Criminal Law

The Basics

Jonathan Herring

The Basics

CRIMINAL LAW

THE BASICS

Criminal Law: The Basics provides an introductory overview of the main themes in criminal law. Giving essential information about what the law is, this book defines and discusses different types of criminal offence, from homicide and assault to fraud and conspiracy. *Criminal Law: The Basics* also offers a thoughtful consideration of:

- The theoretical issues surrounding criminal law.
- The broader ethical issues that arise in the definition of a criminal offence.

Each chapter includes helpful references to key cases and the main statutes and lists of further reading. This book is ideal if you are about to start a course in criminal law or if you just have a general interest in the subject.

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CONTENTS

	Acknowledgements	vi
	Preface	vii
1	**Basic concepts in criminal law**	**1**
2	**Homicide**	**32**
3	**Assault**	**56**
4	**Property offences**	**81**
5	**Accomplices and inchoate offences**	**102**
6	**Defences**	**121**
	Index	**143**

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PREFACE

This book has been written for those seeking an introduction to the basics of criminal law. It would be ideal if you are about to start a course in criminal law or if you just have a general interest in the subject. It does not at all purport to tell you everything you need to know about criminal law for a law degree, but hopefully it will pique your interest in the subject and introduce you to some of the main themes. I have sought not just to give you some information about what the law is, but also to give you an insight into some of the theoretical debates behind the criminal law. Remember, criminal law does not have to be the way it is: it could look very different. Throughout this book you should be asking yourself why the law is the way it is and whether it could be improved.

At the end of each chapter there is a list of further reading that you can use if you wish to read more about the particular topics. There is also a list of some of the key cases which you can read further in the law reports.

J.H.

1

BASIC CONCEPTS IN CRIMINAL LAW

The likelihood is that you have committed a crime. Probably lots of them. A recent survey found that the average person committed a crime once a day. Of course, most of these are relatively minor ones such as littering or parking offences. Others such as speeding or using a mobile phone while driving may be regarded as trivial by some, but breach of them can lead to death. Nine per cent of all men aged eighteen were found guilty of, or cautioned for, an indictable offence in 1997–98. An indictable offence is one that can be tried in the Crown court, which means it is a serious offence, usually carrying a sentence of imprisonment. Of course, many more such offences will have been committed by eighteen-year-olds who were not caught. It probably won't surprise you that the percentage of eighteen-year-old women who committed an offence was far less. Of course, we cannot know for sure what the statistics are for offences where the person is not caught by the police. It seems in a given year 33 per cent of young men and 21 per cent of young women use illegal drugs, but few of them reach the courts.

So, given the likelihood that you have committed an offence, or are likely to be convicted of an offence, it may be a good idea to read this book carefully!

Let us look a bit more at some of the statistics about crimes.

STATISTICS

- There were 78,976 men in prison in August 2008 and 4,320 women.
- There was a 3 per cent chance of being a victim of crime in 2007/08. However, if you were a young man aged sixteen to twenty-four the risk increased to 13 per cent.
- The proportion of recorded crimes cleared up by a sanction detection reached 28 per cent in 2007/08.
- The risk of being a victim of crime at some point in your life was 22 per cent for 2007/08.
- The British Crime Survey (BCS) estimated that there were approximately 10.1 million crimes against adults living in private households in 2007/08, compared with 11.3 million in 2006/07.
- There were just under 5 million crimes recorded by the police in 2007/08, a fall of 9 per cent compared with 2006/07.

WHAT CONDUCT SHOULD BE CRIMINAL?

How should we decide what behaviour should be criminal and what should not? A common answer is that it should be behaviour which is immoral and harmful. However, fairly obviously there are many things which are immoral or harmful which are not crimes (committing adultery; spreading malicious gossip about someone; lying to your friends) and there is some behaviour which is criminal but which some people may not regard as harmful or even immoral. (Saying something blasphemous may be an example.) There is clearly more to defining crimes than determining whether behaviour is immoral or harmful. Indeed, the decision about what behaviour is criminal tells us a lot about society and its values. So this question deserves further discussion.

THE HARM PRINCIPLE

A popular starting point for those considering how decisions are made about which conduct should be criminal is the 'Harm Principle'. This principle, most famously articulated by J. S. Mill, states that behaviour should not be criminal unless the behaviour causes harm to another person. This means that behaviour which is

not harmful should not be made criminal, even if other people might believe that the behaviour is immoral. Picking your nose may be unpleasant but it does no one harm and so on the basis of the 'harm principle' it should not be criminal. But it is important to realise the limited role the 'harm principle' plays: it is not telling us what behaviour should be criminal, rather it tells us what behaviour should *not* be criminal, namely behaviour which is not harmful.

The primary role of the 'harm principle' is to combat 'moralism'. Moralists would seek to use the law to impose moral standards on people through the criminal law. A famous debate over the role of moral issues in criminal law is that between Lord Devlin and Herbert Hart. They were writing in the 1960s about the Wolfenden Report which was considering the criminalisation of same-sex sexual activity, although their debate was on the broader issue of enforcing morality through the law. Lord Devlin argued that it was important for a society to have a common morality. When this common morality was breached, that could harm the structures and security of society. Society was therefore entitled to protect its moral foundations by criminalising acts which infringed its moral codes, even if that behaviour was not harmful to others. He suggested that the strength of feeling of ordinary people would indicate that the taboo behaviour was an important part of the moral fabric of society.

It must be admitted that there are few who would today support Lord Devlin's approach. One objection is that while there may in the past have been a 'common morality', in today's society, with such a broad range of religious, moral and political views, it would be hard to find a common morality. Another is that even if there was it is unlikely that a few people breaching it would, in fact, have harmed the moral fabric of society. Granted there may be a few people somewhere in the country committing bigamy or bestiality under cover of darkness, but they are hardly threatening key moral principles. A more thorough objection is that individuals should be free to pursue their own visions for how they wish to live their lives. To require a person to act in a particular way just because others find how a person chooses to live immoral is unjustifiable.

There are not many moralists who are influential in our society today. A politician who sought to make sex outside marriage illegal on the basis that such behaviour was sinful would not get far in

their career and would win few votes! But bear in mind, the view that criminal law should not be used to impose moral standards is itself a moral view.

The harm principle is influential and important and there are very few people who would disagree with it at a general level. However, it has been beset by difficulties in defining one of its key elements: harm. The following are some of the key questions that arise in seeking to define harm.

- *Is harm to self covered?* Conduct which harms other people clearly can be punished under the harm principle, but what about harm to yourself? Should it be an offence to do yourself an injury? It is clear that we do have crimes which are primarily designed to protect people from their own stupidity. The law requiring the wearing of seatbelts is one obvious example. But, generally we do allow people to do things which are harmful to themselves: eat unhealthy food, enter relationships with unsuitable people, etc. Some people believe that the criminal law should never be used to protect people from themselves. To do so would be to become moralistic.
- *Is offence caused to others?* If a person were to walk down a street naked, no one would be hurt, but some people might be distressed or offended. Can offence or distress be harm for the purposes of the harm principle? Again, this is an issue on which a variety of views are held. If offence is covered how many people must be offended? If conduct which could possibly cause offence is covered then the criminal law would be very broad, because almost anything might be found offensive. However, if we require a majority of people to find the conduct offensive, would that mean that conduct highly offensive to a minority group should be permitted which might increase discrimination against them?
- *Is risk of harm covered?* Does the harm principle prohibit the punishment of conduct which is not itself harmful? On a literal reading it would, but most supporters of the harm principle would support the criminalisation of conduct which endangers others but does not harm them. One example may be offences involving drink-driving. Even if the drunk driver manages to get home without hurting anyone such conduct carries a high risk of harm to others.

A QUESTION TO PONDER

Should it be illegal for a man to pay a prostitute for sex? A moralist may take the view that such conduct is immoral and so should be made illegal for that reason alone. Under the harm principle it would be necessary to point to a harm to justify the intervention of the criminal law. It might be argued that the prostitute is harmed by the act in that it degrades her. However, some would reply that if she has consented to the act then it is not for anyone else to assess whether it is harmful to her. It might be suggested that the harm could be found in the wider community by arguing that prostitution encourages negative attitudes towards women. Another argument might be that many women are trafficked into prostitution and the man is either having sex with a trafficked woman or he is encouraging prostitution, which encourages the practices of prostitution. Either way, it can be seen as harmful. Which, if any, of these arguments would you find the most convincing?

BEYOND THE HARM PRINCIPLE

It is important to appreciate that the harm principle tells us what conduct should *not* be criminalised. It does not tell us what conduct should be criminalised. Supporters of the harm principle do not suggest that all harmful conduct should be criminalised. That would lead to far too broad a range of criminal law. So the harm principle is best seen as a doorkeeper. It keeps out of consideration for criminalisation non-harmful behaviour, but it has nothing to say about what should be criminal.

So how do we decide what should be criminal? Surprisingly, that is a question which has received relatively little attention. The reason is, in part, that the issue is hugely complex. It involves balancing a wide range of different factors and it is difficult to say how they should be weighed. In reality, of course, the question of criminalisation often turns on politics. So the high-minded principles that we are discussing next may play little role in the rough-and-tumble world of parliamentary debate, where what will win votes counts for much more than the musings of philosophers and lawyers who have addressed this issue.

Nevertheless, at a theoretical level, here are some of the issues which would need to be considered:

CRIMINALISATION AS A LAST RESORT

One issue is whether criminalising behaviour is seen as something undesirable which requires a strong justification or whether criminalising behaviour is not in itself necessarily bad. This is a very important question. If criminalisation is seen as something that requires a very strong justification then we would need to be persuaded both that:

- The conduct caused a serious harm.
- There was no other way of preventing the harm.

The second point is that even if we locate harmful behaviour we should prefer to use other means of tackling the behaviour. Let us say, for example, that dog fouling in a park had got so bad that children were not able to use the park. It may be that taking photographs of dog owners who allowed their dogs to foul and posting them on the Web or in public places may be an effective deterrent and that criminal law would not be used. Or it may be that educating dog owners about the dangers of dog fouling would be sufficient. Indeed, one might think that many of the wrongs that trouble society might be better addressed by more informal and less coercive ways than using the criminal law.

So why might someone take the view that criminalisation should be regarded as a 'last resort'? A popular reason is that we prize autonomy, that is, the freedom to live our lives as we wish. The government should restrict what we do only if there is a very good reason for doing so. The criminal law with its risk of imprisonment and its condemnatory message is a particularly serious intervention in our freedom and should be used only if absolutely necessary. A slightly different reason is that it is better for people to work out for themselves what behaviour they should or should not do. The criminal law in ordering people how to behave discourages people from thinking issues through for themselves.

There are some who do not accept these points. They argue that criminal law should not be regarded in a negative light, as an evil to

be avoided, except in the most serious of cases. To them criminal law can provide an important structure for society to operate within, to protect vulnerable members of society and to enable us to live together in communities. Indeed, the criminal law protects us from harm inflicted by others and so in a sense enhances our autonomy. Seen in this more positive light, criminal laws do not require a particularly strong justification, only evidence that they contribute to the general well-being of society.

CRIMINAL LAW AND HUMAN RIGHTS

There are certain rights that we have which many of us treasure. The rights of liberty, free speech and dignity are seen as a central aspect of our humanity. By referring to people's human rights a case can be made for requiring there to be a particularly strong justification for depriving people of a basic human right. Let us take an example. The law on burglary prevents you entering another person's house with intent to steal. That law is not a grave infringement of your rights. There are lots of other things you can do apart from burgling people's houses. However, a law which made it illegal to have sex with a person of the same sex would have a significant impact on gay and lesbian people. It would mean they would not be able to engage freely in sexual relations and that would be an infringement of their private life. It is an infringement of their human rights on a completely different scale from the law on burglary, for example. In short, the value of the activity has to be taken into consideration, as well as the harm it may cause.

This point indicates that when considering whether behaviour should be criminalised we should consider not only the harm caused by the behaviour but the extent to which criminalising behaviour would interfere with a person's rights. This point is also relevant, as we shall see, in that it means that offences should be narrowly drafted. So that if a person's rights have to be interfered with it should be the minimum extent necessary.

The human rights of victims are, of course, crucial in crafting the criminal law. Behaviour which severely infringes the human rights of another person will often be a criminal offence. Indeed, one way of deciding how to determine which crimes are worse than others is to consider to what extent they interfere with the rights of victims.

HOW HARMFUL IS THE CONDUCT?

A key matter when determining whether conduct should be criminalised is how harmful it is. Clearly, the more harmful it is the stronger the case for criminalising it. However, this leaves open the question of how we grade degrees of harm. How do we decide whether a punch is worse than a pinch, or a racial insult worse than a slap? One problem is, of course, that crimes affect people in different ways. The theft of £10 from a millionaire might go almost unnoticed, but to an impoverished pensioner it might be traumatic. Similarly, some people seem able to shrug off a burglary with little effort, while to others it is highly upsetting.

One suggestion is to consider how much an impact the harm in question has on the general quality of life of the individual. To what extent does the harm impede them in living their life as they might choose. Such a question could be asked of an average person. That might give us some way of ranking the harm.

DRAFTING A CRIMINAL LAW

Let us say that a particular kind of behaviour has been accepted by Parliament as deserving of a criminal sanction. Let us assume for the sake of argument that the government has decided that it should be illegal for parents not to give their children a healthy diet. The government must then put that principle into drafting a statute. There are a number of issues and principles which might arise which will affect the drafting process:

THE PRINCIPLE OF CLARITY

It is generally agreed that it is very important that criminal offences are drafted with clarity so that people know what they can and cannot do. Law-abiding citizens are entitled to look at the criminal law and work out for themselves precisely what they must do or not do to ensure they do not break the law. So if Parliament were to enact a law which stated 'It is a crime to feed a child an unhealthy diet' it would create huge uncertainty. Parents would rightly demand to be told in clear terms what the law required them to do. In one famous case before the European Court of

Human Rights a defendant was charged after failing to comply with a court order that he must 'behave differently'! Not surprisingly the court thought that far too vague to form the basis of a criminal charge. So in our example Parliament might decide that a clear description of what a healthy diet involved was required in the statute. Alternatively the offence could be in terms of failing to comply with a notice about diet issued by a health visitor.

THE PRINCIPLE OF *MENS REA*

If you were to accidentally bump into someone in the street, you would probably regard it as most unfair if you were then charged with assault. That is because you would regard what had happened as an accident rather than an attack. But what distinguishes an accident from an attack is the mental element involved. It is the intention to hurt which distinguishes the shove from the accidental knock. So most criminal offences require that the defendant intended or foresaw some kind of harm when they acted. This requirement is known as the mental element of offence, or, to those who love Latin, as *mens rea*.

So if our proposed unhealthy diet offence were to comply with the 'principle of *mens rea*' the law might need to include a clause requiring proof that the parent knew that the diet was unhealthy or that it was contrary to the notice of the health visitor. Otherwise there would be a risk that a parent who honestly believed they were providing a healthy diet could be convicted.

However, the 'principle of *mens rea*' is not an absolute principle. There are some crimes which require proof of no mental state. These are known as offences of strict liability. They are usually minor (such as parking offences) or concern the regulation of businesses (e.g. pollution offences). For nearly all serious criminal offences a mental state must be proved. For such crimes it is necessary to prove only that the defendant acted in a particular way. For example, that he or she drove in excess of the speed limit.

Of course, it would be possible to imagine a criminal law where none of the offences contained a mental element. Anyone who hurt another person could be prosecuted, even if it was all an accident. Some commentators have even recommended such a criminal law. What it would mean, however, is that a criminal

offence would lose its censuring function. In other words, a criminal conviction would no longer necessarily indicate that a person was morally blameworthy. All a criminal conviction would mean is that the defendant had caused harm.

THE PRINCIPLE OF FAIR LABELLING

Many criminal lawyers support the 'fair labelling' principle. This means that the name given to the offence should match the definition of the offence. So it would be wrong to define the offence of rape to include conduct which did not properly fall within the definition of that offence. Imagine a case where a man finds a homeless woman on the street and offers her £15 if she agrees to have sex with him. Reluctantly she agrees because she has not eaten for a long time. Some people believe that the man should be guilty of a criminal offence. If that is right, there is still the question of whether or not it should be rape, or whether it should be some other kind of offence, and we should keep the label 'rape' for violent sexual assaults. This issue is hotly debated, and much turns on what you think the essential wrong in rape is. However, this example shows how important it is that the 'offence label' and the 'offence definition' correlate.

So in our unhealthy eating example, if the government were to call the offence 'child abuse by poisoning' there would be a debate over whether or not that was the correct label for the wrong. An important point in the fair labelling principle would be that all those who fall under the definition should deserve the label attached. So even though we might imagine that few parents feeding their children grossly unhealthy diets might deserve the label 'child abuse by poisoning' the vast majority of those convicted of the offence (if it were created) would not deserve the label.

WHAT ARE THE AIMS OF THE CRIMINAL LAW?

We are long overdue discussing the question of what the aims of the criminal law should be. How should we know what a good criminal law would look like? One answer might be that the aim of a criminal law would be to reduce the harm in society. The role of the criminal law in doing this would be to deter people from

harming others, and to incarcerate people who do harm others, so that they do not do any more harm. This, however, is problematic. A highly authoritarian regime, ruling with terror, might be able to achieve a society in which few people were harmed, but their freedom would be so reduced that their life would lose much of its value.

A different vision of the criminal law is that it should send out a clear message about the kind of behaviour which society deems particularly blameworthy. This would chime with the 'principle of *mens rea*' because the criminal law generally punishes only those who are blameworthy. It would also indicate that not all blameworthy behaviour deserves the censure of a criminal conviction, only that which causes particularly bad harm.

CONDUCT ELEMENT

It is not a crime to have evil thoughts. Crimes involve proof that the defendant did something. This is known as the *actus reus* of the offence. This term refers to the part of the definition of the offence which relates to the actions of the defendant and their consequences.

As we have just noticed, most crimes involve proof that the defendant caused a harm. In murder, for example, it must be shown that the defendant caused the death of the victim. In the offence of assault occasioning actual bodily harm there must be proof that the defendant caused the actual bodily harm. In most cases that is relatively unproblematic. If the defendant stabs the victim, and the victim falls down dead, there can be little doubt that the defendant caused the death of the victim. However, there can be cases where the causation question is far from straightforward.

A good starting point is the principle that the defendant can be said to have caused a result only if 'but for' his or her act the harm would not have happened. This is sometimes known as factual causation. So in one case (*White*) a defendant poisoned his elderly mother's tea. Before she took a sip she suffered a heart attack. The medical evidence showed that her heart attack was unrelated to the poisoning. In other words, she would have died in exactly the same way and at exactly the same time had she not drunk the poison. The result was that he could not be said to have caused her death. However, he could be charged with attempted murder.

'But for' causation is not, however, enough to establish legal causation. This is because it throws the net of potential liability far too wide. You could say that but for a criminal's grandparents producing a child the offence would not have occurred! But to say the grandparents caused the crime would be absurd. So we need some further principles to apply.

THE OPERATING AND SUBSTANTIAL CAUSE TEST

The courts have held that the defendant will have caused a result if his or her act was an operating and substantial cause of the death. It does not need to be shown that the action was the sole cause of death, as long as what was done was an operating cause of death. This means that there may be several operating and substantial causes of death. This principle has been of particular relevance in cases where a defendant has injured the victim, who is taken to hospital, where the treatment the victim receives is negligent. The courts have tended to say that the defendant's acts are still an operating cause. After all, but for his or her actions, the victim would not have been suffering injuries that required him or her to go to hospital in the first place.

LEADING CASE

R V CHESHIRE, COURT OF APPEAL

The defendant shot the victim. The victim was taken to hospital, where the doctors performed a tracheotomy negligently. The patient died. The Court of Appeal said the question of causation was simply whether the defendant's actions were an operating and significant contribution to death. If they were, the fact that had the doctors acted properly the patient's life might have been saved was irrelevant. It was perfectly possible in a case like this that both the doctors and the defendant had done acts which were an operating and substantial cause of death.

As the leading case indicates, causation questions are particularly difficult where one person (A) does an act which affects the victim

and then another person (B) does another act which also affects the victim. For example, imagine a case where A stabs the victim and then B comes along and shoots the victim. In such a case three results could be possible:

- Both the stab wound of A and the shot of B combined to cause the death. In such a case both A and B could be found to have caused the victim's death.
- The shot of B was the sole cause of death and the stab wound was irrelevant to the actual cause of death. In this case B, but not A, could be said to have caused the death. A could still face a charge of wounding.
- The stab wound of A caused the death, and the shot of B did nothing to hasten the death. In such a case A caused the death.

THE PRINCIPLE OF PERSONAL RESPONSIBILITY

A basic principle underpinning the law in this area is that a person is responsible for their actions and no one else. So if Jinx told James to kill Ernst, and James did so, then James alone would be said to have caused Ernst's death. This would be so even if, without Jinx's encouragement, James would not have committed a crime. That is not to say that Jinx would not have committed a crime. She might well be liable as an accessory (a concept we will discuss in Chapter 6). However, she would not have caused Ernst's death. There is one exception to this, and that is where James lacks criminal responsibility for his actions. This might happen if James was under the age of ten or was mentally disordered. In such a case Jinx might be held to have caused the death. This principle played a central role in the following case.

LEADING CASE

R V KENNEDY, HOUSE OF LORDS

The defendant supplied the victim with a syringe full of drugs. The victim injected himself and died. The central question for the House

of Lords was whether or not the defendant could be said to have caused the death. The House of Lords held that he could not. The victim had engaged in a free, voluntary and informed act and therefore was responsible for the consequences of his action. Their lordships explained:

> ... generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act. ... Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.

Sometimes the courts and commentators have talked in terms of a 'chain of causation'. A defendant is responsible for the events that follow from his or her action (the chain) unless someone else intervenes in the chain of causation, when there is a break in the chain of causation. So if Lupa poisons Auric, but before Auric dies from the poison James shoots Auric dead, then James will be held to have caused the death. James's act of shooting Auric intervened in the course of events and broke the chain of causation. Lupa could be charged with a criminal offence because she stabbed Auric but could not be said to have caused the death.

There have been a series of cases where the defendant has injured the victim and the victim has been taken to hospital but has received poor medical treatment and as a result died. In these cases the courts have generally been reluctant to find that the medical treatment broke the chain of causation. Understandably, the courts have taken the view that the victim would not have needed to receive any medical treatment if they had not been injured by the defendant. And it hardly lies in the mouth of the defendant to complain about the standard of medical treatment of those trying to treat the victim for the injuries he inflicted! That said, there have been some exceptional cases where the medical treatment has been so extraordinarily bad that the courts have accepted that the defendant was not responsible for the death they caused.

More difficult cases can arise where the defendant injures the victim and the victim does something which causes their own death. Consider this case:

LEADING CASE

R V BLAUE, COURT OF APPEAL

The defendant stabbed the victim, who was a Jehovah's Witness. She was taken to hospital and was told that she needed to have a blood transfusion, without which she would die. Owing to her religious beliefs she refused to consent to the proposed treatment. As a result she died in hospital. Lawton LJ explained that 'those who use violence on other people must take their victims as they find them'. This, he explained, included not only the victim's unusual physical characteristics, but also their emotional, psychological and spiritual ones. The defendant would therefore be said to have caused the death of the victim

This decision has proved controversial. Everyone agrees that the defendant is criminally liable for causing the injury but some commentators argue that the death was the result of the victim's decision to refuse treatment. The defendant should not be responsible for the unusual religious beliefs of their victim. However, there is much to be said for the court's decision. After all, the victim died as a result of the injury caused by the defendant. This was not a case where the victim made her condition worse by her actions. She simply allowed the wound to pursue its natural course.

