all three offences.</u>

The requirements for determining the encourager/assister's fault in relation to the perpetrator's offending are to are set out in sections 47(5), (6) and (7) of the *Serious Crime Act 2007*. The subsection provides:

> "In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence–
>
> (a) if the offence is one requiring *proof of fault*, it must be proved that–
>
> (i) D *believed* that, were the *act to be done*, it *would be done* with that *fault*;
>
> (ii) D was r*eckless* as to whether or not it *would be done* with that *fault*; or
>
> (iii) D's state of mind was such that, were he to do it, it would be done with that fault; and
>
> (b) if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that–
>
> (i) D believed that, were the act to be done, it would be done in those circumstances or with those consequences; or
>
> (ii) D was reckless as to whether or not it would be done in those circumstances or with those consequences.

There is also a defence:

s50 Defence of acting reasonably

(1) A person is not guilty of an offence under this Part if he proves –

(a) that he knew certain circumstances existed; and

(b) that it was reasonable for him to act as he did in those circumstances.

(2) A person is not guilty of an offence under this Part if he proves –

(a) the he believed certain circumstances to exist;

(b) that his belief was reasonable; and

(c) that it was reasonable for him to act as he did in the circumstances as he believed them to be.

(3) Factors to be considered in determining whether it was reasonable for a person to act as he did include –

(a) the seriousness of the anticipated offence (or, in the case of an offence under s46, the offences specified in the indictment);

(b) any purpose for which he claims to have been acting;

(c) any authority by which he claims to have been acting.