The *Blaue* case may be contrasted with another (*Roberts*) where the victim jumped out of a car when the defendant (the driver) made indecent and threatening comments. Here the Court of Appeal suggested that if the victim behaved in a way which was unforeseeable or 'daft' it could be said that the victim's actions broke the chain of causation. However, in this case they thought it was foreseeable that the victim might jump out of the car and so the defendant caused the victim's injuries.

THE 'THIN SKULL' RULE

A well known rule of the law of causation is that the defendant must 'take his victim as he finds him'. This means that if a

defendant pushes someone over and because they have a thin skull they crack their head and die the defendant will be liable for causing their death. Indeed, the Court of Appeal in *Blaue* indicated that that decision could be seen as a 'thin skull' case. The defendant could not blame the victim for her religious beliefs and he was responsible for the result of her injuries.

PUBLIC POLICY AND CAUSATION

Some lawyers are rather sceptical of the law on causation. Although the judiciary have formulated the principles of causation, as outlined above, one has the feeling that in some cases it is public policy which determines whether or not a defendant is found to have caused a result. We have already noted how reluctant the courts are to find that doctors have broken the chain of causation, even when they behave negligently. This may reflect a public policy against punishing doctors rather than an application of strict rules of law.

OMISSIONS

Generally in English criminal law you are not liable for an omission. So if you see a baby drowning in a lake you are entitled to walk on past, whistling as you go, and there will be no offence committed. That is, however, subject to one important exception, and that is where the defendant is under a duty to act. A duty to act can arise in a number of situations, including the following:

- Where you are under a contract to act. So if in our example you were employed as the baby's nanny you could be under a duty to act.
- Where you are in a close family relationship with the victim. So in our example if you were the baby's parent you would be under a duty to act.
- If you created the dangerous situation for the victim. If you had put the baby in the lake (even if by accident) you would be under a duty to act.

LEADING CASE

R V MILLER, HOUSE OF LORDS

Miller was a homeless man who was squatting in someone's house. He fell asleep on a mattress with a lighted cigarette. When he woke up and found the mattress alight, he simply moved to another room. The house caught fire and substantial damage was done. The House of Lords upheld his conviction for arson (that is, causing damage by fire). At the time when he started the fire (falling asleep with the cigarette) he did not have the necessary mental state. (He was not aware of the risk of starting the fire.) However, when he realised there was a fire he had a duty to take reasonable steps to stop the fire, because he had started it. So he was liable for failing to act to stop the fire and at that point in time he had the necessary mental state.

In this regard English law is out of step with many other countries in Europe. Many of them have 'Bad Samaritan' laws, as they have become known (after the biblical parable of the Good Samaritan). These are laws which punish people who see another person is in danger but walk on by without offering them any help. The argument that has held sway among English lawyers is that you should be free to mind your own business and as long as you don't harm anyone you should not face prosecution.

It may be thought that the distinction between acts and omissions is easy to draw. In fact this is not always so. Imagine a person is on a life support machine and the doctors decide to switch the machine off. Is that an act or an omission? It looks like an act: after all, the doctors move to make the machine switch off. However, the House of Lords has concluded that switching off a life support machine should be regarded as an omission. The reasoning is that, although it looks like an act, the pulling of the switch is in effect stopping providing the treatment. That is best regarded as an omission.

MENTAL STATES

As already mentioned, an important part of most criminal offences is that the defendant had the necessary mental element. The most

commonly used are intention, recklessness and negligence. We shall discuss these next.

INTENTION

Generally speaking, to intend a result is to act with the aim or purpose of producing that result. The problem for juries, of course, is that it is impossible to know exactly what is going on inside a person's head. The jury will have to use their common sense to ascertain the person's state of mind when they committed their crime. In many cases they are unlikely to have any problems. If a defendant points a gun at the victim's head and pulls the trigger, the jury will take a lot of convincing that the defendant did not intend to kill the victim. What other conceivable reason for acting could the defendant have?

Hence in relation to intention the House of Lords has indicated that in most cases the jury do not need to be directed on the notion of intention. It can be taken to have its 'normal meaning'. So, in the straightforward shooting case just described, the jury will easily find that the defendant intended to kill the victim. The only purpose the defendant would have in pulling the trigger would be the intention to kill or cause serious injury.

However, some cases are less straightforward. There are cases where the defendant claims to have been acting for one purpose, but another is very likely to occur. For example, in one case (*Hyam*) the defendant poured petrol on a family's house and set it alight. She gave evidence that she intended to frighten the victims, but it was not her purpose to kill or cause them serious harm. In fact one victim died in the fire. The courts have struggled in dealing with such cases. The current law is that the jury, if they wish, can find that there is intention if the result was virtually certain to occur as a result of the defendant's actions and the defendant realised it.

LEADING CASE

R V WOOLLIN, HOUSE OF LORDS

The appellant was charged with the murder of his baby son, who had died of head injuries. He was convicted of murder after admitting

that he had caused the injuries. The House of Lords allowed his appeal. The judge had misdirected the jury in saying that if there was a substantial risk of death then the jury could find the defendant had intended the injury. Instead, the following test was approved: the jury would be entitled to find intention only if death or serious injury was a virtually certain consequence of the defendant's actions and the defendant realised that this was so.

The *Woollin* test provides a solution in a scenario much discussed by criminal lawyers:

> D plants a bomb on a plane which has items on board that D has insured. D's purpose in planting the bomb is to be able to claim on the insurance policy. He realises that if the bomb goes off the pilot of the plane will die, but that is not his purpose. Indeed, he would be thrilled if the pilot somehow parachuted to safety.

In a case of this kind, were the pilot to die, there is little doubt a jury would find that the death was virtually certain and that the defendant realised it. It would therefore be open to them to conclude that the defendant intended to kill the pilot. No doubt they would do so.

POINT TO PONDER

The *Woollin* direction allows the jury to find intention if they wish, if the foresight of virtual certainty test is satisfied. But what factors are the jury meant to take into account in deciding whether or not to find intention? We are not told by the House of Lords. Presumably the jury are meant to use their common sense and determine whether the defendant's state of mind was 'bad enough' to be labelled as intention. A crucial point may be what the defendant's motive was. One academic has suggested that the *Woollin* direction gives the jury 'moral elbow room' to determine whether or not there is intention. Maybe, in other words, there is an acceptance that among those who foresee a result as virtually certain there are some who should be found to have intention and some who should not. It is, essentially, a moral issue to be decided on the facts of the particular case.

RECKLESSNESS

The basic idea behind recklessness is that the defendant foresaw the risk of harm and yet went ahead and took it. It is important to appreciate that the question is all about what the defendant foresaw. It is not about what the defendant *ought* to have foreseen. In *Stephenson* a man lit a match in a haystack. Not surprisingly, it went up in flames. He was charged with criminal damage. The Court of Appeal accepted that he suffered from a severe mental illness and he had, therefore, not realised that there was a risk in lighting the match. It was irrelevant to the case that most people would have foreseen the risk. What matters is whether this particular defendant foresaw the risk. In this case he did not.

LEADING CASE

R V G AND R, HOUSE OF LORDS

Two boys aged eleven and twelve were convicted of arson. They had set fire to a wheelie-bin they found outside a supermarket. The fire spread and burned down the supermarket and nearby buildings. The boys were out camping without their parents' permission. They were convicted under the '*Caldwell* test' of recklessness. If the defendants did not see a risk which would have been obvious to a reasonable person they could be found reckless in crimes of criminal damage. The House of Lords held this was a misdirection and held:

> A person acts recklessly ... with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.

This understanding of recklessness seems straightforward and uncontroversial. However, there are two cases in particular in which it has proved problematic. The first is where the defendant is drunk or intoxicated with drugs and as a result fails to see the risk in what he is doing. The courts have had no difficulty in finding such defendants reckless. One rather clever line of reasoning that the courts have adopted is that anyone who gets drunk or takes drugs is

taking the risk that they may become intoxicated. They must have foreseen that they might behave in inappropriate ways when intoxicated, and that could include committing a crime. Everyone who takes drink or drugs realises this. Therefore we can say that a drunk or 'high' defendant who commits a crime has been reckless. Notice that the rule applies only if the defendant was voluntarily intoxicated or drugged. If the defendant's drink had been 'spiked' and they had then committed a crime they would be regarded as involuntarily intoxicated, not reckless.

There is a second area where the law on recklessness is a bit more complicated than saying that a person who sees a risk but takes it is reckless. This is where a defendant has not foreseen a risk but may appear blameworthy for having failed to see it coming. Consider, for example, the person who is insulted outside a pub, lashes out in anger and later says, quite truthfully, that at the time he was so angry that he did not think about the risk of doing harm, he just lashed out. In such a case the courts have held that the angry person must have known 'at the back of his mind' that there was a risk he would hurt someone by throwing the punch, even if the angry thoughts were dominant. This reasoning seems to reach the right result, even if some people find it rather suspect.

NEGLIGENCE

Although there are quite a number of crimes that cite negligence, they are nearly all minor. A person is negligent if they behave in a way that a reasonable person would not. So if a person is charged with a driving offence involving negligence the jury must consider whether a reasonable driver would have behaved as the defendant did. If the defendant failed to conform to the standard expected of the reasonable person then he or she will be negligent. Clearly in making that assessment the jury will consider the situation the defendant was in. So if the defendant driver was responding to an emergency they may be more sympathetic to the defendant who makes the 'wrong call' than they would be if the defendant had time to decide how to respond.

It will be apparent that negligence is not, therefore, properly described as a 'state of mind'. Rather it is a description of an action. Some supporters of negligence suggest it could be described as a 'failure

to think about the consequences of one's actions'. So seen it might be described as a state of mind, or at least the absence of a state of mind.

TRANSFERRED *MENS REA*

The courts have developed the doctrine of transferred malice. It is designed to deal with cases of this kind: Martin shoots at Nicola, intending to kill her, but misses and kills Olive instead. In such a case Martin is regarded as having intended to kill Olive. He intended to kill Nicola, but the intention can be 'transferred' to Olive. This all sounds rather complicated, but it is understandable that a defendant should not have base their defence on the claim 'I didn't mean to kill her, I meant to kill him.' That is hardly an attractive defence!

COINCIDENCE OF *ACTUS REUS* AND *MENS REA*

To be guilty of a crime the defendant must have the *mens rea* and *actus reus* at the same time. Take the crime of murder, where the *actus reus* is killing the victim and the *mens rea* is an intention to kill the victim or inflict serious injury. Of course, a defendant cannot be guilty of committing the *actus reus* but not having the *mens rea* (e.g. by killing a victim in a complete accident); nor if the defendant had the *mens rea* but no *actus reus* (e.g. the defendant planned to kill the victim but had not got round to doing so). Further, there can be no offence if the defendant had the *mens rea* at one point in time and the *actus reus* at another. For example, if the defendant was planning to kill the victim one morning and later in the afternoon killed the victim purely by accident.

CRIMES OF STRICT LIABILITY

As mentioned earlier, there are some crimes which are 'strict liability'. That means that no mental element is required. Other crimes require a mental element to be found in some aspects of the conduct but not in relation to other parts. These can be called crimes of partial strict liability.

An example of a strict liability offence would be speeding. A person will be guilty of the offence of driving in excess of the speed

limit even if they were not aware of the speed limit or the speed they were travelling at. The example of speeding is a good example of why strict liability offences are necessary. First, it would be impossible for the prosecution to demonstrate in speeding cases that the driver knew what speed they were travelling at. Second, the offence is relatively minor in the sense that no great stigma is attached to a conviction for speeding. Therefore less wrong is done to the morally innocent person who is convicted. Third, a cautious driver can ensure without great effort that they are lawful.

An important case in this issue was *R v G*, where a young man was told by a girl that she was fifteen when in fact she was twelve. They had sexual relations together. He was charged with the offence of rape of a girl under thirteen. His defence that he believed her to be fifteen was held not to be effective because the offence was one of strict liability as regards the age of the victim. All that needed to be shown was he intended to sexually penetrate the victim. Baroness Hale dealt with his argument rather robustly:

> Every male has a choice about where he puts his penis. It may be difficult for him to restrain himself when aroused but he has a choice. There is nothing unjust or irrational about a law which says that if he chooses to put his penis inside a child who turns out to be under thirteen he has committed an offence (although the state of his mind may again be relevant to the sentence).

CRIMINAL LAW AND CIVIL LAW

If Hugo were to hit Tiffany on the nose there are potentially two significant legal proceedings which could follow. First, the police could arrest Hugo and prosecute him for an assault. The action would be brought on behalf of the state by the Crown Prosecution Service. The case would be known as Regina v Hugo, 'Regina' being the Latin for 'the Queen' and in this context she would be personifying the state. In legal writings Regina is often abbreviated to R, so the case would be called R v Hugo. If he was convicted Hugo would receive a punishment and that could be a fine, a Community Service Order or imprisonment.

Second, Tiffany could sue Hugo for damages. She would bring the proceedings in her own name and so the case would be known

as Tiffany v Hugo. If she succeeded she would be awarded damages to compensate her for her loss.

The distinction between civil proceedings and criminal proceedings is crucial. It tells us a lot about the nature of criminal law. First, it shows that crimes are regarded as essentially wrongs in which the state has an interest or which the state is properly involved in bringing proceedings. Some harms, therefore, may be better left between individuals and communities to sort out. The friend who lets you down may be a good example of this. Others involve a wrong to the state or the wrong is one that the state believes should not be left to individuals to resolve themselves. That may be because it is too serious a wrong to be dealt with informally or because the state is affected by the harm.

Second, the aim of the result of civil proceedings and criminal proceedings are different. The aim of civil proceedings is to compensate the victim for their loss; the aim of the criminal punishment is to mark society's disapproval of the behaviour and to deter similar conduct in the future. This means that civil proceedings can lead to an award of damages, even if the defendant was not morally blameworthy. While normally a criminal conviction is appropriate only where there is blame. It is commonly argued that a criminal conviction carries a censure for what the defendant has done. The same degree of censure is not attached to an order that a person must pay damages to another.

SOURCES OF CRIMINAL LAW

Most criminal offences are found in statutes. For example, the Offences against the Person Act 1861 contains many offences of assault that are used in courts throughout the land every day. However, the courts in their decisions interpret this legislation. To properly understand a statutory offence, therefore, it is necessary to read not only what the statute says, but also the cases which have explained the meaning of the terminology used. Other criminal offences have been built up by the 'common law'. These are decisions of the courts made over the centuries which have established the creation of particular offences. Their meaning must be found by reading the leading cases which set out its requirements.

The Law Commission (a body which advises the government on reform of the law) has recommended that a Criminal Code be created. This would be a single statute which would set out all the criminal offences and defences that exist. That would certainly make things easier for students. They would need only to look at the code, and would not need to consider the multitude of statutes and cases that students currently have to. However, the government has not shown any interest in enacting such a code, so it exists as no more than a glint in the eyes of some criminal lawyers.

CRIMINAL LAW IN THE REAL WORLD

It would be a mistake to think that the law in the statutes and in the textbooks matches the way the criminal law works in the real world. First, and obviously, not all criminals get caught. Not by a long chalk. Second, even if a person is caught there may not be enough evidence to bring a prosecution. Third, the police and the Crown Prosecution Service have discretion as to whether to prosecute. For some offences this can be very significant. Consider the offence of causing another person harassment, alarm and distress in a public place. I don't know about you, but I am caused harassment, alarm and distress most times I go to a crowded place! Certainly this offence must be committed very often. Of course, a person is arrested for it only if the police think an arrest is appropriate or necessary. More cynical observers suggest that POP ('pissing off the police') is a more accurate description of offences of this kind! The suggestion being that whether a person is arrested or not may depend more on whether they annoy the police than on whether they have committed an offence. Certainly the discretion exercised by the police is almost more important than the legal definition of the offence. For more serious cases there is much less discretion on whether to prosecute.

Then there is the uncertainty in the courtroom itself. Of course, the jury themselves are the ones who make the final decision about the guilt or innocence of the defendant. All practising criminal lawyers will be able to tell of cases where they thought there was an open-and-shut case of guilt or innocence but the jury returned a verdict defying all expectations. Note that even where the judge feels the case for the prosecution is overwhelming it must still be for

the jury to determine guilt. Not only do juries have an important role to play, so do the witnesses and others involved in a trial. Rarely is what happens at a trial predictable.

BIZARRE CASE

As the following exchange shows (a report from a real case in the United States) even apparently straightforward matters can go wrong in a courtroom:

By the court clerk. Please repeat after me, 'I swear by Almighty God ... '
By the witness. I swear by Almighty God.
Clerk. That the evidence that I give ...
Witness. That's right.
Clerk. Repeat it.
Witness. Repeat it.
Clerk. No! Repeat what I said.
Witness. What you said when?
Clerk. That the evidence that I give ...
Witness. That the evidence that I give.
Clerk. Shall be the truth and ...
Witness. It will, and nothing but the truth!
Clerk. Please. Just repeat after me, 'Shall be the truth and ... '
Witness. I'm not a scholar, you know.
Clerk. We can appreciate that. Just repeat after me, 'Shall be the truth and ... '
Witness. Shall be the truth and.
Clerk. Say, 'Nothing ... '
Witness. Okay. [Witness remains silent]
Clerk. No! Don't say nothing. Say, 'Nothing but the truth ... '
Witness. Yes.
Clerk. Can't you say, 'Nothing but the truth ... '?
Witness. Yes.
Clerk. Well? ... Do so.
Witness. You're confusing me.
Clerk. Just say, 'Nothing but the truth ... '
Witness. Is that all?
Clerk. Yes.
Witness. Okay. I understand.

Clerk. Then say it.
Witness. What?
Clerk. 'Nothing but the truth ... '
Witness. But I do! That's just it.
Clerk. You must say, 'Nothing but the truth ... '
Witness. I will say nothing but the truth!
Clerk. Please, just repeat these four words 'Nothing', 'But', 'The', 'Truth'.
Witness. What? You mean, like, now?
Clerk. Yes! Now. Please. Just say those four words.
Witness. 'Nothing. But. The. Truth.'
Clerk. Thank you.
Witness. I'm just not a scholar, you know.

In a criminal trial there is an important distinction between the role played by the judge and that played by a jury. It is the role of the judge to tell the jury what the law is and the job of the jury to decide what the facts of the case are. The jury will be directed on the law by the judge and must determine whether, in accordance with the direction given by the judge, the facts apply to the law.

That is what is meant to happen. There have been cases where it seems the jury are not convinced that the law is right and even though the evidence appears to point to a clear case for a conviction they have acquitted. Most notoriously this appears to have happened in some prosecutions under the Official Secrets Act. Indeed, some lawyers have argued that this is one of the strengths of the legal system. The jury provide a bastion for a citizen against an absurd law. However, technically the jury will have acted improperly because it is their job to determine the facts and apply them to the law, not to decide what the law should be.

The judge has a duty to ensure that the trial is conducted according to the rules of procedure and evidence, a large subject in itself. The judge's function is to explain the *law* to the jury: this is a very important part of the judge's summing-up, in which she addresses the jury before they retire to consider their verdict. If any questions of law are raised during the trial, by the prosecution, the defence or by the judge herself, it is the judge who must give a ruling on the point. The jury are bound to take the law from

the judge. It may be possible for the defendant to challenge the judge's ruling on the law by appealing to a higher court after the verdict.

The jury are to consider only whether the defendant committed the offence with which he is charged. For example, if the defendant is charged with stabbing the victim and during his evidence the defendant admits stealing from the victim, but denies stabbing him, the jury cannot return a verdict of guilty of theft, as they are allowed to consider only the offence with which the defendant was charged. That said, sometimes the jury can return a verdict of guilty to a lesser crime if the defendant is charged with a serious offence the elements of which include the lesser offence. For example, if the defendant is charged with murder, the jury could convict him of manslaughter if the jury decided that it had not been shown that he intended to kill or cause serious injury. The judge will inform a jury if this may be possible. It is not true to say that the jury are not concerned with the law at all: if that were so, then the 'verdict' would merely be a series of statements of fact about what the jury think happened. A verdict is the law applied to the facts, which results in a conclusion of guilt or innocence.

THE RULE AGAINST RETROSPECTIVE LEGISLATION

Imagine the government passed a law which said that it was an offence to chew chewing gum in a public place. There would certainly be objections to that. But imagine the government said that the law applied to chewing gum eating in the past as well as the future and you were arrested for chewing gum in public several months ago. Now you would certainly object! You could rightly argue that at the time you chewed there was nothing in the law which made that an offence and there was no way you could have known it was an offence. You may be relieved to know the courts would back you up. There is a general principle that criminal laws must not be retrospective and not operate backwards, and indeed this is reflected in the European Convention on Human Rights.

This principle is, however, not as straightforward as might at first appear. It is a source of great shame to English criminal law that until 1991 a husband could not be convicted of raping his wife.

Extraordinarily, up to that point a wife, on marriage, was taken to consent to her husband having sex with her whenever he wanted. In 1991 the House of Lords decided that the law was outdated and changed it, upholding a husband's conviction for rape of his wife and declaring that the defence for husbands no longer existed. The husband took his case to the European Court of Human Rights, arguing that the House of Lords had, in effect, engaged in retrospective law making. The European Court supported the House of Lords, arguing that the law had to adapt to changes in society and the essence of the offence of rape had not been altered by their decision. Sometimes reference is made to the 'thin ice' principle, which argues that if a defendant is engaging in behaviour which is of dubious legality he can hardly complain if the courts decide that the behaviour is indeed illegal. Referring back to the chewing gum example, you could not have known that the law would render chewing gum illegal, but the husband in the rape case must have known that what he was doing could well be regarded as illegal.

There is a tension here within the role of the judge. On the one hand a judge is meant to interpret the law rather than create it. It is the job of Parliament to change the law if required or to enact new legislation. However, sometimes Parliament has neglected to change the law, or it has been too busy with other matters. Some judges feel bolder than others in changing the law to ensure fairness is achieved. Lord Millett, in *R v K*, was willing to reinterpret the law because he felt that Parliament had failed to ensure that the law accorded with current standards of morality. The case raised issues about the age at which teenagers could consent to sexual activities. He held:

> the age of consent has long since ceased to reflect ordinary life, and in this respect Parliament has signally failed to discharge its responsibility for keeping the criminal law in touch with the needs of society. I am persuaded that the piecemeal introduction of the various elements of Section 14 [Sexual Offences Act 1956], coupled with the persistent failure of Parliament to rationalise this branch of the law even to the extent of removing absurdities which the Courts have identified, means that we ought not to strain after internal coherence even in a single offence. Injustice is too high a price to pay for consistency.

THE PRESUMPTION OF INNOCENCE

One of the fundamental principles of English criminal law is that a person is presumed innocent, unless they are proved guilty. Hence a jury can convict a defendant only if they are persuaded that beyond all reasonable doubt the defendant is innocent. Notice this does not mean that the jury must have no doubts at all. After all, if the defendant claims that the crime was committed by a little green man from Mars, a jury may feel one cannot be 100 per cent sure that is untrue. But we can be as sure as we can be about things that it is not. What the principle does mean is that even if the jury think it more likely than not that the defendant committed the crime, they should not convict if they still have some genuine doubts over his or her guilt.

The principle that a defendant is innocent until proved guilty is a recognition of the severity of a conviction and punishment for a crime. In effect it involves acceptance that it is preferable for some guilty people to go free than for some innocent people to be convicted. Certainly, the criminal law would soon fall into disrepute if the number of innocent people convicted became significant. Indeed, the European Convention on Human Rights found, in Article 6(2):

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.

It would be wrong, however, to think that this presumption applies to all aspects of every criminal offence. There are some crimes where the burden lies on the defendant to prove that one of the elements does not exist. This applies particularly in relation to minor offences where it is easy for the defendant to prove they are innocent. An example would be offences which involve doing an activity without a licence from the government (e.g. operate a radio station). For these sometimes the burden is on the defendant to prove he did have a licence. The argument being that it is very easy for defendants to prove their innocence in such a case: they just need to produce their licence.

STATUTE

Offences against the Person Act 1861.

CASES

R v Blaue (1975) 61 Cr App R 271, Court of Appeal.
R v Cheshire [1991] 3 All ER 552, Court of Appeal.
R v G and R [2004] 1 AC 1034, House of Lords.
R v G [2008] UKHL 37, House of Lords.
R v Hyam [1975] AC 55, House of Lords.
R v K [2001] UKHL 41, House of Lords.
R v Kennedy [2007] UKHL 38, House of Lords.
R v Miller [1983] 2 AC 161, House of Lords.
R v Roberts (1972) 56 Cr App R 95, Court of Appeal.
R v Stephenson [1979] QB 695, Court of Appeal.
R v White [1906] 2 KB 106, Court of Appeal.
R v Woollin [1999] 1 AC 82, House of Lords.

FURTHER READING

Popular textbooks on criminal law include Ashworth (2006), Herring and Ormerod. The leading works in the debates over moralism and criminalisation are found in Devlin, Fineberg, Hart and Mill. Chalmers and Leverick and Ashworth (2000) discuss the importance of fair labelling. Debate over *mens rea* and culpability can be found in Keating, Lacey and Norrie. Horder and McGowan provide an interesting discussion of causation.

Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *Law Quarterly Review* 424.
Ashworth, 'Is Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225.
Ashworth, *Principles of Criminal Law* (2006, Oxford University Press).
Chalmers and Leverick, 'Fair Labelling in the Criminal Law' (2008) *Modern Law Review* 217.
Devlin, *The Enforcement of Morals* (1968, Oxford University Press).
Fineberg, *Harm to Self, Harm to Others; Harmless Wrongdoing; Offence to Others* (1984, 1986, 1988, Oxford University Press).
Hart, *Law, Liberty and Morality* (1963, Oxford University Press).
Herring, *Criminal Law: Text, Cases and Materials* (2008, Oxford University Press).
Horder and McGowan, 'Manslaughter by Causing Another's Suicide' [2006] *Criminal Law Review* 1035.
Keating 'Reckless Children?' [2007] *Criminal Law Review* 546.
Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 *Modern Law Review* 621.
Mill, *On Liberty* (1859).
Norrie, *Crime, Reason and History* (2001, Cambridge University Press).
Ormerod, Smith and Hogan *Criminal Law* (2008, Oxford University Press).

2

HOMICIDE

Homicide involves killing someone. There are two crimes of homicide in English law:

- Murder.
- Manslaughter.

The most important distinction between them is that a conviction for murder leads to a mandatory life sentence, while a conviction for manslaughter does not. Indeed, you could be convicted of manslaughter and be given an absolute discharge, meaning there is effectively no punishment at all. That would be very rare. By contrast if you are convicted for murder there is no alternative but for the judge to sentence you to a life sentence in prison. That will not normally mean all your life, but it will be a very substantial term. However much sympathy a judge may have for a murderer, there is no other sentence that can be imposed.

Watching television would give you the impression that a huge number of murders are committed every day, especially if you live in Midsomer! That is, in fact, an inaccurate picture. The numbers are really quite small. Nevertheless the offences are important, as they are the most serious crimes that can be committed. They also raise some important issues of legal principle.

STATISTICS ON HOMICIDE

In the year 2007/08 there were only 784 reported offences of murder or manslaughter.

There were 620 attempted murders in the same period, suggesting that killing someone is not as easy as might be thought. There were 419 offences of causing death through dangerous or careless driving.

It is not only the numbers that are smaller than might be expected; so are the kinds of killing that take place. Can you guess at which age a person is most likely to be killed? The answer is from birth to one year. Two-thirds of children killed are under the age of five. Every week in England and Wales one to two children are killed by someone. In over half these cases the person who has killed the child is their parent. Where the child is killed under the age of one, 80 per cent were killed by a parent. Only eleven children a year are killed at the hands of strangers. While the fear of every parent is that their child will be abducted and killed, that is, in fact, a very rare event. The child is far more likely to be killed by someone nearer at home.

Looking more broadly at killing, men are more likely to be killed than women. In 2005/06 67 per cent of homicide victims were male. The most common form of killing was with a sharp instrument, such as a knife. Men tend to be killed by a stranger – 62 per cent of cases – whereas women are more often killed by a partner, former partner or friend. So again the danger for women of being killed comes not from the masked figure in the alleyway but from someone they know.

The second most common method of killing was by hitting or kicking. Killing by shooting is less common than might be thought. In 2005/06 there were only fifty deaths by shooting. Thirty-one per cent of homicides followed a quarrel, were in revenge or due to loss of temper.

The last statistic is the least surprising but should be the most shocking. In 2005/06, of 244 people convicted of homicide, 230 were male and fourteen were female. Killing is still very much man's business.

MURDER

For a defendant to be guilty of murder it must be shown that:

- D caused the death of a person.
- D intended to cause the victim death or grievous bodily harm.

We shall consider these two elements separately.

D CAUSED THE DEATH OF A PERSON: WHEN DOES LIFE BEGIN?

There are two issues needing discussion here. The first is the definition of a person. Starting with the beginning of life, there are huge philosophical debates over the nature of personhood and when someone becomes a person. For some it occurs at the moment of conception, for others it is not until the person is several years old. It is not necessary for us to enter these tricky waters. The law is clear: someone becomes a person the moment they are outside the mother and have taken their first breath. But as soon as that has happened the baby can be the victim of murder just like anyone else.

There are two points to add to this. First, if a person injures a foetus they have committed a crime; it will just not be murder. There are offences of procuring a miscarriage or causing an abortion. So a man who punched a pregnant woman causing her to miscarry would not be guilty of murder, but would be guilty of one of these other offences. Second, a person may cause an injury to a foetus, causing the foetus to be born and live for a while and then die of the injuries. If that occurred it would mean a charge of murder or manslaughter. The defendant would have done an act which caused the death of a person.

GETTING BIZARRE

In 2008 a woman was arrested in Japan after she was alleged to have killed her virtual husband in a video game, Maplestory. Her on-line character had been married, but she was furious when she discovered that her on-line husband was planning to divorce her. 'I was suddenly divorced, without a word of warning. That made me so angry', she is reported as saying. She managed to obtain the man

playing her on-line husband's log-in details and arranged for him to be killed off.

The prosecution had a struggle to decide what offence she had committed! It could hardly be murder, as no real person had been killed. It is possible that a computer offence had been committed under Japanese law. Had the same thing happened in England an offence under the Computer Misuse Act might be available. Murder would certainly not be!

D CAUSED THE DEATH OF A PERSON: WHEN DOES LIFE END?

You might think it fairly obvious whether a person is dead or not, but books have been written on how to define death. The problems of definition arise especially given the advent of technologies which enable people to be kept apparently alive for far longer than would have been the case in the past. One consequence of this is that the old rule that in order to be guilty of murder the victim had to die within a year and a day of the act of the defendant has now been abolished. Lawyers have rather neatly sidestepped complex issues over when exactly death occurs by stating that it is matter of expert medical opinion. Medics generally use the notion of brain stem death to define death, and that is reflected in the law. This means that a victim who is suffering persistent vegetative state is a person who is alive if there is brain activity.

INTENTION TO KILL OR CAUSE GRIEVOUS BODILY HARM

Nothing less than intention will do for the crime of murder. So if it can be shown that it was not the defendant's intention to kill or cause grievous bodily harm then a defendant cannot be guilty of murder. This is so however heinous the conduct of the defendant may have been. Terrorists who seek publicity and plant a bomb in the city centre, then phone the police, giving them time to evacuate the area, may have foreseen that something could go wrong and someone might be killed, but it was not their intention. If a person is indeed killed then they can be guilty of manslaughter at most. Of course, the defendant might be given a life sentence in a particularly bad case of manslaughter.

A jury should not infer intent simply from the fact that the defendant foresaw the result. That is made clear in Criminal Justice Act 1967, Section 8.

KEY STATUTE

CRIMINAL JUSTICE ACT 1967, SECTION 8

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

(1) Shall not be bound in law 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

(2) Shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appears proper in the circumstances.

Notice that an intention to cause grievous bodily harm is sufficient. The thinking appears to be that it can be difficult to prove whether the defendant caused a serious injury or death. Of course, in truth a person who causes a serious injury (e.g. by stabbing the victim in the stomach) takes the victim's life in his hands.

LEADING CASE

R V MATTHEWS AND ALLEYNE, COURT OF APPEAL

The defendants attacked the victim, an eighteen-year-old A-level student, and threw him into the river Ouse. The victim was short-sighted and had lost his glasses in the attack. He was not able to swim. He told his attackers he could not swim before they threw him into the river and they stood by and watched him drown. The defendants denied intending to kill the victim. The judge directed the jury that they should find intention if the victim's death was a virtually certain consequence of their actions and the defendants realised it was. The Court of Appeal held the judge should have told

the jury that *they were entitled* to find that the defendants intended death if it was a virtually certain consequence of their action and they realised that. Nevertheless the Court of Appeal was satisfied that even if that direction was given the jury would have found intention.

Unlike other jurisdictions English law does not draw any distinction between kinds of victim. Killing a police office or child is the same offence of murder as killing anyone else. Nor is a distinction drawn between different forms of killing. There have been calls for the law to be changed to recognise that killing a police officer or a child should be a specific offence, but so far such calls have not been heeded by the government.

THE TWO KINDS OF MANSLAUGHTER

There are two versions of manslaughter:

- Voluntary manslaughter.
- Involuntary manslaughter.

Voluntary manslaughter occurs where the defendant would be guilty of murder but for the existence of a special defence. For example, the defendant has intentionally caused the death of the victim, but did so while under provocation. There are four defences which operate in this way so as to reduce a charge of murder to one of manslaughter:

- Provocation.
- Diminished responsibility.
- A suicide pact.
- Infanticide.

Involuntary manslaughter exists in two forms: *gross negligence* manslaughter or *constructive* manslaughter. In neither case is it necessary to show that the defendant intended to kill the victim; some lesser mental state is required.

PROVOCATION

KEY STATUTE

HOMICIDE ACT 1957, SECTION 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 be determined by 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 on a reasonable man.

This defence of provocation is available only in relation to murder. So if the defendant is provoked in a very grave way and responds only by punching the victim, he or she cannot raise the defence of provocation in response to a charge of assault. Of course, the judge can take into account the provocation when sentencing, and it may lead to a lower sentence than would otherwise be the case. Where the provocation defence is successfully applied in relation to a charge of murder the effect is that the defendant is still guilty of manslaughter. This means that the defendant will still receive a sentence. In fact it explains why the defence exists. Because a murder conviction carries a mandatory life sentence it is not possible for provocation to be taken into account as mitigation in a murder case.

The defence of provocation is available where:

- D was provoked by something said or done into losing his or her self-control and then killing the victim.
- A reasonable person would have responded to the provocation in the same way.

These two requirements are different. The first focuses on the defendant's state of mind at the time of the killing. The second is not concerned with the defendant but considers how a reasonable person would have responded to the provocation.

Looking at the first question – was D provoked by something said or done into killing the victim? – it raises a number of issues.

THERE MUST BE SOMETHING THAT PROVOKES THE DEFENDANT

It is not enough for the defendant simply to show that he or she lost self-control. It must also show that that was the result of something said or done. In one case (*Acott*) a man living with his mother suddenly lost all control and killed her. The House of Lords accepted that there was evidence that the defendant had lost his self-control but he could not point to something his mother had said or done which had caused this. The defence of provocation could not, therefore, be relied upon.

Another aspect of this requirement is that the defendant cannot rely on an event as a provoking incident. So if the defendant were to read in a newspaper that his share portfolio had suddenly dropped in value and this were to cause him to lose his self-control and kill, he could not use the defence. There would have been nothing said or done that would have caused the loss of control. Rather oddly, if he heard the news about his shares on the radio things would be rather different.

THE DEFENDANT MUST HAVE LOST HIS OR HER SELF-CONTROL

In *Cocker* the defendant was caring full time for his terminally ill wife. She constantly pestered him with requests for him to kill her, and one night, in an exhausted state, he did so. While the Court of Appeal accepted that he was facing extreme provocation, it was found that in fact he was perfectly calm at the time when he killed his wife. He was, therefore, not able to use the defence of provocation. Similarly, a person who is gravely insulted but then goes away and calmly plans their revenge will not be able to rely on the defence, however grave the provocation.

THE LOSS OF SELF-CONTROL MUST BE SUDDEN AND TEMPORARY

The courts have held that a defendant must suffer a sudden and temporary loss of self-control. This means that the longer the gap in time between the provocation and the killing the harder it will be

for the defendant to be able to show that the loss of self-control was caused by what was said and done and that it was sudden and temporary. The court is unlikely to believe that a defendant who was provoked one day, but killed the next day, had killed while suffering a loss of self-control rather than acting in revenge. That does not mean it is impossible to succeed in using the defence of provocation in those circumstances. It might be shown that the defendant was gravely provoked, managed to restrain himself at the time but later, on seeing the victim and recalling the provocation, lost his self-control. More significantly, the courts have accepted that women who have been the victims of domestic violence may not respond immediately to a provocation but kill some time later, having lost their self-control. This is sometimes known as a 'slow burn' reaction.

LEADING CASE

R V AHLUWALIA, COURT OF APPEAL

The defendant had killed her husband and was charged with murder. She had entered an arranged marriage with him, but he had abused her over several years. There was evidence that this had caused her to suffer 'battered woman syndrome'. One night, while he was asleep, the defendant poured petrol over him and set it alight. He died as a result. The Court of Appeal confirmed that in order to use provocation the jury would need to be persuaded that she had suffered a sudden and temporary loss of self-control. However, it did not need to be shown that the loss of self-control occurred soon after the provocative word or actions. The court added that the longer the gap in time between the provocative act and the killing the harder it would be to show that the defendant had lost her self-control as a result of the provocation. The Court of Appeal also confirmed that battered women's syndrome was a characteristic that could be taken into account in determining how provocative the defendant's words or actions were. The syndrome could also be used to form the basis of a defence of diminished responsibility. In this case her murder conviction was overturned and a conviction for manslaughter as a result of diminished responsibility was substituted.

THE PROVOCATION DOES NOT NEED TO COME FROM THE VICTIM

The provocative thing or things said do not need to come from the victim. In theory if Alfred provokes Bruce, who loses his self-control and kills Charles, Bruce can rely on the defence. In many cases the defence would fail on the basis that it would not be reasonable to kill a person who had not said or done the provocative thing. However, one could imagine a case where Alfred tells Bruce that his wife has been unfaithful to him and in a rage Bruce kills his wife. In that case a jury might (unfortunately) find that Bruce was acting reasonably.

THE REASONABLE PERSON TEST

This is a crucial part of the provocation test. Even though a jury may be persuaded that the defendant was so enraged by the victim's comments that they lost self-control, the jury may well conclude that a reasonable person would not have killed in such circumstances. Indeed, you might take the view that a reasonable person would never kill when faced with provocative words, however annoying the comments were. It is, perhaps, worth remembering, though, that the defence only reduces a charge of murder to one of manslaughter. There is no question, therefore, of the defendant being acquitted altogether. This might explain why the jury tend to be fairly generous in deciding whether the defendant has been able to satisfy the requirements for the provocation defence.

There is one particular issue surrounding the reasonable person limb of the test which has proved highly controversial. That is which characteristics of the defendant, if any, you assign to the reasonable person. Take, for example, a defendant who is taunted about having ginger hair. It would make no sense to consider how a reasonable person with black hair would respond to a taunt about having ginger hair. So clearly we must consider the reasonable person with the characteristics which are the subject of the taunt.

But this has proved problematic. First, there is the question of whether other characteristics which are relevant to, but are not the subject of, taunts can be taken into account. In one case, that of a deaf man who was called 'stupid', it was accepted that the jury should consider how the reasonable deaf person would respond to being

called stupid. This was after the court had heard expert evidence that deaf people find it particularly annoying that people assume that because they are deaf they are less intelligent than others. So, it seems, the jury can take into account not only the characteristics that a person is taunted about, but also other characteristics which make the provocation worse for the particular defendant than for other people.

The most controversial issue has been whether or not characteristics can be used to affect the level of self-control expected. In one case an Italian tried to argue that he could not be expected to show the same level of self-control as others because Italians are particularly hot-blooded! After much toing and froing on the issue the courts have now resolved that the only characteristics which can affect the level of self-control expected are age and sex. The Italian was, therefore, required to show the same powers of self-control as the ordinary person. In *Camplin* a fifteen-year-old killed a man who had just sexually abused him. It was held by the House of Lords that the law could not expect 'an old head on young shoulders'. The jury should consider how a reasonable fifteen-year-old would have responded, rather than a reasonable adult. As a result of the current state of the law a defendant cannot say, 'Because I suffer from depression I have lower levels of self-control than other people', but can say, 'Because I suffer from depression the provocation was graver for me than it would be for other people.'

In summary, then, the jury must consider how the reasonable person with those characteristics which affect the gravity of the provocation but with the level of self-control expected of a person of his age and sex would react to the provocation. One might wonder quite how many juries get completely confused by directions along these lines!

LEADING CASE

ATTORNEY GENERAL FOR JERSEY V HOLLEY, PRIVY COUNCIL

Holley was a chronic alcoholic. He and his girlfriend had a tempestuous relationship. One day they had been drinking together and got into an argument. The girlfriend made some unpleasant remarks

about Holley and then revealed that she had been sleeping with another man. Holley killed her with an axe. The appeal to the Privy Council turned on whether the jury should have been directed to consider whether he should be expected to show the level of self-control expected of a reasonable alcoholic man or the self-control of an ordinary reasonable person. The Privy Council confirmed that any relevant characteristic could be considered when assessing the gravity of the provocation. However, only age and sex could be taken into account when determining the level of self-control expected. So the defendant could not argue that his alcoholism meant that he could not be expected to exhibit reasonable powers of self-control. He could, however, seek to argue that he suffered from diminished responsibility in view of his alcoholism.

DIMINISHED RESPONSIBILITY

KEY STATUTE

HOMICIDE ACT 1957, SECTION 2

Where a person kills or is a 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 for his acts and omissions in doing or being a party to the killing.

Diminished responsibility is a partial defence. If it succeeds it reduces the charge from murder to manslaughter. It is available only as a defence to murder. If the defendant commits a lesser crime while suffering from diminished responsibility then that can be taken into account when deciding what sentence to order. Where the defendant is clearly suffering from a mental condition which affects his responsibility the prosecution may well decide to accept the defendant's plea of diminished responsibility. Otherwise the defendant must prove he or she is entitled to the defence.

The defendant has the burden of proving he or she suffers from diminished responsibly. It must be established that the defendant had an abnormality of mind. This will need to be established by medical evidence. The case law shows a broad range of conditions being found to constitute an abnormality of mind, from depression to morbid jealousy, from battered women's syndrome to premenstrual tension. The phrase 'abnormality of mind' is not meant to be a technical one and has been said by the courts to be a state of mind so different from the average mind as to be abnormal. In fact some cynical observers have suggested that an expert psychiatrist who is sympathetic to a defendant can readily find some kind of abnormality.

The abnormality of mind must result from one of the causes listed in Section 2(1), such as a disease or injury. This requirement is designed to prevent defendants relying on mental abnormalities caused by alcohol or illegal drugs or other external factors. The one exception is where the defendant is suffering from alcohol dependence syndrome (alcoholism) and can show that as a result of the syndrome his or her drinking was involuntary. The courts have indicated that it will be very rare for a sufferer in fact to have no control over their drinking.

The most important element of the defence is that the abnormality must 'substantially impair the defendant's responsibility for his actions'. Note this does not require the defendant to be unaware of what he or she is doing, but simply that the defendant is much less responsible for his or her actions than other defendants.

Some commentators have been rather cynical about the use of this defence in practice. Indeed, it seems to be used in cases where the court feels the defendant does not deserve a murder conviction, even if there does not appear to be anything particularly abnormal about his or her mental state. Indeed, it might be said the defence is needed only because of the existence of the mandatory life sentence for murder.

LEADING CASE

R V NORTON, OLD BAILEY

Sidney Norton was eighty-six years old and was charged with the murder of his wife Betty, aged eighty-five. They had been married for

fifty-seven years. Betty had had a stroke, was suffering from Alzheimer's, and Sidney was caring for her. He found caring for her extremely stressful. He killed her by smothering her with two plastic bags. At his trial he was convicted of manslaughter on the grounds of diminished responsibility. The judge commented, 'I am totally convinced you are a thoughtful, kind and honest man and had been a devoted husband ... It was increasingly difficult for you to shoulder that burden. ... Society may understand your act but they cannot condone it.' He was given a nine-month suspended sentence, meaning he could walk from the court free.

POINT TO PONDER

One issue which has greatly troubled the courts is where a woman who has been the victim of domestic violence at the hands of her husband kills him. What defence, if any, is appropriate? As we have seen, one claim is that the victim can rely on battered women's syndrome and can rely on diminished responsibility. However, that might imply that she is mentally disordered, whereas in fact she might be responding in a reasonable way, given the scenario she was in. The defence of provocation may be available. However, there can be difficulties in proving that, especially in proving that the victim lost her self-control. One defence that has not been fully explored yet is whether a woman in such a case may be able to claim self-defence. This will be discussed further in Chapter 3.

SUICIDE PACT

If the defendant killed the victim in the course of a suicide pact then the defendant will be guilty of manslaughter rather than murder. The defence of suicide pact is found in Section 4 of the Homicide Act 1957. The defendant must show that the plan was that she was going to kill the victim and then kill herself. It is not enough just to show that the victim wanted to be killed. There is, therefore, no defence of mercy killing in English law.

GETTING BIZARRE

Armin Meiwes was charged in Germany with murder. His defence must be one of the most extraordinary ever raised in a criminal trial. He explained that he had placed an advertisement 'looking for a well built eighteen-to-thirty-year-old to be slaughtered and then consumed'. Many people responded, but all bar one backed out when they discovered that his advertisement was meant in all seriousness. Bernd Jürgen Brandes alone of all those who responded was willing to go through with the plan. It seems that together they ate some parts of Herr Brandes before he was killed and most of him was then eaten by Herr Meiwes over the course of the next ten months. He was convicted of manslaughter. His defence, that the victim had consented to being killed, was no defence in German law and failed, just as it would have done in English law. His claim that the victim had a 'beautiful death', which the victim had hoped for for years, clearly carried little weight with the court.

INFANTICIDE

Infanticide is a defence that a mother can be charged with if she has killed her newborn baby. The defence is available only if the mother has killed her own child, under the age of twelve months. The defence was created by the Infanticide Act 1938. The age of the statute is reflected in the language used. It has to be shown that 'the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child' or by reason of the 'effects of lacerations consequential upon the birth'.

The defence has been criticised because it appears to see the mental problems some women have following birth as resulting from the birth itself. However, postnatal depression seldom results from the birth itself. Its causes are complex, but sometimes relate to the mother's social and economic position. The defence appears to be generally interpreted fairly broadly so that women who are suffering postnatal depression can use it. However, the defence cannot be used by a father. If the father is suffering mental illness after the birth he might be able to use the defence of diminished responsibility.

CONSTRUCTIVE MANSLAUGHTER

A defendant is guilty of constructive manslaughter if he or she has committed an unlawful and dangerous act which has caused the death of the victim. As can be seen from the definition of constructive manslaughter, there are three elements of the offence:

- The defendant's act must involve a crime.
- The defendant's act must be dangerous.
- The defendant's act must have caused the death of the victim.

LEADING CASE

ATTORNEY GENERAL'S REFERENCE (NO. 3 OF 1994), HOUSE OF LORDS

The defendant stabbed his pregnant girlfriend, intending to do her a serious injury. She survived the attack but the foetus was seriously injured. In due course the girlfriend gave birth and the baby lived for a short while before dying. The defendant was charged with the murder of the baby. The House of Lords held that he could not be guilty of murder. He did not intend to kill or cause grievous bodily harm to the baby and so the prosecution had argued that the court should use the doctrine of transferred malice (see p. 22). The House of Lords thought that not possible, because at the time he stabbed the girlfriend intending to harm her the foetus was not yet born and so was not a person. There was, in other words, no person to transfer the intent to.

However, the House of Lords held that the defendant had committed constructive manslaughter. He had done an unlawful act (the stabbing of the girlfriend); it was dangerous (it harmed the girlfriend) and it caused the death of a person (the baby born alive). The fact that the unlawful and dangerous act was aimed at another person apart from the person who died did not prevent the offence being proved.

As already explained, to convict the defendant of constructive manslaughter it must be shown that the defendant committed an unlawful and dangerous act. By 'unlawful' the courts mean that the act must be a criminal offence. A breach of contract or a tort will

not be enough. Further, a criminal offence to which the defendant has a complete defence cannot be used as the basis for a constructive manslaughter charge. It does not have to be a serious offence: theft or battery would do. However, it must require a *mens rea* of more than negligence. So an offence of careless driving, for example, could not form the basis of a constructive manslaughter charge. Nor, it seems, can a crime of omission.

LEADING CASE

R V LAMB, COURT OF APPEAL

Two young men were playing games. The defendant pointed a revolver at his friend and pulled the trigger. He shot his friend dead. He gave evidence that he believed the gun would not fire a bullet. Before firing he checked to see that there was no bullet opposite the pin, but he had failed to realise that as he pulled the trigger the bullet holder revolved and there was a bullet in the neighbouring chamber. He was convicted of manslaughter, but the Court of Appeal overturned his conviction. Although he intended to fire the gun, he had no intention or recklessness that he would harm his friend. Therefore he had not committed a crime. There could, therefore, be no conviction for manslaughter.

It is useful to contrast *Lamb* with the case of *Larkin*, where the defendant threatened a man with a razor. His girlfriend fell against the razor and died. By brandishing the razor the defendant was committing an unlawful act. Hence, although the killing was accidental, it was done during the commission of an unlawful act and so could form the basis of constructive manslaughter.

As well as amounting to a crime the act which forms the basis of a constructive manslaughter charge must be dangerous. This means that it must carry a risk of physical injury to the victim. The test of dangerousness is objective. In other words the jury must consider whether a reasonable person in the defendant's shoes would have realised there was a risk of physical injury. Whether the defendant believed the act was not dangerous would be irrelevant. In one case

a defendant, carrying an imitation firearm, approached a middle-aged petrol pump attendant, who suffered a heart attack and died. It was held that the defendant was not doing a dangerous act because although fear would have been foreseeable to the reasonable person in the defendant's shoes, a physical injury was not foreseeable. It might have been different if the petrol pump attendant had been a particularly frail-looking person.

It must be shown that the unlawful and dangerous act caused the death of the victim. It does not need to be shown that the person who dies is the same person as the victim of the unlawful and dangerous act. The normal rules of causation will be used to determine whether or not the defendant's unlawful and dangerous act caused the victim's death.

GROSS NEGLIGENCE MANSLAUGHTER

To convict a defendant of gross negligence manslaughter the following elements need to be shown:

- The defendant owed the victim a duty of care.
- The defendant breached the duty.
- The breach of duty caused the death.
- The breach was a 'gross' breach of duty.

LEADING CASE

R V ADOMAKO, HOUSE OF LORDS

The appellant was an anaesthetist. During an operation a tube had become disconnected and emergency bells sounded. The defendant should have realised what the problem was and reinserted the tube almost immediately. However, the appellant failed to notice what was wrong until nearly ten minutes had passed, by which time the patient had died. His conviction was upheld. He owed his patient a duty of care which had been breached in a grossly negligent way.

As the example of the *Adomako* case shows, a person can be guilty of gross negligence manslaughter even though they were not acting

in a malicious way. Indeed, they do not even need to have been shown to have foreseen that death or serious injury might result from their mistake. That case also shows that gross negligence manslaughter can be committed by an omission. Indeed, many cases of gross negligence manslaughter are committed that way.

The requirement that a duty of care must be owed by the defendant to the victim requires proof that the defendant had taken on responsibility for the victim (e.g. a doctor and patient) or the defendant was acting in a dangerous way that could cause harm to others (e.g. he or she was operating a piece of machinery in a dangerous way).

It must be shown that the defendant breached the duty of care. This is a relatively straightforward concept. It means that the defendant must have acted in a way a reasonable person would not. Where the defendant was purporting to exercise some special skill (e.g. he is acting as a doctor) he must act as a reasonable person with that skill (e.g. as a reasonable doctor). Notice that this is an objective test. It was no defence for Dr Adomako to argue that he did not breach his duty because he was doing his best, bearing in mind that he was exhausted by having had to work a long shift. The fact that a reasonable doctor would have spotted that the tube had come out in a matter of seconds was enough to mean that he had breached his duty of care, whatever good reasons he may have had for the lapse. A similar response would meet his claim that he had received inadequate training. If he put himself up as an anaesthetist then he must act as a reasonable anaesthetist.

It must be shown that the breach of duty would have caused the victim's death. This means that the defendant will not be guilty if, even had he acted as a reasonable person would have acted, the patient would still have died. So, for example, if a defendant is charged with gross negligence manslaughter by dangerous driving, in that she was looking in the mirror to apply make-up while driving, she would have a defence if she could show that even if she had been paying full attention to the road the accident was unavoidable.

The jury must be satisfied that the negligence was 'gross'. It has been explained that this means that it needs to be established that the breach was so bad as to justify a criminal conviction. A defendant who has breached a duty of care will be liable to pay damages

in compensation to the victim's family under the law of tort. However, the question for the jury in a gross negligence manslaughter case is whether payment of compensation is sufficient, or whether the defendant's breach was so bad that there should be a conviction under the criminal law. The jury are given little guidance to help them decide this, and will rely on their common sense as representative members of the local community.

This has led to concern that inconsistent verdicts will be returned. Different juries facing similar cases of gross negligence manslaughter could come to different verdicts. Indeed, the Crown Prosecution Service has complained that it is difficult to predict whether a jury will find negligent gross or not and so whether or not to bring a charge.

LEADING CASE

R V WACKER, COURT OF APPEAL

The defendant was driving a lorry containing a large group of people who were attempting to enter England illegally. The defendant had put them in the back of his lorry. He closed the ventilation shafts for long periods of time, because he feared that keeping them open would mean it was more likely they would be discovered. When his lorry reached England it was found that fifty-eight of those in the lorry had suffocated. The Court of Appeal held that he owed them a duty of care, even though they were engaging in an illegal enterprise together. The fact the victims had consented to him closing the ventilation was no defence to the crime of manslaughter. The jury were entitled to find that his breach of duty towards his passengers was so gross as to justify a criminal conviction.

CAUSING OR ALLOWING THE DEATH OF A CHILD OR VULNERABLE ADULT

As we saw in Chapter 1, generally a person is not liable for failing to rescue a person from danger, even the danger of death. However, Parliament has created a special offence dealing with those who do

not protect children or vulnerable adults from death. It is found in the Domestic Violence Crime and Victims Act 2004, Section 5.

KEY STATUTE

(1) A person ('D') is guilty of an offence if:
(a) a child or vulnerable adult ('V') dies as a result of the unlawful act of a person who
  (i) was a member of the same household as V, and
  (ii) had frequent contact with him,
(b) D was such a person at the time of that act,
(c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
(d) either D was the person whose act caused V's death, or:
  (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
  (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
  (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen ...

This offence was created to deal in particular with cases where a child or vulnerable adult had been killed in a house but it was not clear which of two or more people had killed the child. In such a case previously the jury in some cases had to acquit both defendants because they could not be sure beyond reasonable doubt who had killed the child. This was so even if the jury were sure one of the two defendants had committed the murder. The new Section 5 offence enables the jury to convict both people if it is satisfied that one of them must have killed the child or vulnerable adult and the other had failed to protect the victim from the risk. The offence can also be used in a straightforward case where, say, the father was a violent man who posed a risk to the child and killed him or her, and the child's mother had failed to protect the child from the danger the father posed. In such a case the father could be convicted of murder and the mother of the failure-to-protect offence in Section 5.

REFORM OF THE LAW OF HOMICIDE

The Law Commission has suggested reform of the law on murder and manslaughter. In its basic structure, it proposes, murder should be divided into two categories: first-degree murder and second-degree murder. Only first-degree murder would carry the life sentence.

First-degree murder would occur where the defendant killed the victim intending to kill the victim or with the intention of doing serious injury, coupled with awareness of a serious risk of death. This would be narrower than the current understanding of murder, which includes those who intend to do grievous bodily harm without necessarily foreseeing death.

Second-degree murder would arise where the defendant killed in one of the following mental states:

- Intention to do serious injury.
- Intention to cause some injury or a fear or risk of injury and was aware of a serious risk of causing death.

Also included within second-degree murder would be cases where the defendant would be otherwise guilty of first-degree murder but had a partial defence (such as diminished responsibility). So the category of second-degree murder would include some people who currently would be convicted of manslaughter.

The offence of manslaughter would be committed either where there was killing through gross negligence such as to amount to a risk of causing death or killing through a criminal act where there was an intention to cause injury, or an awareness of a serous risk of causing injury. These would largely match the current law on manslaughter, although the proposed version of constructive manslaughter would be slightly tighter, as it would require at least awareness of a serious risk of injury being caused.

SUMMARY

This chapter has considered the variety of forms of homicide under English law. As the last section indicates, there is general consensus that all is not well with the law on homicide and that some reform would be desirable. However, it is a politically and morally

controversial issue and there is no consensus on how the law should be reformed.

STATUTES

Criminal Justice Act 1967.
Domestic Violence Crime and Victim Act 2004.
Homicide Act 1957.
Infanticide Act 1938.

CASES

Attorney General of Jersey v Holley [2005] UKPC 23, Privy Council.
Attorney General's Reference (No. 3 of 1994) [1997] 3 WLR 421, House of Lords.
R v Accott [1997] 1 All ER 706, House of Lords.
R v Adomako [1995] 1 AC 171, House of Lords.
R v Alhuwalia [1992] 4 All ER 889, Court of Appeal.
R v Camplin [1978] AC 705, House of Lords.
R v Cocker [1989] Crim LR 740, Court of Appeal.
R v Lamb [1967] 2 QB 981, Court of Appeal.
R v Larkin [1943] KB 174, Court of Appeal.
R v Matthews and Alleyne [2003] EWCA Crim 192, Court of Appeal.
R v Norton, BBC News Online, 10 October 2008.
R v Wacker [2002] Crim LR 839.

FURTHER READING

For a discussion of the reform of the law see Ashworth, Goff, Law Commission, Ministry of Justice, Tadros and Wilson. For an analysis of aspects of the law on manslaughter see Clarkson and Cunningham, Herring and Palser, and Mackay. Dressler, Edwards, McColgan and Horder examine the law on provocation. Issues surrounding abortion and euthanasia are considered in Dworkin.

Ashworth, 'Principles, Pragmatism and the Law Commission's Recommendations on Homicide Reform' (2007) *Criminal Law Reform* 333.
Clarkson and Cunningham, *Criminal Liability for Non-aggressive Death* (2008, Ashgate).

Dressler, 'Provocation: Partial Justification or Partial Excuse?' (1988) 51 *Modern Law Review* 467.

Dworkin, *Life's Dominion* (1993, HarperCollins).

Edwards, 'Abolishing Provocation and Reframing Self-defence' [2004] *Criminal Law Review* 181.

Edwards, 'Descent into Murder: Provocation's Stricture – The Prognosis for Women who kill Men who abuse them' (2007) 71 *Journal of Criminal Law* 342.

Goff, 'The Mental Element in the Crime of Murder' (1988) *Law Quarterly Review* 30.

Herring and Palser, 'The Duty of Care in Gross Negligence Manslaughter' [2007] *Criminal Law Review* 24.

Horder, *Provocation and Responsibility* (1992, Oxford University Press).

Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25 *Oxford Journal of Legal Studies* 123.

Law Commission, *Murder, Manslaughter and Infanticide*, *Report 304* (2006, Law Commission).

McColgan, 'In Defence of Battered Women who Kill' (1993) 13 *Oxford Journal of Legal Studies* 508.

MacKay, *Mental Condition Defences in Criminal Law* (1995, Oxford University Press).

Ministry of Justice, *Murder, Manslaughter and Infanticide* (2008, Ministry of Justice).

Tadros, 'The Homicide Ladder' (2006) *Modern Law Review* 69: 601.

Taylor, 'The Nature of "Partial Defences" and the Coherence of (Second Degree) Murder' [2007] *Criminal Law Review* 345.

Wilson 'The Structure of Criminal Homicide' [2006] *Criminal Law Review* 471.

3

ASSAULT

In this chapter we shall consider all those offences which involve injury or harm to the victim's body or person but do not result in death. The sexual offences are found in the Sexual Offences Act 2003. The non-sexual assaults are found in the 1861 Offences against the Person Act. It is remarkable that a piece of legislation nearly 150 years old still represents the law in this area. Indeed, many people feel that it is beginning to show its age, with the courts struggling to use it to deal with some contemporary problems which the drafters of the legislation would not have had in mind: silent phone calls, stalking, transmitting HIV. The reluctance to reform the law, however, indicates the controversial nature of some of the issues raised.

STATISTICS

The British Crime Survey estimates that in the year 2007/08 there were 2,164,000 assaults. Included in this figure were 467,000 cases of wounding, 481,000 cases of assault with minor injury and 903,000 assaults with no injury. Only 1,046,200 violent crimes were reported to the police. This indicates that about half of victims of assault do not inform the police. In 2006 the chances of a man aged

fourteen to twenty-six being the victim of a violent offence was 13.8 per cent. That is remarkably high.

There is a widespread misperception about the nature of violent crime. Twenty-two per cent of all recorded violent incidents reported to the police are cases of domestic violence. Forty-six per cent of assault cases referred to the Crown Prosecution Service are cases of domestic violence. In fact you are far more likely to be attacked at home than on the street at night. One in four women has been or will be physically assaulted by a current or former partner at some point in her life. Each year between one in eight and one in ten women will suffer domestic violence. Each year 13 million separate incidents of violence or threatened violence take place against women by their former or current partners.

ASSAULT

The word 'assault' in criminal law does not carry the same meaning that it does in normal usage. It involves creating a fear of violence. A defendant is guilty of an assault if he causes a victim to apprehend that violence or force will be used against him or her in the very near future. It must be shown that the defendant intended to cause the victim to have that fear or foresaw that the victim would have that fear.

A classic example of an assault would be where D approached V, saying, 'You're for it', and shook his fist. No doubt the victim would fear violence and, presuming that D intended or foresaw the fear, he would be guilty of an assault. It does not need to be shown that the defendant intended to carry out his threat. In one case a man was having his taxes investigated by a tax inspector. He opened a drawer and showed the inspector a gun. He was convicted of an assault. His argument that he did not intend to carry out any threat was found to be irrelevant. The fact was that he had created a fear of violence and that was enough to convict him of an assault. Indeed, his argument that he could not carry out the threat because the gun was in fact just an imitation gun was likewise irrelevant.

Less straightforward was the case of *Ireland*. The defendant made silent phone calls to a number of women. It was held that he had committed an assault. The victims gave evidence that they were

frightened, but they could not explain what they were frightened of. The House of Lords concluded that the only thing they could logically have been frightened of was that the person calling them would come round and attack them. That was sufficient for an assault.

LEADING CASE

R V IRELAND, HOUSE OF LORDS

The accused telephoned several women a number of times and simply remained silent. They suffered from a variety of psychiatric illnesses. The convictions for assault occasioning actual bodily harm were upheld by their lordships. Lord Steyn affirmed that actual bodily harm could include a psychiatric illness. He stated that words alone or indeed silence could form the basis of an assault. He explained that the assault in this case could be said to have arisen because the victims would not have known what the accused was going to do next and might have feared that he was about to come round to their houses and attack them within a minute or two.

As the decision in *Ireland* shows, an assault can be committed by word, deed, message or even in some cases silence. In the past it was thought that words alone could not amount to an assault, but that is no longer the law. Words can, however, render an action which might otherwise be threatening not so. If the defendant raised his fist and said to the victim, 'I'd hit you if it wasn't Christmas day', the words might mean that the raising of the fist was not an assault. Without the words the action could well be an assault.

In order to amount to an assault the victim must fear the use of imminent force. Therefore if Douglas said to Valerie, 'I'll beat you up next week', he would not commit an offence. Even if Valerie was very frightened by what Douglas had said it would not amount to an assault, because Valerie would not fear an *imminent* use of force.

It is not quite clear how the law would deal with a case where a defendant looks very scary, walks around a town and frightens several people. In such a case unless he is making threatening gestures it is hard to believe a court would convict him of an offence. But in

one case where the defendant stood in the victim's garden just looking up at her house the court had no difficulty in upholding a conviction of assault. An important point in that decision was that he was committing trespass by being in her garden.

A defendant is guilty of an assault only if he or she intends or foresees that the victim will fear the imminent use of force. So if, as a joke, Charles were to send Eli a threatening e-mail, not realising that Eli would take it seriously, Charles would not be guilty of a crime. But he would be if he knew there was a risk that Eli would take it seriously.

BATTERY

Battery requires proof that the defendant touched the victim. To be guilty the defendant must intend to touch the victim or foresee that he might do so. Touching here can include touching by means of an object. So in one case the defendant committed battery when he parked his car on a policeman's foot! It was held he was guilty of battery through the car. The case was less straightforward than first appears because the defendant was found to have parked the car on the officer's foot accidentally. He therefore lacked *mens rea* initially. However, when the policeman, surprisingly politely, according to the evidence, asked him to move the car he did not. It was found there was continuing battery and that once he was aware his car was on the foot the driver was guilty of the offence. This indicates that a person commits battery for the whole length of time they are touching the victim.

Battery need not even be as direct as stopping a car on someone's foot.

BIZARRE CASE

DPP V K, DIVISIONAL COURT

K, a schoolboy, had been given some sulphuric acid in the course of a chemistry lesson. He removed the acid from the chemistry lab. For reasons which were never properly explained, he took the acid to the school toilets. When he heard another pupil approach the toilets, he

told police, he panicked and poured the acid into the hand dryer. Tragically the other boy used the hand drier directed towards his face and suffered burns from the acid.

Battery is not restricted to the touching of a person's body but it could include touching another person's hair or even clothing without consent. A man who touched the hem of a girl's skirt was held to have committed battery. One suggestion is that any invasion of 'personal space' can be battery, although that terminology has never been used by the courts. There is no need to show that the victim was harmed by the touching. Indeed, there could be battery even though the victim was unaware that it had taken place.

At one time it was suggested that to be battery the touching had to be hostile or aggressive. That was rejected by the courts. An unwanted loving touch is just as much battery as an unwanted hostile one. However, it must be shown that the defendant intended to touch the victim or was reckless in doing so. If the defendant touched the victim accidentally, that would not be an offence.

Not all touching will amount to battery. The courts have stated that touching which is a normal part of life will not be criminal. So brushing against someone in a crowded supermarket or standing close to someone in a crowded Tube train will not be an offence. This is because people can be taken to have consented to being touched in that way if they go to places where it is normal. This may mean that tapping someone on the shoulder to point out that they have dropped something may be taken not to be battery. However, grabbing hold of their arm would not be included. Even kissing a stranger on the stroke of midnight at a new year's eve party may fall under this rule if it is the kind of party where that might be expected.

Of course, battery is not an offence if it is consented to. Otherwise holding hands or kissing a partner would be an offence. That would not be very sensible!

ACTUAL BODILY HARM

The Offences against the Person Act, in Section 47, contains the offence of assault or battery which occasions actual bodily harm. The defendant is guilty of the offence only if it is shown that he or

she committed assault or battery, as we have just discussed. It must also be shown that that assault or battery caused actual bodily harm. So if the defendant hid the victim's asthma inhaler, and the victim suffered a harmful asthma attack, the defendant would not be guilty of that offence. In hiding the inhaler he or she would not be committing assault or a battery.

Actual bodily harm is any injury which is more than 'transient and trifling'. So a light slap which just hurts for a short while and leaves no lasting pain would not be actual bodily harm, although it could be battery. Although that is the official law, the Crown Prosecution Service recommends that a defendant is charged only with battery if the injury to the victim is just a graze, a scratch, abrasion, minor bruising, swelling, reddening of the skin, superficial cut or a black eye. Causing a victim to lose consciousness for a few seconds was found to be actual bodily harm. Although the harm might have been described as transitory because it lasted such a short time it was not trifling. Cutting off a large chunk of hair has been held to be actual bodily harm.

LEADING CASE

R V SMITH, DIVISIONAL COURT

As an act of revenge the defendant cut off his ex-girlfriend's pony tail without her consent. The key issue was whether cutting off hair could amount to actual bodily harm, and so whether he could be convicted of an assault occasioning actual bodily harm under section 47 of the Offences against the Person Act 1861. On appeal by the prosecution the divisional court held that cutting hair could be actual bodily harm. 'Harm' included injury, hurt or damage. There was no need to prove that the victim had felt pain. The phrase 'bodily' referred to the whole body, including the organs, nervous system, brain and hair. After all, the judges noted, for some women their hair is their 'crowning glory'! Perhaps more convincingly they argued that cutting off a large portion of a person's hair could not be dismissed as 'trivial'.

Actual bodily harm includes psychological harm, where the victim has suffered an identifiable psychological injury. So making a victim

suffer emotional upset will not amount to that offence. This is understandable. People say hurtful things to each other all the time and if simply causing another emotional hurt was sufficient the jails would soon be overflowing. However, causing a psychological condition is sufficient for actual bodily harm. The courts have recognised that stalking and similar behaviour may not cause physical injury as such, but can produce a medically recognised psychological illness. In accepting that psychological injuries could be included within the notion of an actual bodily harm the court noted that the line between mind and body is not an easy one to draw. It would be artificial to confine the notion of actual bodily harm to the body and exclude the mind.

To be guilty of an assault occasioning actual bodily harm, the courts have held, it is sufficient if the defendant intended to commit assault or battery. It is not necessary to show that the defendant foresaw or intended the actual bodily harm. So in one case a defendant made sexual advances towards a woman and she jumped out of the car, suffering serious injury. It was held that he was guilty of an assault occasioning actual bodily harm because his assault (making her afraid he was about to touch her) caused her to jump out of the car and sustain injuries.

LEADING CASES

DPP V SAVAGE, *DPP V PARMENTER*, HOUSE OF LORDS

Two cases were heard together by the House of Lords. Mrs Savage had intended to throw beer over Miss Beal, her husband's former girlfriend, but the glass had slipped out of her hand and broke, injuring Miss Beal. Mr Parmenter had injured his child by rough handling, which he said he did not realise would harm his child significantly. These cases were brought before the House of Lords in order to determine the correct *mens rea* for Sections 47 and 20. The House held that the *mens rea* for Section 47 was that necessary for assault or battery. There was no need to prove a further *mens rea* as to the actual bodily harm. For Section 20 the *mens rea* was foresight as to some harm, albeit not serious harm.

GRIEVOUS BODILY HARM

KEY STATUTES

OFFENCES AGAINST THE PERSON ACT 1861, SECTION 18

Whosoever 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, shall be guilty of an offence and being convicted thereof shall be liable ... to imprisonment for life ...

OFFENCES AGAINST THE PERSON ACT 1861, SECTION 20

Whosoever shall unlawfully and maliciously wound or cause any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be liable ... to imprisonment for a term not exceeding five years.

There are two offences connected with grievous bodily harm (GBH): Section 18 (GBH with intent) and 20 (maliciously inflicting GBH). For both these offences the injury to the victim that must be shown is a proved grievous bodily harm or a wound. 'Grievous bodily harm' does not have a technical meaning, it covers any injury which the jury considers a really serious injury. In deciding whether the wounds are really serious the jury can take into account all the injuries that the defendant has caused. So if the defendant inflicted a large number of minor injuries on the victim during a prolonged attack, the jury might well be persuaded that the totality of what he had done could be described as a really serious injury. Similarly the jury can take account of the victim's situation in considering whether or not the injury was really serious. This means that what might be a grievous bodily harm to a baby might not to an adult.

A wound is any break in the skin. The wound does not need to be serious to fall within the offences. It seems that causing internal bleeding will not be a wound. But that will often be grievous bodily harm. Note that both the Section 18 and Section 20

offences both require proof that the defendant either wounded *or* caused grievous bodily harm.

The courts have agreed that a really serious psychological condition could be GBH. This would only be where the condition is a medically recognised one. An example of where such a charge may be appropriate is if the defendant stalked and harassed the victim so much that she suffered post-traumatic stress disorder.

When reading the two offences above, there are two subtle differences in the descriptions of grievous bodily harm required. In Section 20 it is said that the harm must be 'inflicted', whereas in Section 18 the word 'caused' is used. For many years the distinction between these two words caused much trouble for lawyers and courts. However, in a line of cases it has been made clear that in this context 'inflict' means the same as 'cause' and so there is no difference between them. Another difference is that Section 20 can be committed only against 'any other person', while for Section 18 it can be against 'any person'. It may be that this suggests that defendants can be convicted of committing the Section 18 offence against themselves, but not the Section 20 offence. That said, it may well be that if a person is intentionally causing a really serious injury to themselves it would be more appropriate to provide them with medical help, rather than undertaking a criminal prosecution.

Although both the offences involve GBH and wounding, there is a crucial difference in the mental element. To be guilty of the Section 20 offence it need only be shown that the defendant foresaw that some harm would occur. For the Section 18 offence it must be shown that the defendant intended to cause a really serious injury. This is significant because the maximum sentence of imprisonment for the Section 18 offence is life, while it is only five years for the Section 20 offence. This demonstrates how when the criminal law defines the severity of crimes it takes into account not only the harm done to the victim but also the moral blameworthiness of the defendant.

TRANSMISSION OF HIV AND STDs

One issue which has been attracting considerable attention is whether a person who transmits the HIV virus or a sexually transmitted disease can be convicted of a criminal offence. It is now clear that they can be.

LEADING CASE

R V DICA, COURT OF APPEAL

Dica was convicted of inflicting grievous bodily harm on two women after he had infected them with HIV. He was aware he was HIV-positive and yet had had unprotected sexual relations with them. The judge at the trial had ruled that he would be guilty of the offence even if he had informed his victims of the risk that they might catch the virus. The Court of Appeal disagreed and held that if the defendant had informed the victims of the risk of catching the virus and the victims had nonetheless agreed to have sex with him then he would not have committed an offence. If, however, the victims had not consented to run the risk of acquiring the virus then the defendant would have been guilty of inflicting grievous bodily harm if he had been aware that there was a risk that by having sex with the women he might pass on the virus.

Following *Dica*, it is clear that if the defendant is aware that he is HIV-positive or has a serious sexually transmitted disease and he has sex with a partner and passes his condition on, then he can be guilty of inflicting grievous bodily harm. If, however, he informs his partner of his condition and the partner agrees to run the risk of catching the condition there will be no offence committed.

Some academics argue that, given the rate of STD and HIV, anyone having casual sex with someone else must be taken to have agreed to run the risk of catching an STD or acquiring HIV. This should especially be so where they have not asked their partner about their sexual health. It could also be argued that anyone who is sexually active should be aware there is a risk they are carrying an STD and so are now required to disclose this.

CONSENT AS A DEFENCE TO ASSAULT

One of the most controversial issues relating to the law on assault is when a defendant might be able to plead consent as a defence. It is uncontroversial that consent is a defence to minor assault or battery. The debate becomes more serious where the victim consents to a

more serious injury than mere battery. Can a victim consent to a serious injury being inflicted?

That issue was considered in one of the most controversial criminal law cases of recent times:

CONTROVERSIAL CASE

R V BROWN, HOUSE OF LORDS

A group of sadomasochists engaged in a series of acts with each other that caused actual bodily harm and wounding. They argued before the House of Lords that, because all the activities had been consensual, consent was a defence to the charge. The majority of their lordships held that consent was a defence to a charge of assault or battery. But where the injury amounted to actual bodily harm or more serious harm the defence could be used only if the case fell within one of an accepted category of exceptional cases. Their lordships suggested that new categories could be added if it was in the public interest to create them. In this case there were no good reasons to create a new category. Indeed, the risk of AIDS infection, the fact participants may withdraw their consent and the fear that youngsters would become involved indicated the activity was contrary to the public interest. The minority, by contrast, emphasised that the activities had been consensual and had taken place in private. They believed that this meant the activities should not be regarded as criminal unless there was some clear public harm resulting from them. They did not think the prosecution had shown there was, and so the defendants should not have been convicted.

To many commentators on this case the majority were too strongly influenced by their moral disgust at what the defendants were doing. As the minority emphasised, as the alleged victims had consented to what was done and, presumably, enjoyed it, was there any genuine harm? Notably all their lordships thought this was an issue which was better resolved by Parliament than by the courts.

As a result of the decision in *Brown*, consent is not a defence to an assault charge if the degree of injury is actual bodily harm or

worse, unless the case falls within one of the established category of exceptions or the court is persuaded to create a new one. So what are the exceptional categories? They are as follows:

- Sports and organised games.
- Tattooing, circumcision of males, ear piercing and personal adornment.
- Religious mortification.
- Rough horseplay.
- Surgery carried out by a medically qualified person.
- Dangerous exhibition (e.g. acts by stuntmen).
- Non-violent consensual sexual activity which passes on a sexually transmitted disease.

Most of these are fairly self-explanatory but some of them need further elaboration.

First, sports are an excepted category. However, the courts have explained that, to be a sport, the activity must have rules and be organised (e.g. by having a referee). A fist fight in a street could not be described as a boxing match! The sports exception does not mean that no injury committed during a sport can be a crime, as the case of Barnes shows:

LEADING CASE

R V BARNES, COURT OF APPEAL

During an amateur football match the defendant tackled the victim very high and very late. The victim suffered a serious injury and the defendant was convicted of inflicting grievous bodily harm. He appealed, seeking to rely on the consent of the victim to play sport. The Court of Appeal stated that consent could be a defence in the case of a legitimate sport if the use of force by the defendant was of the kind which could be expected during the game. When considering the type of force which could be expected the jury will consider the level at which the sport was being played (e.g. amateur or professional); the nature of the act; the degree of force used; the extent of the risk of injury; and the state of mind of the defendant. The court

emphasised that criminal prosecutions should be reserved for only the most serious fouls. In the heat of a game it was to be expected that breaches of the rules would be committed and these would not necessarily be criminal. A key question was whether the tackle was so obviously late and violent that it could not be regarded as an instinctive reaction, error or misjudgement in the heat of the game.

Another exception which requires further discussion is that of rough horseplay. Originally this exception applied in relation to cases involving schoolchildren playing rough games in the playground. Not surprisingly, perhaps, the courts have held that in such a case, as long as the victims are consenting to being thrown up in the air (or whatever it is the game involves), there will be no crime. Otherwise soon the schools would be very empty and the prisons very full! However, to many commentators' surprise, the courts have been willing to extend the defence to a wider category of cases than schoolchildren.

LEADING CASE

R V AITKEN, COURT OF APPEAL

A group of RAF officers were holding a drunken party and playing wild games in their mess. At one point the victim was seized by the appellants and set alight. He suffered serious burns. Surprisingly the Court of Appeal held that the appellants could rely on the consent of the victim to the action. This was surprising for two reasons. First, it was held that by remaining at the wild party he could be taken to have consented to being set alight, even though he had not given express permission for it. Second, it was held this fell within the 'rough horseplay' exception.

POINT TO PONDER

If in the Aitken case the men had been a group of friends in a pub, do you think the court would have responded in the same way? Some commentators have contrasted the 'manly' behaviour of

the RAF officers in *Aitken*, of which the court seems to have approved, with the 'unmanly' behaviour of the defendants in *Brown*, of which the court clearly disapproved. Is the law being unduly influenced by what is seen as proper behaviour for men in these cases?

HARASSMENT

In 1997 Parliament passed the Protection from Harassment Act. This legislation was primarily designed to deal with stalking. Of course, in some cases where there is stalking there will also be an offence of assault, but it is not always possible, especially if the victim does not fear unwanted force. Although the Act was passed with stalking particularly in mind, in fact it is drafted broadly and can include any kind of harassing behaviour.

KEY STATUTE

PROTECTION FROM HARASSMENT ACT

(1) A person must not pursue a course of conduct:
  (a) which amounts to harassment of another; and
  (b) which he knows or ought to know amounts to harassment.
(2) For the purposes of this section the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows it was:
  (a) pursued for the purpose of preventing or detecting crime;
  (b) that it was pursued under enactment or rule of law or to comply with any condition or requirement imposed by any person, under any enactment; or
  (c) in the particular circumstances, the pursuit of the course of conduct was reasonable.

In order for the defendant to be guilty of this offence he or she must pursue a course of conduct. Conduct is defined so as to include speech. A 'course of conduct' requires there to be at least two incidents. An isolated piece of harassing behaviour, however disturbing, will not breach Section 1. The two or more pieces of conduct must be linked. The larger the number of incidents the easier it will be to establish a course of conduct. Where there are fewer incidents they will amount to a course of conduct only if they have some connecting theme.

It is not necessary to show that all the incidents caused harassment; it must be the course of conduct that does so. So if, the first time the defendant behaves oddly to the victim, the victim laughs it off, but the second time he does she became concerned, then the offence is made out.

Harassment includes causing a person alarm or distress. The courts have been required on occasion to draw a line between 'clumsy' chatting up and harassment. In one case a man wrote a woman a long letter asking her if she was interested in a relationship and gave her a gladioli plant as a gift. This was held not to be harassment. However, repeated letters or extravagant or inappropriate gifts could be.

The defendant will be guilty of the harassment offence only if he knew or ought to have known that his conduct was harassing. It is no defence for the defendant to claim, 'I did not realise she was upset by what I was doing. I only intended to show her I loved her', if a reasonable person in his shoes would have known that she was being harassed by the conduct.

Under Section 4 of the 1997 Act there is a more serious version of the Section 1 offence. It is in similar terms, but requires proof that the victim feared that violence would be used against him or her. It must be shown that the same victim feared violence on at least two occasions.

POISONING

There are two main poisoning offences.

KEY STATUTES

OFFENCES AGAINST THE PERSON ACT 1861, SECTION 23

Whosoever shall unlawfully and maliciously administer to or cause to be administered to or be taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of [an offence], and being convicted thereof shall be liable ... to imprisonment for any term not exceeding ten years ...

OFFENCES AGAINST THE PERSON ACT 1861, SECTION 24

Whosoever shall unlawfully and maliciously administer to or cause to be administered to or be taken by any other person any poison or other destructive or noxious thing with intent to injure, aggrieve or annoy such person shall be guilty of an offence, and being ... convicted thereof shall be liable to imprisonment for a term not exceeding five years.

Both these offences have a common element: 'unlawfully and maliciously administering or causing to be administered or be taken by any other person any poison or other destructive or noxious thing'. The two offences then have different extra elements that need to be added to this core. In the case of Section 23 it is that as a result the victim's life was endangered or grievous bodily harm was inflicted. In the case of Section 24 it is that the defendant intended to injure, aggrieve or annoy the victim.

The courts have developed a rather complex understanding of the term 'poison'. There are some substances which are in their nature poisons even if a small amount is used. Putting arsenic in a person's tea will be to poison them, even if so little is put in that it has no effect. Other substances are not poisonous on their own but will be treated as poisons if a sufficient amount is administered so as to affect the victim's health. So administering a tiny amount of a sedative may not be to poison someone, but to administer a very large amount might be.

The verb 'administer' is interpreted broadly in these sections. It certainly covers secreting poison in someone's food or spraying poisonous gas in their face. If, however, the victim is aware the substance is poisonous and willingly takes it (e.g. it is an illegal drug the victim wishes to use), then no offence will be made out.

RAPE

STATISTICS

In 2006/07 there were 12,630 recorded rapes of women and 1,150 rapes of men (the majority of which involved boys under the age of sixteen). A study found that 23.9 per cent of women and 3.6 per cent of men had suffered a sexual assault or attempted assault since their sixteenth birthday. Three-point-three per cent of women and 0.6 per cent of men had suffered an actual or attempted sexual assault in the year prior to the survey.

The common perception of the rapist being a stranger in a dark alley is misguided. Eighty-nine per cent of serious sexual assaults on women were carried out by someone known to the victim. This was true of 83 per cent of male victims.

Rape is one of the most serious criminal offences. It is an offence to which it has proved unusually difficult to find an effective legal response. The conviction rate is very low. In part this may be because in many cases it is one person's word against another's, and even if the jury prefer the evidence of the victim they may not feel persuaded beyond reasonable doubt that the defendant is guilty. Also it seems that defence barristers are able to rely on 'rape myths' to bolster the defendant's claims. These include the false beliefs that victims who dress in a particular way, or go to particular kinds of nightclubs, or are 'flirty', are willing to have sex with anyone. Indeed, one commentator has gone so far as to say:

> there is still within our society credence given to the 'rape myths' that women can generally be taken to agree to sex at any time with any man, unless she dresses in very baggy clothing, stays indoors, is

rude and unfriendly, and fights any man who attempts to have sex with her.

The law on sexual offences was overhauled in the Sexual Offences Act 2003. This Act provides a wide range of sexual offence. Here we will focus on the most serious, that of rape.

KEY STATUTE

SEXUAL OFFENCES ACT 2003

(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.

The *actus reus* of the crime is that the defendant sexually penetrated the victim with his penis. This definition means that a woman cannot rape a man. To some this is wrong. If a woman forces herself sexually upon a man she invades his sexual freedom as much as when a man does so to a woman. Supporters of the approach taken by the law argue that in our society rape carries a special meaning of hatred towards women. Further, that the impact of rape upon women as a group is significant. These factors justify restricting the offence to one where a man rapes a woman.

The main issue in many cases is whether or not the victim consented. The defendant will be guilty if there was no consent. Most cases will be decided by the jury on the definition of consent given by the Act: a person 'consents if he agrees by choice, and has the freedom and capacity to make that choice'. This definition makes it clear that a defendant cannot successfully claim that as the victim did not oppose the sex she must be taken to have consented. The offence of rape occurs where the victim does not consent. So in a

case where the victim remained asleep during the whole of the sexual intercourse it was found to be rape. She had not resisted, but that did not matter, she had not consented. That definition also makes it clear that, even if the victim said 'yes', if it was not a genuine choice or she did not have the freedom and capacity to make that choice it will not be taken to be consent.

The 2003 Act states that there is no consent where the defendant has deceived the victims as to the 'nature or purpose' of the act. An obvious instance of this is an old case where a doctor persuaded a young woman to allow him to perform an operation when in fact he was having sex. Although she had consented to him doing what he did – she thought it was a medical procedure (it seems she was utterly innocent of sexual matters) – it was not consent to sex. Less clear is whether it would apply to a case where the defendant persuaded the victim to have sex by using a deception which did not obviously relate to the nature or purpose of the act. The following two cases provide a useful contrast.

CONTRASTING CASES

R V JHEETA, COURT OF APPEAL

The defendant sent various threatening text messages to the victim. She did not realise who had sent them and consulted the defendant (who was an ex-boyfriend) for advice and he recommended that she went to the police. The defendant then sent her messages which purported to come from the police. These encouraged her to have sex with the defendant and threatened that if she did not she would face a fine. As a result of these messages she had sex with the defendant on many occasions. His conviction for rape was upheld by the Court of Appeal. The deceptions did not relate to the nature or purpose of the act. There was, therefore, no conclusive presumption of consent. However, the jury were still allowed to conclude on the facts of the case that there was no consent. She had not exercised a free choice.

R V DEVONALD, COURT OF APPEAL

This case concerned the offence of causing sexual activity without consent. The meaning of 'consent' for the offence is the same as

that for rape. The defendant's daughter had been in a relationship with the victim, who was a sixteen-year-old boy. The defendant believed that the victim had treated his daughter badly. He assumed the persona of a young woman and started corresponding with the victim on the Internet. He persuaded the boy to masturbate in front of a webcam, and gave the impression that the woman he was pretending to be was enjoying this. The key issue in the case was whether the victim had consented to engage in the masturbation. That turned on whether it could be said that the complainant had been deceived as to the nature or purpose of the act; specifically that the boy had been deceived into thinking he was doing an act for the sexual enjoyment of a young woman, whereas in fact he was doing the act to his ex-girlfriend's father, who was seeking material to embarrass him with. The defendant was convicted and the Court of Appeal upheld the conviction on the basis that it was open to the jury to find that the complainant had been deceived as to the purpose of the sexual act. This is a surprisingly broad interpretation of 'purpose'.

Another case where non-consent will be found automatically is where the defendant has impersonated a person known to the victim. Again this will be rare, but there have been occasional cases where the defendant has impersonated the victim's boyfriend.

The 2003 Act also provides that in certain cases there will be a presumption of no consent, although this can be rebutted by the defendant. These cases include where the defendant used violence against the victim immediately before the sexual intercourse and where the victim was asleep.

The victim may be found to have had no choice owing to threats or the circumstances he or she was facing. The jury may have to decide whether the victim's apparent consent was in fact submission rather than consent. In *Kirk* a fourteen-year-old girl ran away from home. She was hungry, tired and cold. She went to the defendant for help and he offered her £3.25 for sex so that she could get something to eat. The Court of Appeal agreed that in such circumstances the jury could decide that she had not truly consented. Notably this was so even though the defendant had not actually made any threats, simply that, given the circumstances, her apparent consent could not be taken to have been given freely.

Much controversy has surrounded cases where the victim has been drunk. The courts have made it clear that 'drunken consent is still consent'. What is meant by this is that just because the victim is drunk does not mean that she cannot consent. However, it should be remembered that the consent must be genuine consent and the person must have had the capacity to make the choice. So a victim who is so drunk that she does not know what is happening, or has only a confused understanding, will certainly lack the capacity to consent.

LEADING CASE

R V BREE, COURT OF APPEAL

The defendant and complainant had been drinking heavily together and then had sex. The complainant had a hazy recollection of what had happened, but was adamant she had not consented to sex. The defendant claimed that although the complainant was intoxicated she had consented. The Court of Appeal allowed the defendant's appeal against his conviction. The judge should have made it clear that even though a person is intoxicated they may still have the capacity to consent. However, a person may become so intoxicated that they lack the ability to consent. The court noted that there was nothing abnormal or unusual about people having sexual intercourse after having consumed a great deal of alcohol. As long as there was consent it was not an offence.

It is also possible that the victim is mistaken about an important issue relating to the sexual intercourse so that her consent is regarded as invalid. If she thought that the couple had married, when in fact the defendant had deceived her into thinking this, then the victim would not have given sufficiently informed consent. More controversial is the suggestion that if the victim consented to sexual intercourse believing that the defendant loved her, when he did not, this could be rape, at least where the defendant knew of the victim's mistake. To many commentators this is a very common situation and it would be spreading the net of the law of rape too wide if such cases were included within its definition.

The mental element required for the offence of rape is that the defendant does not reasonably believe that the victim is consenting. This means that not only must the defendant believe that the victim is consenting, but that the belief must be reasonable. The following case is one decided under the old law. Under the 2003 Act there would be no difficulty in convicting him

LEADING CASE

DPP V MORGAN, HOUSE OF LORDS

Mr Morgan told his friends that they should have sex with his wife. He told them that she might pretend to put up resistance, but they should realise that would merely be a pretence and was in fact a sign of her enjoyment. Three friends therefore had sex with Mrs Morgan despite her adamant protests. The House of Lords confirmed that if the defendants honestly believed that Mrs Morgan was consenting they would not be guilty of rape. [*Note*. That is no longer the law.] However, their lordships decided that it was inconceivable that the defendant did in fact believe that Mrs Morgan was consenting. The friends' convictions, and that of Mr Morgan, were upheld.

SEXUAL ASSAULT

KEY STATUTE

The Sexual Offences Act 2003, Section 3, reads:

(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.

This offence deals with unwanted sexual touching. It should be noted that the offence covers only touching. So if the defendant commits a sexual act which disturbs the victim, but which does not involve touching, that would not be this offence. The Act makes it clear that touching a person through their clothing or making an object touch a person will fall within the definition of the offence. There are, however, a range of other offences included in the Act which could be relied upon if the defendant did not touch the victim, including voyeurism and causing a person to perform a sexual act.

The main difficulty with the interpretation of the offence is the meaning of the term 'sexual'. The Act explains that in deciding whether an act is sexual the jury should consider whether a reasonable person would consider it sexual, taking into account the nature of the act or its circumstances, or the purpose of the defendant in relation to the act. The Act indicates that an act will not be sexual only because the defendant regards it as sexual, if in its nature there is nothing sexual about it. So in one case a defendant with a foot fetish removed a woman's shoe. As the average person would not regard the removal of a shoe as sexual, the act was not found to be so, even though it was very sexual for the defendant. The Act also makes it clear that some acts will be sexual 'in their nature', whatever the defendant's purposes. Whether the defendant finds the act sexual will be particularly relevant in a case where there the act is ambiguous. In other words the average person would say, 'That may or may not be sexual', it all depends on the motive of the defendant. In such a case if the defendant was indeed sexually motivated, the jury will find the act sexual. But it will not be if the defendant did not.

SUMMARY

This chapter has looked at a wide range of offences where the victim has been injured, short of being killed. This raises some surprisingly complex decisions. In particular over the extent to which a person should be allowed to do what they like with their body and the extent to which people should be responsible for their own health or well-being. Many of the issues discussed in this chapter involve a delicate

balance between protecting people from being taken advantage of and allowing people the freedom to decide how to live their lives.

STATUTES

Offences against the Person Act 1861.
Protection from Harassment Act 1997.
Sexual Offences Act 2003.

CASES

DPP v K [1990] 1 WLR 1067, Divisional Court.
DPP v Morgan [1976] AC 182, House of Lords.
DPP v Savage, *DPP v Parmenter* [1992] 1 AC 699, House of Lords.
R v Barnes [2005] 1 WLR 910, Court of Appeal.
R v Bree [2007] EWCA Crim 256, Court of Appeal.
R v Devonald [2008] All ER (D) 241, Court of Appeal.
R v Dica [2004] 3 All ER 593, Court of Appeal.
R v Ireland [1998] AC 147, House of Lords.
R v Jheeta [2007] EWCA Crim 1699, Court of Appeal.
R v Kirk [2008] EWCA 343, Court of Appeal.
R v Smith [2006] EWHC 94, High Court.

FURTHER READING

The general law on offences against the person is discussed in Gardner and Horder. Consent is considered in Elliott and de Than and in Roberts. Transmission of HIV is discussed in Weait and Ryan. Gardner and Shute, Gross, Herring, Madden Dempsey and Herring, Tadros and Temkin and Ashworth analyse sexual offences.

Elliott and de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) *Modern Law Review* 225.

Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) *Cambridge Law Journal* 502.

Gardner and Shute, 'The Wrongness of Rape', in Horder (ed.), (2000) *Oxford Essays in Jurisprudence* (Fourth Series).

Gross, 'Rape, Moralism and Human Rights' (2007) *Criminal Law Review* 220.

Herring, 'Mistaken Sex' (2005) *Criminal Law Review* 511.

Herring, 'Human Rights and Rape: a Reply to Hyman Gross' [2007] *Criminal Law Review* 228.

Horder, 'Rethinking Non-fatal Offences against the Person' (1994) 14 *Oxford Journal of Legal Studies* 335.

Horder, 'Reconsidering Psychic Assault' [1998] *Criminal Law Review* 392.

Madden Dempsey and Herring, 'Why Sexual Penetration requires Justification' (2007) *Oxford Journal of Legal Studies* 467.

Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' [1997] 17 *Oxford Journal of Legal Studies* 389.

Ryan, 'Reckless Transmission of HIV: Knowledge and Culpability' [2006] *Criminal Law Review* 981

Tadros, 'Rape without Consent' (2006) *Oxford Journal of Legal Studies* 515.

Temkin and Ashworth, 'Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328.

Weait, *Intimacy and Responsibility* (2007, Routledge).

4

PROPERTY OFFENCES

So far in this book we have primarily focused on offences against the person. Most people agree that offences against the person are more serious than offences against property. One important reason is that the harm in property offences in generally easily remedied. If someone steals your car, you can buy a new one. If someone chops your hand off, you cannot. That, however, may be too simplistic a point. Property can have great emotional value. If the family photograph album is stolen, it may not be easily replaced. Some property offences, especially burglary, can be traumatic and some victims take quite some time to recover.

One interesting contrast between offences against the person and those against property is as follows. The offences against the person tend to focus on the gravity of the harm: did the case involve actual bodily harm or grievous bodily harm? Whereas offences against property focus on the way the harm was done: was the property obtained by the use of fraud or force?

THEFT

KEY STATUTE

THEFT ACT 1968, SECTION 1

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ...

Theft is one of the most common criminal offences. There are five elements of theft. D is guilty if he or she:

- appropriates
- property
- belonging to another
- dishonestly
- with intent to permanently deprive.

These elements will be considered in turn.

' ... APPROPRIATES ... '

Appropriation involves 'assuming the rights of an owner'. In other words it means that a person has treated the property in the way an owner would. The courts have made it clear that the defendant will have appropriated the property if he has exercised one of the rights of the owner. This means that the defendant will appropriate property if she moves it, eats it, sells it or throws it away.

One question which greatly troubled the courts for a while was whether or not appropriation could occur if the victim consented to the defendant's action. In the following case the House of Lords held that there could be an act of appropriation, even if the owner had consented to the act.

LEADING CASE

R V GOMEZ, HOUSE OF LORDS

Gomez was the assistant manager of a shop. A friend of his offered two cheques in return for some goods. Gomez did not realise that the cheques were stolen. He persuaded the manager of the shop to accept the cheques as payment, telling him that the cheques were 'as good as cash'. He was charged with theft of the goods, with the claim being made that he was in league with his

friend. At his trial he argued that there had been no appropriation because the manager had consented to the goods being handed over in return for the cheques. The House of Lords held there could be appropriation, even though the victim had consented to the passing over of the goods. Gomez's conviction for theft was upheld.

This decision in many ways made the law easier to apply. The only question for the jury in relation to the appropriation issue was whether or not there had been a touching or dealing with the property. There was no need to think about whether there was consent from the victim, and if there was whether or not it was a valid consent. Of course, in a case where the victim consents to the appropriation, the defendant will often be found to be honest and so be acquitted on the basis that she lacks dishonesty.

The House of Lords were again required to consider the notion of appropriation in the following case where the key issue was whether or not there could be appropriation even if the transfer of the property to the defendant was a valid gift under the law of property.

LEADING CASE

R V HINKS, HOUSE OF LORDS

Ms Hinks had befriended a Mr Dolphin, who was described in court as having limited intelligence and being trusting. Nearly every day for six months she took him to his building society, where he withdrew £300 and gave her the money. She obtained £60,000 in total. The prosecution case was that she had manipulated him into giving her the money in a dishonest way. She was convicted and appealed on the basis that the transactions might be valid under the law of property, as it had not been proved that she had used any threats, lies or undue influence. The House of Lords upheld the conviction, finding that if there was dishonesty a conviction for theft could be

upheld even though the transaction may have been a valid transfer under the law of property

This decision has many practical benefits. It means that magistrates or juries hearing theft cases do not need to worry themselves abut the complexities of the law of property. However, many academics are concerned about the theoretical problems it raises. If there is no wrong under the law of property, what exactly is the harm the criminal law is responding to? Further is it not inconsistent for the criminal law to tell a defendant that he has committed theft, but the law of property to say that the property is his?

' ... PROPERTY ... '

Property is given a very broad definition in the Theft Act 1968. It includes most of the things one would expect to be defined as property. However, there are some rather complex exceptions. Land is not property for the purposes of the Theft Act 1968 and so cannot be stolen. The detailed provisions on plants are a lawyer's delight! One can 'pick' bits of a plant, but not 'cut' them. Wild creatures can be stolen if they are 'tamed' but not if they are 'untamed'. Electricity is not property, but gas is, if it is kept in a container. The complexities go on. Perhaps the most interesting is bodies.

BIZARRE CASE

R V KELLY, COURT OF APPEAL

Kelly was an artist. He was a cousin of the Duke of Norfolk and a teacher at the Prince of Wales's Institute of Architecture. He paid a technician at the Royal College of Surgeons to remove from the college up to forty anatomical specimens. They were used in order to make art works and the remaining parts were buried in a field. Some of the body parts were used to make art works which appeared in the 1997 London Contemporary Art fair. His conviction for theft of the body parts was upheld on the basis that the college had exercised

skill on the specimens, and they had thereby become property for the purposes of the law on theft. He was sentenced to nine months' prison, with the judge describing his crime as 'disgusting'. Thanks to a legal technicality he was able to recover his work from the police and went on to exhibit it. He continues to work as an artist.

' ... BELONGING TO ANOTHER ... '

This requirement is rarely problematic. It means you cannot normally steal your own property. That might sound like common sense, but it is not straightforward. In one case the defendant had taken his car into a garage for repairs. After the work had been done, but before he had paid the bill, he drove his car away. It was held he was guilty of stealing the car. Although he was the owner, the garage had a claim over it until the bill had been paid.

The requirement can raise some complex issues of property law. For example, if a person is overpaid, although the money becomes theirs when it enters a bank account, they can become liable to return it under something called a constructive trust. This means that if the property is not returned to the original owner it can be stolen.

' ... DISHONESTLY ... '

The basic test of dishonesty has been set out by the Court of Appeal in the 'Ghosh test'. The defendant will be regarded as dishonest if:

- His conduct is dishonest according to the standards of reasonable and honest people; and
- He realised that reasonable and honest people would regard his conduct as dishonest.

Notice that the defendant will not be dishonest if the ordinary reasonable and honest person would think that he was not dishonest. That is so even if the defendant himself regarded what he was doing as dishonest. Also notice that the jury should consider

whether the defendant realised that most people would regard their conduct as dishonest. If they did they will be dishonest in law, even if they thought they were behaving properly. So an Animal Rights protester releasing animals from a laboratory might regard themselves as acting morally, but might accept that most people would think they were acting dishonestly. They could therefore be found dishonest in the eyes of the law.

Section 2 of the Theft Act 1968 sets out some circumstances in which the defendant will not be dishonest, even if they might be under the Ghosh test. These include where the defendant believes he has the right in law to take the property and where the defendant believes that the owner of the property cannot be found by taking reasonable steps.

KEY STATUTE

THEFT ACT 1968, SECTION 2

(1) 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 in law he has the right to deprive the other of it, on behalf of himself or of a third person; 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) (Except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

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

POINT TO PONDER

Do you think there are standards of the community which the jury can seek to apply in determining dishonesty? For example, if someone

gives someone a non-transferable one-day travel card because they have finished using it, is that dishonest? People might disagree on an issue like that. Or maybe they would not, maybe they would agree it was dishonest, but just that a lot of people do it. This raises the question whether the test should be how ordinary people act rather than what their beliefs are.

' ... WITH INTENTION TO PERMANENTLY DEPRIVE ... '

The defendant will be guilty only if there is an intention to permanently deprive the victim of the property. Borrowing something is not generally theft. The view the law takes is that borrowing properly might be an inconvenience but it is not a sufficiently serious wrong to amount to theft. That said, it is not difficult to imagine borrowings which would cause serious harm: borrowing a bride's dress the day of the wedding might be as bad as taking it permanently.

Section 6 of the 1968 Act sets out some circumstances which will be treated as an intention to permanently deprive. These include where a person has treated 'the thing as his own to dispose of regardless of the others' rights'. That might cover the situation where the defendant takes property and later throws it into a hedgerow. Although she might say she did not intend the victim to be deprived of it (she would not have minded if a passer-by picked it up and returned it to the victim), she had treated it as her own. Also covered is where the borrowing is such that it is 'equivalent to an outright taking'. That would include taking a season ticket and returning it when it was no longer any use.

FRAUD

The 2006 Fraud Act has greatly simplified the law on offences involving deception. The law before the Act came into force was extremely complicated. You are lucky you were not trying to find out about this topic a few years ago! The Act creates three new offences of fraud.

FALSE REPRESENTATION

KEY STATUTE

FRAUD ACT 2006, SECTION 2(1)

A person is in breach of this section of the Act 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 to expose another to a risk of loss.

This form of fraud requires proof of the following:

- Making a false representation.
- Dishonestly.
- With intent to make a gain for himself or another or cause a loss to another.

The making of the representation can be by words or conduct. It could include statements on a Web site. The statement must be false, but this includes statements which are 'untrue or misleading'. It also includes statements that are implied rather than expressed. This might include, for example, dressing up in a particular uniform to pass oneself off as an employee of a company.

The offence is committed only if the defendant has made the false representation. So, if a defendant knows that X has lied to V, he will not be guilty of fraud if he tries to obtain property by taking advantage of V's mistaken belief unless the defendant himself makes a false representation.

The defendant will be guilty of fraud by false representation only if he knows that the statement is or might be misleading. The statement must also be made with the intention of making a financial gain or a loss. It may be that this will provide a defence for a defendant who makes outrageous claims. For example, if a seller in a market shouts out to passers-by, 'These are the most delicious melons in the world', and as a result a person buys a melon but finds it does not taste pleasant, it is unlikely that this would be the

offence of fraud. One reason would be that the seller did not intend anyone to take his statement seriously and therefore he was intending to make a gain by the statement.

The defendant will be guilty of this offence only if he is dishonest. The courts will apply the Ghosh test, described earlier in the chapter.

It is important to realise that this offence is committed whether or not in fact the defendant makes a gain or a loss. It is enough that he intends to make a gain or a loss. So if the police find a man sitting on a street corner with an untrue sign saying 'I have not eaten for two days, please give generously' he could be prosecuted for fraud by false representation even though no member of the public was in fact taken in by what the sign said. Indeed, one leading commentator has argued that the offence 'criminalises lying'. This is a slight exaggeration because it is only where a lie is used in order to make a financial gain that the offence is made out.

FAILING TO DISCLOSE INFORMATION

This offence is found in Section 3 of the Fraud Act 2006.

KEY STATUTE

FRAUD ACT 2006, SECTION 3

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.

This offence is committed when the defendant fails to disclose information to another person when he is under a legal obligation to do so. It must be shown that the defendant was dishonest and intended by failing to make the disclosure to make a gain for himself or another or cause loss to another.

This, in effect, covers deception by silence cases. However, it operates only where the defendant is under a legal obligation to

make a disclosure. Generally people are not under obligation to make a disclosure. A person selling a car is not required to point out to the punter all its faults. However, there are statutes and special legal rules that apply in particular circumstances requiring a person to make a disclosure. This arises, for example, where a person is a trustee or a person is applying for insurance cover.

ABUSE OF POSITION

KEY STATUTE

FRAUD ACT 2006, SECTION 4

A person is in breach of this section if he:
(a) occupies a position in which he is expected to safeguard, or not 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.

This offence can be committed when a person is in a position where they are expected to safeguard the financial interests of someone else. This could include a trustee. A person who dishonestly misuses that position with intention to make a gain for himself or another or cause loss to another will be guilty of the offence. Notice that as with the other offence it is not actually necessary to show that the defendant did, in fact, make a gain or cause a loss. It is sufficient that he intended to do so.

OBTAINING SERVICES DISHONESTLY

KEY STATUTE

FRAUD ACT 2006, SECTION 11

(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 may be,
but intends that payment will not be made or will not be made in full.

This offence applies only to services that are offered on the basis that they have been or will be paid for. The offence does not, therefore, arise where the defendant has deceived the victim into providing a service for free. So if D were to persuade V to do his laundry for him after falsely explaining that he had injured his back, it would not fall under this offence. It applies therefore when a person persuades a shop to provide goods or a professional to provide services at a reduced cost.

MAKING OFF WITHOUT PAYMENT

Section 3 of the 1978 Theft Act creates the offence of making off without payment. It is made up of the following elements:

- Making off
- dishonestly
- without having paid as required or expected.
- Knowledge that payment on the spot is required.
- Intent to avoid payment.

Typical examples of the offence arise where the defendant leaves a restaurant without paying the bill or drives away from a petrol station without paying for the petrol. The notion of 'making off' means leaving the place where payment is expected. This offence

does not require proof that the defendant used any kind of fraud or deception.

CRIMINAL DAMAGE

KEY STATUTE

CRIMINAL DAMAGE ACT 1971, SECTION 1(1)

A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

This offence involves destroying or damaging property which belongs to another with intention or being reckless as to whether the property of another would be damaged or destroyed.

'Damage' indicates that the property has been reduced in value or usefulness. Putting a leaf on a car would not damage it. Scratching it would, because that would affect its value. In one case spitting on a police officer's raincoat was found not to be criminal damage because the coat could easily be returned to its original state by simply wiping the spit off.

KEY CASE

MORPHITIS V SALMON, DIVISIONAL COURT

The defendant was in an argument with a neighbour who had erected a barrier between their properties. The defendant removed parts of the barrier and in doing so scratched a scaffolding clip. He was charged with criminal damage to the clip. It was held he could not be guilty of causing criminal damage to the clip. Neither its value nor its usefulness was affected by his action. The court did suggest that had he been charged with damage to the barrier a stronger case would have been made.

Section 5 of the 1971 Act provides a defence if the defendant believed that the victim would have consented to the damage. So if a father repaints his daughter's house while she is on holiday he may have a defence, even if on her return she is unhappy with the work. He would not be guilty if he believed (however incorrectly) that she would have consented to him doing the work had he asked her.

Section 5 also provide a defence where the defendant was destroying or damaging property in order to protect other property and he was acting reasonably. An example might be if fire had broken out and the victim's house was destroyed to create a firebreak to stop the fire spreading.

ROBBERY

The offence of robbery is set out in the Theft Act 1968, Section 8.

KEY STATUTE

THEFT ACT 1968, SECTION 8(1)

A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

To be guilty of robbery two things must be shown. First, it must be shown that the defendant committed theft. All the elements of that offence, as discussed above, must be proved. Second it must be shown that at the time of theft the defendant used or threatened force. The force can be used at the time of theft or immediately before it, but must be used in order to steal.

KEY CASE

R V HALE, COURT OF APPEAL

Hale was charged with robbery. He and an associate knocked at the door of the victim. Hale covered the victim's mouth and tied her up

while the associate went upstairs and took a jewellery box. The defendant claimed he had used force against her in order to assist his escape rather than assist in the theft. His appeal was dismissed because it was held that the theft was taking place the entire time the two men were in the house. Tying the victim up had helped them take the property.

BIZARRE CASES

Bank robbers appear to be some of the most ineffectual criminals. Here are some of the less successful bank robberies:

- In Florida a man made a daring armed robbery. However, it seems he posed a greater threat to himself than to anyone else. He approached the bank clerk with the gun pointing to himself. He seemed to be nervous and afraid of the gun. He left with no money.
- In San Fransico a man walked into a branch and handed over a note saying, 'This iz a stikkup. Put all your muny in this bag.' Perhaps not surprisingly, he was not taken very seriously.
- In Portland a robber handed over a note to a bank clerk which stated, 'This is a hold-up and I've got a gun.' He then wrote down, 'Put all the money in a paper bag.' The cashier wrote, 'I don't have a paper bag.' The robber fled.
- In Rothesay some bank robbers got stuck in the revolving doors trying to enter the property. They were helped in by staff. After thanking the staff they announced they were robbers and wanted £5,000. The cashier just laughed. The leader of the gang asked for £500. This led to more laughter. When £50 was asked for the cashier could hardly contain herself for laughing. In embarrassment the robbers fled, only to be caught again in the revolving door.

COMPUTER CRIME

The Computer Misuse Act 1990 was passed specifically to protect information on computers. The Act does not define the term 'computer' but the courts seem to have taken a fairly broad interpretation of the term. The key offence is found in Section 1 of the Act and punishes those who try to gain access to unauthorised data.

KEY STATUTE

(1) A person is guilty of an offence if:
   (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer or to enable such access to be secured;
   (b) the access he intends to secure or enable to be secured is unauthorised; and
   (c) he knows at the time when he causes the computer to perform the function that that is the case.

(2) The intent a person has to have to commit an offence under this section need not be directed at:
   (a) any particular program or data;
   (b) a program or data of any particular kind; or
   (c) a program or data held in any particular computer.

Notably this offence is committed if a person causes a computer to perform any function with the necessary intent. This could include switching it on. The necessary intent is to secure access to data or a program to which he is not authorised to have access. So the offence is committed if the defendant tries, but fails, to hack into a computer. The offence is not committed by simply looking at unauthorised data on the computer, the computer must be made to perform some function. The courts have made it clear that a defendant may have authority to access some data but not others. So in one case an employee of a credit card company had been allocated some customers on a database and was entitled to access information about them. However, she also accessed the data of other customers who had not been allocated to her and she was convicted of an offence under Section 1.

There is also an offence under Section 2 of the Act which requires proof that a Section 1 offence was committed with the intention to commit a serious offence such as fraud. There is an offence under Section 3 which involves modifying the contents of a computer in an unauthorised way if as a result the operation of the computer is impaired or access to data or programs is hindered or prevented. This section would apply to those who send computer viruses to affect computers or those who delete databases. It has also

been said to apply to a defendant who sent over 5 million e-mails to a former employer.

BLACKMAIL

KEY STATUTE

A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces ...

To be guilty of blackmail the defendant must have made an unwarranted demand. The demand will be treated as unwarranted unless the defendant believes he has reasonable grounds for making the demand and that the use of menaces is a proper means of reinforcing the demand. This means that a defendant who is owed money by the victim and threatens to bankrupt the victim would not be guilty, as long as he believed he was entitled to make that demand to get his money back.

In determining whether someone has committed blackmail a fine line needs to be drawn between a demand which can form the basis of a blackmail charge and an offer which cannot. Consider a case where the defendant says to the victim, 'Give me £50 and I'll make sure no harm comes to you.' That might appear to be an offer, but it might also be regarded as a threat: that the defendant is impliedly saying that if he is not given the money he will be violent to the victim.

The word 'menaces' will involve the threat that something unpleasant will happen. It will normally be violence, but it could involve a threat of financial loss, for example.

BURGLARY

For many people their home is a place where they are meant to feel safe. Burglary is therefore often regarded as a particularly unpleasant crime. The average person on the street would probably define burglary as entering someone's house and stealing property. In fact,

its legal definition is much broader than that. It includes entering a house with the intention to steal even if the defendant does not actually steal. Further, burglary is not restricted to stealing from people's homes, but includes a wider range of crimes than that. Finally it includes stealing not just from homes but also from office premises and other buildings.

KEY STATUTE

(1) A person is guilty of burglary if:
   (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or
   (b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm, and of doing unlawful damage to the building or anything therein.

As will be clear from that definition there are in fact two kinds of burglary:

- Where the defendant enters property as a trespasser with intent to commit theft, grievous bodily harm or criminal damage. For this version there is no need in fact to commit any of those offences. Intention to do so is sufficient
- The defendant enters property as a trespasser and then in fact commits theft or grievous bodily harm. This offence would be relied upon where it is not possible to show that when he or she entered the property the defendant intended to commit an offence.

A key requirement in the offence of burglary is that the defendant entered the property as a trespasser.

KEY CASE

R V COLLINS, COURT OF APPEAL

The accused climbed naked up a ladder to the bedroom window of a girl he knew slightly, intent on having sexual intercourse with her. For reasons which are unclear, he kept his socks on. It was the middle of the night and the girl was asleep, but when she saw the accused at the window she jumped to the conclusion that he was her boyfriend and invited him into the room. They then had sexual intercourse. Collins was convicted of burglary with intent to rape, under Section 9(1)(a). (Rape used to be one of the offences listed in Section 9(2), but it was removed by the Sexual Offences Act, to be replaced with the new offence of trespassing with intent to commit a sexual offence.) His appeal was allowed on the basis of the uncertainty over whether he had entered as a trespasser: if the victim had invited him into the room before he had entered it, then, according to the court, he would not have been a trespasser. If, however, he had entered the room before the invitation, then he would have committed the offence. The jury had not been properly asked to consider this question and so his conviction had to be set aside.

The courts have made it clear that to enter a property the defendant must have made an 'effective and substantial entry'. So simply putting a hand into a window may be insufficient, although there was a case where a defendant was convicted after putting his head and arm inside a building.

The Theft Act 1968 does not define a building, but it clearly includes a house or business premises. The Act indicates that it includes vessels (e.g. a houseboat) and it would presumably include sheds and outbuildings. A car would not be included.

Burglary is committed only where the defendant enters the property as a trespasser. In short this means that he or she must enter without the consent of the owner. This means that generally a shoplifter would not be guilty of burglary, as the shop owner would have consented to them being in the shop. Although if there was a case where the defendant had previously been told by the

shop owner that he was not allowed to go into the shop then it would be a trespass for the defendant to enter the shop.

Permission to enter property could be express or implied. Express permission would be where the owner invited the defendant into the house. Implied would be where the property owner indicates that members of the public may enter. That would apply in the case of a shop, for example. The defendant can be guilty of burglary only if they know they are a burglar or are aware there is a risk they are.

The offence covers entering a building or part of a building as a trespasser. This is useful where the defendant has permission to enter some parts of the building but not others. So if, at a parents' evening at a school, a parent were to enter the head teacher's office and take property they could be convicted of theft. Although the parent may have had permission to enter the school, they would not have had permission to enter the part that included the head teacher's office.

Section 10 of the Theft Act 1968 creates the offence of aggravated burglary. This occurs where the defendant, at the time of the burglary, has a firearm, imitation firearm or weapon of offence or an explosive. A weapon of offence could include an 'innocent object' (e.g. a screwdriver) if it is carried with the intention to use it as a weapon.

Under Section 63 of the Sexual Offences Act 2003 if a person is a trespasser in any structure, part of a structure, or on any land, and intends to commit a sexual offence or does commit any sexual offence he commits an offence. This is similar to burglary, but is not limited to buildings, and includes any land. It would therefore include a man who has trespassed in a hospital, intending to rape or commit some other sexual offence.

SUMMARY

This chapter has considered the law on property offences. The main ones are theft and the offence of fraud. However, we have also considered criminal damage, blackmail and the more modern computer offences. The criminal law sometimes struggles in its interaction with the law on property, which is complex and is more concerned

with producing certainty than ensuring dishonest behaviour does not arise. The current law on property offences is marked by its breadth and the weight placed on the notion of dishonesty. It is probably true to say that almost anyone who acts dishonestly in relation to property could be found to be guilty of one of the offences discussed in this chapter.

STATUTES

Computer Misuse Act 1990.
Criminal Damage Act 1971.
Fraud Act 2006.
Theft Act 1968.
Theft Act 1978. (Note that many of the provisions of this Act have been abolished by the Fraud Act 2006.)

CASES

Morphitis v Salmon [1990] Crim LR 48, Divisional Court.
R v Collins [1973] QB 100, Court of Appeal.
R v Gomez [1993] AC 442, House of Lords.
R v Hale (1979) 68 Cr App R 415, Court of Appeal.
R v Hinks [2001] 2 AC 241, House of Lords.
R v Kelly [1999] QB 621, Court of Appeal.

FURTHER READING

Appropriation is discussed in Beatson and Simester, Gardner, Shute and Shute and Horder. Elliot and Griew consider the concept of dishonesty. The Fraud Act 2006 is examined in Ormerod. Broader issues surrounding the nature of property offences are analysed in Bogg and Stanton-Ife, Green, Simester and Sullivan, and Williams.

Beatson and Simester, 'Stealing one's own Property' (1999) 115 *Law Quarterly Review* 372.
Bogg and Stanton-Ife, 'Theft as Exploitation' (2003) *Legal Studies* 402.
Elliot, 'Dishonesty in Theft: a Dispensable Concept' [1982] *Criminal Law Review* 395.
Gardner, 'Appropriation in Theft: the Last Word' (1993) *Law Quarterly Review* 195.

Gardner, 'Property and Theft' [1998] *Criminal Law Review* 35.
Green, *Lying, Cheating and Stealing* (2007, Oxford University Press).
Griew, 'Dishonesty: the Objections to Feely and Ghosh' [1985] *Criminal Law Review* 341.
Harris, 'Who owns my Body' (1996) 16 *Oxford Journal of Legal Studies* 55.
Ormerod, 'The Fraud Act 2006: Criminalizing Lying' [2007] *Criminal Law Review* 193.
Shute, 'Appropriation and the Law of Theft' [2002] *Criminal Law Review* 450.
Shute and Horder, 'Thieving and Deceiving: What is the Difference?' (1993) 56 *Modern Law Review* 548.
Simester and Sullivan, 'The Nature and Rationale of Property Offences' in Duff and Green (eds), *Defining Crimes* (2005, Oxford University Press).
Williams, 'Temporary Appropriation should be Theft' [1981] *Criminal Law Review* 129.

5

ACCOMPLICES AND INCHOATE OFFENCES

The criminal law would be missing something if it penalised only defendants who actually harmed victims. There would be no punishment for those who try to commit crimes but by chance fail to do so. Also the law would not deal with those who help or encourage others to commit crimes but are not directly involved in inflicting the harm themselves. Some of the worse criminals are those masterminds who order others to commit crimes but ensure they themselves never get their hands dirty.

English criminal law makes sure that people such as these can be convicted of an offence. Hence in this chapter we will consider those who attempt to commit crimes and those who work with others to commit offences.

ATTEMPTS

The law has to tread carefully with attempted crimes. The criminal law has always been wary of punishing wicked thoughts which are not put into action. No doubt if wicked thoughts on their own were criminal then the prisons would be very full indeed!

The criminal law of attempts covers all of these kinds of attempts:

- *Thwarted attempt*. A person tries to commit a crime but is prevented from completing it because of some intervening act. This would include where he is stopped by the police or by the victim.
- *Failed attempt*. The person tries to complete a crime but fails to do so. An example would be where the defendant shoots at the victim but the bullet misses.
- *Impossible attempt*. The person tries to committed the crime but fails because the crime they are trying to commit cannot be done. For example, this would arise where the defendant tries to kill a victim who is already dead.

THE *ACTUS REUS* OF AN ATTEMPTED CRIME

To be guilty of an attempt D must have done an act which is 'more than merely preparatory' to committing the full offence (Criminal Attempts Act 1981). Further he must have intended to commit the completed offence. So, for a charge of attempted criminal damage, he must have intended to damage property belonging to another.

The courts have been reluctant to set down any firm rule for deciding whether or not an act is more than merely preparatory. The word 'merely' in the test is important. Not every preparatory act will be the *actus reus* for an attempt. The act must be more than mere preparation, and the defendant must have started on the crime proper. The best that can be done is to refer to some of the cases.

- *Geddes*. A man was found in a lavatory block in a school. He had no permission to be there and was found with a knife, rope, masking tape and orange toilet paper. The prosecution claimed that he was planning to kidnap a boy. While the Court of Appeal held it was clear what his intention was he had not actually started to commit the crime.
- *Jones*. D hid in some bushes beside V's car. When V entered the car D got in after him and pointed a gun at him. This was sufficient to be an attempted murder. Even though he still had a few acts to go before the crime was completed (e.g. he had not removed the safety catch) it was held he could still be guilty of an attempt. He had moved beyond the stage of preparation. Had

he been found by the police in the bushes he would not have been guilty of attempted murder.

- *Kelly*. D dragged the victim behind a hedge. He pulled at her clothing, but she managed to fight him off. His conviction for attempted rape was upheld. Even though he had several acts to do before committing a rape he was far enough along to be more than preparation.
- *Campbell*. D was arrested wearing a balaclava and carrying a replica gun outside a post office. He had been witnessed several times approaching the door of the post office, but not going in. He was held not to be guilty of an attempt. It was suggested an attempt would begin only once he had entered the post office.

As these cases indicate, the law is trying to ensure that a person is not convicted of an attempt unless we are sure that he or she was going to actually commit the crime. Further, the courts appear to be requiring that the defendant has actually started to commit the crime, rather than is just getting ready to do it.

BIZARRE CASE

For one remarkable case a newspaper headlined the story 'Biscuits wanted for attempted murder'. The case involved Linda Burnett, twenty-three, who was found in a supermarket car park in San Diego, California, with her hands holding the back of her head and her eyes closed, looking strange. Eventually someone noticed that she had been in that position for some time and asked if she needed any help. Ms Burnett told the passer-by that she had been shot in the back of the head and was holding her brains in. She explained she had been doing so for over an hour.

An ambulance crew was called and they had to break into the car because it was locked and she did not want to move her hands, for fear that her brains would fall out. Fortunately it transpired that the truth was less dramatic than she feared. A canister of biscuit dough she had bought had exploded in the car due to the heat. The sound of the explosion had sounded like a gunshot. Some of the dough had hit the back of her head. When she reached behind her head she was convinced the dough was her brains!

IMPOSSIBLE ATTEMPTS

A defendant can be convicted of an attempt even though the crime he is trying to commit is impossible.

LEADING CASE

R V SHIVPURI, HOUSE OF LORDS

When Mr Shivpuri was arrested by customs officers he confessed that he was dealing in illegal drugs. However, when the contents of his suitcases were examined it was found they contained harmless vegetable matter. He was charged under the Customs and Excise Management Act 1979 with the offence of attempting to commit an offence. His conviction was upheld on the basis that on the facts as he believed them to be he was attempting to commit the offence.

As a result of this case it would be attempted murder to shoot at a person intending to kill them, even though they were in fact dead; or attempt to steal from someone by pickpocketing them, even though there was no property to be had in their pocket. In such cases the defendant will be judged on the facts as he or she believed them to be. If they believed that the facts meant they were committing a crime, they can be convicted of an attempt.

A conviction would not be possible just because the defendant thought something was criminal when it was not. So a defendant who when arrested admitted illegally importing currency could not be convicted of an attempt to import currency illegally, because there is no such offence. In a case of this kind the defendant has not shown a propensity to do an act which is in fact forbidden by the criminal law.

The law on impossible attempts is controversial. There are some who think that in the case of an impossible attempt there has been no harm to anyone else. No one has been injured or even nearly injured and so the criminal law should not be involved. On the other hand it may be replied that the defendant had demonstrated willingness to break the law. Although in this case his attempt was

doomed to failure we cannot be sure that the next attempt will be. Further, in moral terms he is as blameworthy as any other person who tries to commit a crime. His stupidity or ineffectualness should not be a defence!

THE *MENS REA* OF AN ATTEMPT

The mental element is an important aspect of attempted crime. Indeed, it is what can be all the difference between an attempted killing and an innocent act. If D raises his hand as he meets V, intending to strike V, then this could be an attempted assault occasioning actual bodily harm, while if the intent is to give a cheery wave then no crime is committed. For most crimes there must be an intention to produce the end result. So, for attempted murder, it must be shown that the defendant intended to kill. More tricky are cases which involve doing an act in certain circumstances where the act must be done intentionally, but recklessness or negligence as to the circumstances is required. So in an attempted rape it needs to be shown that the defendant intended to penetrate the victim, but he need only be negligent as to whether or not the victim was consenting (the circumstances of the offence).

POINT TO PONDER

Why is it that the law punishes attempted crimes? One response is that the person who tries, but fails, to commit a crime may be as morally blameworthy as the person who tries and succeeds. It may be only luck that the defendant failed to commit the crime they were trying to do. But that argument may prove too much. It may suggest the law should draw no distinction between those who attempt to commit crimes and those who succeed in doing so. Another argument is that an attempted crime can be regarded as an attack on the victim's rights (even if it does not harm the victim) and that can be regarded as a harm to the victim. However, would that be true if the victim was unaware that the crime had been attempted?

SERIOUS CRIMES ACT 2007

KEY STATUTE

SERIOUS CRIMES ACT 2007, SECTION 44. 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.

SERIOUS CRIMES ACT 2007, SECTION 45. 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.

The Serious Crimes Act 2007 creates offences of intentionally encouraging or assisting another to commit an offence. There is no need to show that this led to a crime being committed. So if D says to B, 'You should kill your wife', D will be guilty of intentionally encouraging an offence even if B were to reply, 'What a horrible thing to suggest. I certainly will not.' Similarly if D believes incorrectly that B is planning to kill his wife and posts him a recipe for a poison, that would be intentionally assisting an offence and D would be guilty even if B threw the recipe away.

To be guilty of this offence it must be shown that D intended to encourage or assist the offence occurring. It is not enough that he foresees that his action might. This is an important limitation, otherwise

an author of a textbook on criminal law who foresaw a passage in his book might assist in the commission of a criminal offence could be guilty of a crime.

It is also an offence to encourage or assist an offence believing it will be committed. So if D knows the offence is going to take place it will be a crime to offer an act of assistance. Belief in this context requires more than foreseeing a possibility, it requires confidence that it is very likely the offence will be committed.

There is a defence to all these charges if the defendant is acting reasonably. The jury will consider the seriousness of the offence; the purpose for which D was acting; and any authority he was acting under (e.g. whether he was operating as an undercover police officer). It may be that a person who was threatened with violence if he or she did not help commit a minor crime could claim to have been acting reasonably.

BIZARRE CASE

One of the most bizarre cases of encouragement to kill was heard in 2007. A young man known as Mark was befriended on the Internet by someone purporting to be a young woman, who introduced him to her friends. In due course he was asked by one character, Janet, if he would like to join the British secret service. He was told that if he would as an initiation test he needed to kill a young man called John. He was told if he went through with the killing he would meet the Prime Minister, be given his own gun and receive £500,000. The Internet exchanges concluded with the message 'U want me 2 take him 2 trafford centre and kill him in the middle of trafford centre?' 'Yes', came the reply.

Mark indeed met up with John and stabbed him, leaving him critically ill in hopsital with stab wounds in the chest and stomach. The police, investigating what had happened, were amazed to discover that John had been the person who was inciting his own death. He was convicted of inciting his own murder and Mark was convicted of attempted murder. As the judge noted, 'Skilled writers of fiction would struggle to conjure up a plot such as that which arises here. It's staggering to be dealing with a case that arises out of a fourteen-year-old boy's invention of false personalities, false relationships and

events arranged for his own killing at the hands of a sixteen-year-old boy whom he had met via an Internet chat room.'

CONSPIRACY

Essentially a criminal conspiracy is an agreement to commit an offence. The offence of conspiracy is committed the moment the defendants reach their agreement. There is no need to prove the agreement was actually carried out. It is possible to prosecute a defendant with conspiracy even though it is unknown who the other members of the gang were. However, the jury would need to be persuaded that the defendant had reached an agreement with some other people, rather than just acting on his or her own.

Generally the offence will be committed only if there is agreement to commit a criminal offence. There is a special category of conspiracies where the law makes it illegal to reach agreement to persue a course of action which itself is not blameworthy. These are known as common law conspiracies. There are only two:

- *Conspiracy to corrupt public morals*. This would require agreement to do something that would harm the general moral standards of the country. Perhaps making child pornography freely available would be an example.
- *Conspiracy to defraud*. Many conspiracies to defraud will involve agreement to pursue a course of conduct which would be an offence under the Fraud Act 2006. But the offence could be used if the conduct was 'dodgy' but just fell outside the Act.

These are controversial because they mean that agreement to do something which is not itself criminal is a crime. This seems odd, because if the actual activity is not sufficiently harmful to be a crime, why should an agreement to do that same behaviour be? It is perhaps reassuring that these offences are very rarely charged. If they can be justified it is on the basis that it is more harmful for society if a group of people together do these undesirable actions than if individuals do them on their own. Most conspiracies, however, involve agreement to embark on a course of criminal conduct.

The essence of the conspiracy is agreement. This can be implied from conduct, but is normally proved by producing evidence of a conversation. There must be at least two parties to the conspiracy. A person muttering dark thoughts and agreeing with themselves to commit a crime will not be guilty of any offence! Nor can spouses be guilty of conspiracy with each other, unless they involve a third party. Nor can the potential victim of the crime be a party to the conspiracy. So if a wife, suffering a terminal illness, agrees with her brother that he will kill her, there can be no conspiracy to murder.

The conspiracy must involve one of the parties in committing a crime. So if A and B agree that C will commit an offence that would not be a conspiracy between A and B. Further, the conspiracy must involve agreement to commit an offence and this will involve agreement that all the elements of the offence are committed. So agreeing to loosen the brakes on V's bicycle will not be a conspiracy to murder unless the agreement is that V will die as a result. An agreement that D will have sex with V will be a conspiracy to rape only if part of the agreement is that V will not consent. At one time it was thought that to be guilty of a conspiracy each of the parties had to intend to perform some active role in the conspiracy. That was never a very sensible rule. A 'godfather'-type figure who was masterminding all sorts of terrible conspiracies but never intended to dirty his hands by actually doing any of the work could easily escape liability. Fortunately that requirement is no longer part of the law.

More tricky are cases where the conspiracy is to commit a course of conduct which might involve a crime or it might not. It is necessary to distinguish two kinds of cases. Agreement to commit a crime under certain circumstances will be a conspiracy. So if A and B agree to steal a painting from an art gallery if there is no security guard in the room they will have entered into a conspiracy to steal. But agreement to do an act which may or may not be criminal will not. So in one case it was suggested that agreeing to drive from London to Edinburgh in a certain number of hours would not be a conspiracy to commit a speeding offence if the journey could be covered in that time legally, even if owing to traffic jams it could usually only be done by speeding. It was not a conspiracy to break the speed limits, but the planned course of action did not necessarily involve the commission of a crime.

There is no need to show that all the elements of the crime were agreed as long as the general outline of the offence was agreed. So, as long as A and B agree that they will kill C, the offence of conspiracy to kill will be committed, even if they have not yet decided what day to do the killing, or how to do it. However, there will be a point at which the agreement is be so vague that a jury may conclude a real agreement had not yet been reached.

In order for a conspiracy to have been committed the conspirators must have intended the offence to be committed. So if D was sitting in a room nodding as the others agreed to commit a crime, but D intended to tell the police and so ensure that the conspiracy was not carried out, he would not be guilty of a conspiracy. In such a case there would be no problem in convicting the other parties to the conspiracy.

ACCESSORIES

The criminal law has always regarded those who join together with others to commit criminal offences as particularly dangerous and worthy of blame. There is something about the notion of a criminal gang which generates fear among the public and is seen as particularly wrong. It may be that for the victim being attacked by a gang is much more terrifying than being attacked by an individual. Alternatively it may be argued that if a gang has formed the members will encourage each other to go ahead with the crime and so it is more likely it will be committed. Hence it is that in criminal law where a person has been assisted by others to commit a crime all those involved can be found liable. This is under the law of accessories or accomplices. Indeed, some of the worst criminals are not those who actually commit the crimes but those who plan, co-ordinate and commission them.

A central aspect of the law on accessories is that a person can be an accomplice only if the principal has gone on to commit a crime. D may give P all the help and encouragement he can think of, but he will not be an accomplice if P fails to commit the offence. However, the newly created offence under the Serious Offences Act, discussed above, of intentionally encouraging or assisting a crime can be committed even though the defendant does not actually commit the offence.

PRINCIPALS AND ACCESSORIES

Criminal law distinguishes between the principal and an accessory. The principal is the person who actually does the *actus reus* of the crime. For example, the person who pulls the trigger in a murder case. The accomplice is the person who assists or encourages them to commit the crime.

There is one exception to this basic rule and that is vividly described as the 'doctrine of innocent agency'. Under this doctrine if the person who actually commits the crime is blameless, for example because they are a child, are insane or do not know what they are doing, then the person who caused them to commit the crime will be the principal. Hence if D gives his child some poisoned food and tells the child to give it to a baby, which the child does, D will be seen as the principal in the homicide. The child will be merely an 'innocent agent'.

HOW TO BE AN ACCOMPLICE

There are four ways the law recognises for a person to be an accomplice: (1) aiding, (2) abetting, (3) counselling or (4) procuring. The courts have explained that the meaning of the four words overlaps to some extent and it is not necessary for the prosecution to prove precisely which of them the defendant did. The jury could convict if they were sure that the defendant was doing at least one of them.

- *Aiding*. This involves giving someone advice or assistance in the commission of a crime. Telling the principal where the victim is or giving the principal the equipment would be sufficient. The act of assistance does not need to be a major part of the principal's plan, but it must actually help the principal. So, if an employee left the office window open in order to help a burglar enter and steal property, they could be an accomplice. However, they would not be if the burglar in fact entered by some other means and so it was of no help to them that the window was open. In such a case the prosecution should charge the employee with intending to assist the commission of a crime under the Serious Crimes Act.

- *Abetting*. The meaning of abetting is unclear. It seems to involve encouraging or supporting the principal at the time when they commited the offence. In truth it could probably be dropped from the list of ways of being an accomplice without anything being lost.
- *Procuring* involves causing the crime to take place. It is commonly used where D has spiked P's drink (e.g. they have put vodka in P's orange juice without P's knowledge). In such a case if P were then to drive, not realising that they were now over the legal alcohol limit, D would be said to have procured a drink-driving offence.
- *Counselling* involves giving encouragement, advice or information to the principal. There is no need to show that the counselling caused the principle to commit the crime. So if A says to B, 'You should go and kill C', and B replies, 'I was on my way to kill them anyway', A could be liable for counselling. However, to be guilty as a counsellor the principal must have committed the crime they were encouraged to do. So if A encourages B to punch C and in fact B rapes C, then A would not be liable as an accomplice.

R V CALHAEM

The appellant was convicted of murder. She had hired another person (who pleaded guilty to murder) to kill the victim. The killer claimed at the appellant's trial that he had intended only to pretend to attempt to kill the victim, but when the victim screamed he had killed her. The appellant argued on appeal that there must be a causal connection between the counselling and the killing. The court dismissed the appeal, holding that there was no need for such a causal connection as long as the killing was within the authority or advice of the accessory. 'Counsel' should be given its ordinary meaning of 'advise' or 'solicit'.

One issue which has troubled the courts in some cases is whether merely being present at the scene of a crime can make a person liable as an accomplice. It seems generally not. If you stand by

watching a crime take place you will not be criminally liable, except in two circumstances. First, is where you are under a duty to intervene. That might be because you are under a duty to act to protect the victim (e.g. you are the victim's parent or you are employed as a bodyguard). Second, is where your presence is encouraging the principal to commit the crime, but then it would need to be shown that you intended the principal to be encouraged by your presence.

The mental element that must be proved in order to be an accomplice is that the accomplice intended to aid, abet, counsel or procure the commission of a crime and that the accomplice foresaw that the principal might go on to commit the crime. So the alleged accomplice would have a defence if it could be shown that they did not believe the principal would in fact commit the crime, or if they did not intend to assist the principal. So if the employee left the window of the office open, foreseeing that it might be used by a burglar, but not intending to help a burglar, they would not be liable as an accessory.

More tricky is the 'problem of the generous host'. If a person organises a party and gives guests alcohol, knowing that the guests will be driving home, can she be said to have aided or abetted their drink-driving? It may be in such a case that she does not intend to assist the guests in drink-driving and she escapes liability. But that may not be beyond dispute. It may be said that she knows her guests are going to drive and therefore cannot deny that she intended to assist them.

An accomplice will not be liable for the crime the principal goes on to commit if it is not that which the accomplice foresaw. A famous example is the following old case.

KEY CASE

SAUNDERS AND ARCHER (1573)

A husband and friend agreed that the husband would poison the husband's wife. The friend helped prepare a poisoned apple for him to give to her. The husband gave the apple to the wife, but she passed it on to the couple's child. The husband stood and watched

as the child ate the apple and died. It was held that the friend was not an accomplice to the child's murder because the failure of the husband to stop the child eating the apple had not been foreseen by the victim.

The law is, however, more complex than that case might suggest. The key question is whether the principal's act was foreseen, rather than whether the consequence of that act was foreseen. So, if the accomplice gives the principal a screwdriver to help the principal commit burglary, but during the burglary the victim wakes up, sees the principal in her bedroom, has a heart attack and dies, then the accomplice could be charged as an accessory to murder. The principal acted in exactly the way foreseen by the accomplice, it was the consequences that were not foreseen. Of course, that case would be completely different if the principal had stabbed the victim with the screwdriver. That act would not have been foreseen by the accomplice and so the accomplice would not be guilty as an accomplice to murder.

JOINT ENTERPRISE

There is a special set of rules where a gang of people commit a crime together. Such cases are known as cases of *joint enterprise*. Under the doctrine of joint enterprise each member of the gang is responsible for the crimes committed by any other member, if they had foreseen that that kind of crime might be committed. Therefore, if A and B commit a burglary together, having agreed that if they were disturbed by a police officer A would kill the police officer, then if that occurred B would be liable as accomplice to the killing. If, however, C and D commit a burglary together and C kills a security guard who interrupts them D will not be liable if D did not foresee that C would kill. In such a case the jury will consider whether D knew C was a violent person or whether D had a gun. In fact the courts have developed special rules in relation to weapons: if the defendant knew that another gang member had a weapon they will be treated as having foreseen that the weapon (or any similar weapon) will be used.

LEADING CASE

R V POWELL AND ENGLISH, HOUSE OF LORDS

In this case two appeals were heard together. In *Powell*, the defendant and two friends visited a drug dealer. A fight broke out and the drug dealer was shot dead. Powell told the police that he had not fired the gun and had been unaware that anyone with him had a gun. The prosecution case was that he had either fired the shot or was liable as an accomplice. In *English* the defendant and a friend (Weedle) had attacked a police officer with a wooden post. Weedle produced a knife and stabbed the police officer to death.

Powell's conviction was upheld. The judge had correctly directed the jury that Powell could be convicted if he was in a joint enterprise with the principal and had foreseen that the principal might murder. English's appeal was allowed, with the House of Lords holding that if in a joint enterprise one party acted in a way not foreseen by the other party then the other could be found not guilty as an accomplice. If a party to a joint enterprise was not aware that another was armed with a deadly weapon, the use of the weapon would be outside the scope of the joint enterprise and the party would not be liable as an accomplice to the principal's use of the weapon. However, the party could be convicted if he or she was aware that the principal had a weapon of a similar level of dangerousness to the kind used by the principal. Applying this to the facts of the case, English knew that Weedle had a post but not a knife and so English could not be convicted as an accomplice to Weedle's act of murder.

It is possible to avoid accessorial liability by withdrawing from the enterprise, although the courts tend to be rather strict about when this can be done. If the defendant has given an act of aiding, abetting, counselling or procuring, or has joined a joint enterprise, then they can still escape liability as an accomplice if they withdraw from the criminal enterprise before the crime has been committed. However, withdrawal must be clear and unequivocal withdrawal. Simply not turning up on the day the crime is due to be committed is insufficient. It will be necessary for the defendant to make it clear

that she no longer wants to be part of the group and that she no longer supports their plan. She may even be required to have taken steps to try to thwart the gang's plan, especially if it is to be carried out very soon.

WHY PUNISH ACCESSORIES?

There has been much dispute over exactly why it is we punish accessories. One of the difficulties with the law is that the courts have not clearly identified the theoretical basis for punishing them. Here are some of the alternatives:

- *Derivative liability*. This theory argues that the accomplice has voluntarily associated him- or herself with the conduct of the principal. It is as if the accessory has consented and authorised the principal to act in the way he or she has, and thereby taken on some responsibility for it. In the same way in which a person chooses to enter a contract and therefore to be bound by it, an accessory chooses to join in with the principal and is therefore liable for his or her crime. The criticisms of this approach can be seen in the following discussion on other approaches.
- *'Inchoate' theory*. An 'inchoate' offence is one where the defendant has not him- or herself harmed anyone, but is nevertheless seen as liable under the criminal law. The act is seen as one which is morally blameworthy and which threatens the values the law protects. An attempted offence is a good example of an inchoate model. So under this model the accessory has attacked legally protected rights of other people, in a similar way to that in which a person who attempts a crime does. It is this model of accessory liability we see in the Serious Crimes Act 2007. Professor John Spencer has argued in favour:

  > If you commit the crime I knew you intended with my help to commit, I am likely to be an accessory, but if you do not, I may well commit no offence at all … This is very strange. In either case, I have done all that I have to do to incur criminal liability. It is no fault of mine – or, to be accurate, it is not due to any lack of fault on my part – that the crime was never committed. If my behaviour was bad enough to punish where

you actually made use of the help I gave you, it was surely bad enough to punish where I fully expected you to use it but you got caught before you had the chance.

Adopting the inchoate model of accessorial liability would mean that whether the principal went on to commit the crime would be irrelevant to the liability of an accessory. The key wrong of the offence would be offering assistance to someone who is believed to be going to commit a crime.

- *Causation analysis.* Another way of justifying liability for accomplices is to argue that the accomplice has helped to cause the offence. By offering an act of assistance or encouragement to the principal who goes on to commit the offence, they should be seen as one of the causes of it.

ASSISTANCE AFTER THE OFFENCE

If a person helps the principal only after the offence has been committed he or she cannot be liable as an accessory. However, there is an offence of assistance after the offence:

KEY STATUTE

CRIMINAL LAW ACT 1967, SECTION 4

Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.

This offence would be committed by a defendant who lied to the police or helped someone escape from the scene of the crime. Notably it is committed only where the defendant intended to impede the apprehension of a criminal. So a person who lied to the police unintentionally, or even did so as a prank, would not be guilty of this offence.

SUMMARY

This chapter has been considering the law on accessories, attempts and conspiracies. In all these crimes the defendants have not themselves directly harmed the victim; nevertheless their conduct is sufficiently serious that the law seeks to intervene. In the case of accessories the harm is that the defendant has helped or encouraged another person to commit a crime. In the case of attempts it is that the defendant has tried to commit a crime. In the case of accomplices it is that the defendant has agreed with others to commit a crime.

STATUTES

Criminal Law Act 1967.
Criminal Attempts Act 1981.
Serious Crimes Act 2007.

CASES

Jones [1990] 1 WLR 1057.
Kelly [1992] Crim LR 181.
Campbell (1990) 93 Cr App Rep 350.
Geddes [1996] Crim LR 894, Court of Appeal.
Saunders and Archer (1573) 2 Plowd 473.
R v Calhaem [1985] 2 All ER 266.
R v Powell and English [1999] 1 AC 1, House of Lords.
Shivpuri [1987] AC 1, House of Lords.

FURTHER READING

Complicity issues are discussed in Benyon, Clarkson, Duff, Glazebrook, and Smith.

Attempts issues are considered in Ashworth and Williams. Reform of the law is examined in Law Commission, Sullivan, Taylor and Wilson.

Ashworth, 'Defining Criminal Offences without Harm', in Smith (ed.), *Criminal Law: Essays in Honour of J. C. Smith* (1987, Butterworth).

Beynon, 'Causation, Omissions and Complicity' (1987) *Criminal Law Review* 539.

Clarkson, 'Complicity, *Powell* and Manslaughter' [1998] *Criminal Law Review* 556.

Duff, 'Can I help you? Accessorial Liability and the Intention to Assist' (1990) 10 *Legal Studies* 165.

Glazebrook, 'Structuring the Criminal Code: Functional Approaches to Complicity, Incomplete Offences and General Offences', in Simester and Smith (eds), *Harm and Culpability* (1996, Oxford University Press).

Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (2006, Law Commission).

Law Commission, *Participation in Crime*, Report 305 (2007, Law Commission).

J. Smith, 'Aid, Abet, Counsel or Procure', in Glazebrook (ed.), *Reshaping the Criminal Law* (1978, Stevens).

J. Smith, 'Criminal Liability of Accessories' (1997) *Law Quarterly Review* 453.

K. Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991, Oxford University Press).

K. Smith, 'Withdrawal in Complicity: a Restatement of Principles' [2001] *Criminal Law Review* 769.

Sullivan, 'Participating in Crime: Law Commission No. 305, Joint Criminal Ventures' [2008] *Criminal Law Review* 19.

Taylor, 'Procuring, Causation, Innocent Agency and the Law Commission' [2008] *Criminal Law Review* 32.

Williams, 'The Lords and Impossible Attempts, or, *Quis custodiet ipos custodes?*' (1986) 45 *Cambridge Law Journal* 33.

Wilson, 'A Rational Scheme of Liability for Participation in Crime' [2008] *Criminal Law Review* 3.

6

DEFENCES

The criminal law would be a blunt instrument indeed if there were no defences. Where a defence is raised the defendant admits that the elements of the crime are made out but argues that nevertheless he should not be punished. It may be, for example, that they were acting in self-defence or that they were insane at the time. Before looking in more detail as the defences three important distinctions about defences can be made.

First, there is the distinction between a defence and mitigation. Mitigation is an argument that the defendant should be given a lower sentence than would otherwise be the case, due to the circumstances. For example, the defendant may argue that at the time of the crime he was depressed because his wife had just left him. This would not provide a defence, it would not lead to a conclusion that the defendant was not guilty. But it might lead to a slightly lower sentence.

Second, there is the distinction between a partial defence and a complete defence. Where a partial defence is successfully claimed the defendant is not guilty of the charge she faced, but is found guilty of some lesser charge. In English law all the partial defences operate in relation to murder and have the effect of reducing the charge to manslaughter. A crucial consequence of this is that the defendant does not have to be given the life sentence which automatically

follows murder. Instead the judge can determine what sentence is appropriate. Provocation and diminished responsibility are the two partial defences that are relied upon most often. They were discussed in Chapter 2. A *complete* defence operates to mean that the defendant is acquitted and does not face any punishment.

Third, many academics believe that a useful distinction can be drawn in theoretical terms between a justification and an excuse. Where a defendant is justified it means that what he or she was doing was morally appropriate or at least permissible. Where a defendant is excused there is no claim that his or her behaviour was morally appropriate, but rather it is said that the defendant was not fully to blame for his or her actions. An example of a justification might be self-defence where the defendant was acting in a morally appropriate way in defending himself against an attack. An example of an excuse might be insanity, where the defendant was not fully responsible for his actions. While many academics have found this classification helpful, it has received relatively little attention from the courts, which have developed the law on these defences without much attention to the wider theoretical issues. Maybe if they had the law would be clearer.

SELF-DEFENCE AND PREVENTION OF CRIME

This defence is available where the defendant is seeking to prevent the use of force either against herself or against someone else. In fact, it is available in an even wider sense than that. It is available whenever force is used to prevent a crime. A person who damages property in a minor way to avoid having their purse stolen would certainly be able to rely on the defence. More significantly, the defence is available if the defendant believes that they or another are being attacked even if they are in fact not. More on that later.

LEADING CASE

R V MARTIN, COURT OF APPEAL

Anthony Martin's isolated house had been burgled several times in the past. One night he shot at two persons who had burgled his

house again and who were running away. Both were injured and one died from his injuries. Martin was convicted of murder. There were two main issues raised on appeal.

First, there was evidence that Martin believed that he was acting reasonably when he shot the burglars, even though they were running away. The argument was rejected by the Court of Appeal. It confirmed that the jury should judge the defendant on the basis of the facts as the defendant believed them to be at the time. However, the jury would decide whether he used reasonable force.

Second, the jury did not need to take evidence of psychiatric conditions in relation to self-defence. Although they should have done in relation to diminished responsibility.

As the Court of Appeal in *Martin* emphasised, defendants will be judged on the basis of the facts as they believed them to be. In one leading case the defendant thought he was witnessing a mugging and ran over to grab hold of the criminal and release the victim. In fact it turned out he was witnessing an undercover police office trying to arrest someone and he had grabbed hold of the police officer, allowing the criminal to escape. He was allowed to use the defence of private defence, because, based on the facts as he believed them to be, he was acting in a reasonable way.

Private defence or self-defence can be used only where the defendant is using force against the victim, who is posing a threat to someone else. So self-defence would not be available in a case like this: Albert is trying to escape from a burning building, but is being impeded by Beryl, who is walking very slowly. He pushes her over so that he can escape more quickly. The defence could not be used by Albert because Beryl would not be posing a threat against him. In such a case duress may be available.

BIZARRE CASE

The *Herald of Free Enterprise*, an English passenger ferry, capsized and sank in 1987 off the coast of Belgium, killing nearly 200 passengers. A coroner's inquest into the disaster found that a number of passengers were attempting to climb down a ladder to get to a

rescue vessel. They were blocked by a man who had frozen in fear or shock on the ladder. After yelling at the man to move, an army corporal on board instructed the closest passengers to push him from the ladder. They did so and the man was never found. It is presumed he was drowned. No one was ever charged in relation to the incident. Although the army corporal is considered by some to be a hero it is not clear that he, or the other passengers, would have had a defence had they been charged with murder. Certainly their action saved many lives, but the man on the ladder was not threatening them.

If the defence of self-defence is to be used, not only must the victim be posing a threat, it needs also to be shown that the threat is unjustified. So the defendant cannot use force to push away a police officer who is trying to arrest her and then seek to rely on self-defence. Even if the police officer was threatening to use force against the defendant, the use of force would be justified (presuming the arrest was a lawful one).

Private defence or self-defence can be used only if the defendant's use of force was necessary. So, even if the defendant was facing an unjustified attack, the use of force to defend him- or herself would not be justified if there was an easy means of escaping from the threat, for example by running away. However, in deciding whether or not the use of force was necessary the court will take into account the urgency of the situation the defendant found him- or herself in. A cool look at the situation facing the defendant may suggest that there was a way to escape from the threat, but that may not have been apparent to the defendant in the emergency they were facing.

The amount of force used by the defendant by way of defence must be reasonable. This means that if it would be possible to ward off the attack by pushing the victim over, shooting them dead might well be deemed excessive and then the defence would not be available.

This requirement is now explained in Section 78 of the Criminal Justice and Immigration Act 2008:

(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 (c. 58) or Section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making an arrest).

(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 held 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 on 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 that 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 include acting in defence of another person; and

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

One explanation for the defence of self-defence is that generally citizens should rely on the state to protect them from harm and should not use force against others in anticipation of harm. So, for example, if your enemy has said they will beat you up tomorrow, the correct response is to inform the police and not arm yourself in preparation or use pre-emptive force. However, in a case where you are facing an imminent threat you cannot rely on the police to protect you and you are entitled to use force.

The defence of self-defence is generally used when the defendant has used force against the victim in order to prevent them attacking someone. However, it has a wider scope than that. In one case the defendant destroyed genetically modified maize in a field in order to prevent the genetically modified organisms being transferred to other people's property. In the actual case the defendants could not raise the defence of self-defence, as the victim was acting lawfully in growing the maize. However, the court indicated that had the maize been grown unlawfully it might have been possible to use the defence of self-defence to a charge of criminal damage or aggravated trespass. Where a person is acting to protect their

property it is less likely that they will be regarded as acting reasonably if they cause a person serious injury.

Some commentators have taken the view that although generally a person has the right to not to have force used against them, they 'forfeit' their right by attacking someone else. This explains why it is not possible to kill an innocent passer-by so you can use their organs for transplantation and so save the lives of five other people. The passer-by has done nothing to forfeit their right to life. Where, however, someone is attacking you, they thereby lose their right not to be harmed. This explanation may be less convincing where the person attacking the defendant is a child or is insane. In these cases the defendant can use the defence of self-defence, but the forfeiture explanation is less forceful.

Article 2 of the European Convention on Human Rights protects the right to life. This, however, does not mean that the defence of self-defence is not available in relation to murder because the article explicitly says that interfering with someone's right to life is permissible 'when it results from the use of force which is no more than absolutely necessary … in defence of any person from unlawful violence'. Lawyers disagree on whether there is a difficulty here where the defendant has killed someone mistakenly believing they were attacking them.

POINT TO PONDER

In Chapter 2 we discussed the case of *Ahluwalia*. The defendant was a woman who had been abused by her husband for ten years. On the night in question he had threatened her with further violence. When he was asleep she had poured petrol over him and set him alight. The case was not considered on the basis of self-defence. The reason was that the threat was not imminent. In cases of self-defence where the defence has been used successfully the defendant was being attacked or on the point of being attacked. However, an argument can be made for allowing a woman in a case like Ahluwalia to use the defence. It is well accepted that a defendant does not need to wait until they are actually being attacked, as long as they can show that they are almost bound to be attacked. The difficulty in this case may be not so much the inevitability of the attack (all the evidence

indicated that further attacks from the husband were inevitable) but rather that she had the opportunity to escape from the threats and contact the police. That may, however, be to fail to appreciate the position a victim of domestic violence is in. In fact leaving an abusive partner can be more dangerous than remaining. More women are killed by violent partners who they have just left than those who remain. Further, battered woman syndrome may affect the victim's perception of what options are open to her. She may have perceived the situation to be that the only escape from the cycles of violence she was suffering was to kill the defendant. Realistically, doing so while he was asleep was the only way she could.

DURESS

There are two kinds of duress recognised in English law:

- Duress by threats.
- Duress of circumstances.

Both kinds of duress arise where the defendant is facing a threat of death or serious injury and commits a crime to avoid the threat. It is in a way similar to self-defence or private defence, therefore. However, unlike those defences, in a case of duress the victim of the defendant's crime is not posing a threat to anyone.

An example of duress by threats would be where A tells D, 'I'll kill you unless you help me commit a burglary.' In such a case, if D helps A with the burglary and is charged with the offence, he will be able to raise the defence of duress by threats. Duress of circumstances is similar to duress of threats, except there is no one ordering D to commit the crime, it is just that the circumstances are such that committing the crime is the only way to avoid the threat. An example would be where D is being pursued by a gang who are intent on killing him and the only way he can escape is to drive in excess of the speed limit.

Duress is available only when the source of the threat comes from someone other than the defendant. In one case a rather imaginative barrister argued that two inmates who escaped from prison

were acting under duress. He argued that they were facing a threat of death, in that they both believed they would commit suicide if they did not escape from prison! Rather unsurprisingly the court found duress was not available in such circumstances. The threat of death or serious injury must come from outside the defendant!

There is one very important limitation on the availability of the defence of duress and that is that it cannot be used as a defence to a charge of murder or of attempted murder. At first sight this may seem like a harsh rule. If a person is told their family will be killed unless they kill someone, it is understandable if they decide to kill. However, the House of Lords in *Howe* held that it was never justifiable to take an innocent person's life.

LEADING CASE

R V HOWE, HOUSE OF LORDS

Howe and Bannister appealed against their convictions for murder. They had both been involved in the killing of younger men. They claimed they had joined in only because they had been told by an older man with a substantial criminal record that they would be killed if they did not join in. At their trial for murder they sought to rely on the defence of duress. The judge held that the defence was not available for the crime of murder. The House of Lords agreed. Lord Hailsham believed that killing an innocent person in order to avoid a threat to oneself or one's family was 'embracing the cognate but morally disreputable principle that the end justifies the means'.

The key elements of both kinds of duress are as follows:

- There must be a threat of death or serious injury.
- A reasonable person would have responded to the threat as the defendant did.

A defendant can use the defence if he or she reasonably believes there to have been a threat of death or serious injury, even if in fact there was not one.

The defendant is expected to show a reasonable degree of firmness. So the jury will consider whether a sober person of reasonable firmness would have given in to the threat. The courts will not allow a person to simply claim they are a more nervous or vulnerable person than others. However, if they can show that they suffer from a specific condition that makes them more liable to threats (e.g. suffering from post-traumatic stress disorder) then they will be expected to have only the level of courage of a person with that condition.

The defendant cannot use the defence of duress if it would have been possible to escape from the threat and they failed to do so. For example, in one case the defendant was threatened with violence in a few days' time unless he assisted in a delivery of drugs. The court determined that he had sufficient time to escape from the threat and so could not rely on the defence. He could have sought the protection of the police or move a long distance away.

The defence of duress is available if the defendant reasonably believes there to be threat of death or serious injury even if there is not. A subtle difference with the law on self-defence can be noted here. The defendant can rely on duress only if he or she *reasonably* believes there to be a threat of death or serious injury, whereas with self-defence the defendant need only believe *honestly* there is a threat.

The defence cannot be used if the defendant got themselves into the position where it was foreseeable that they would face a threat or death or serious injury. This might be described as 'self-induced duress'. A common example of where this might arise is where the defendant has joined a criminal gang, knowing them to be violent, and when they try to leave the gang they are threatened with violence. In such a case they will not be able to rely on the defence if they remain in the gang and commit a crime.

It must be admitted that the law on duress is not entirely satisfactory. This is in large part because the courts are yet to decide quite what the theoretical basis for the defence is. There are two primary theories:

- *Duress as a justification*. Here the argument would be that if the defendant commits a crime when facing a threat of death or personal injury he or she is justified in acting in that way. We would rather a man faced with a crazed gunman threatening to

kill people unless he commits theft did so than that he should refuse to do so and the gunman kills people.

- *Duress as an excuse*. This argument is that when a defendant faces a threat of death or personal injury they are not fully responsible for their actions. A defendant may be so overcome with fear that he or she is not able to think clearly. Or the threat may be such that, although technically a defendant has a choice about whether or not to give in to the threat, his or her actions are 'morally involuntary'.

POINT TO PONDER

In 1949 Professor Lon Fuller proposed the hypothetical case of the 'Speluncean Explorers'. It has been keenly debated by criminal lawyers ever since. The hypothetical case imagines that five explorers become trapped in a cave with little food, and on the twentieth day of their entrapment they find a radio with which they can communicate with their rescuers outside. An engineering team tells them that the rescue will take another ten days to complete, while a physician tells them that they will probably all die within ten days unless they eat the flesh of one of their number. One of the explorers proposes that they roll dice in order to determine who is killed, and the rest agree. However, he later withdraws his support for the move, and when the roll goes against him, he is killed and eaten. The remaining explorers are later rescued, and charged with murder following their return home. Do you think they should have a defence? It looks like a case of duress of circumstances and so no defence to a charge of murder would be available in English law.

NECESSITY

The defence of necessity can be used only in rare situations in English criminal law. The defence involves a claim that the defendant did a greater good by performing the crime than would have occurred if the defendant had not acted. Basically they are saying that by committing the crime they did the lesser of two evils. Generally such a defence is not accepted by the courts. Lord

Denning explained why not in a case involving homeless people who had forced entry into a house:

> if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of lawlessness and disorder would pass ... 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.
>
> (*Southwark LBC v Williams*)

The most dramatic case demonstrating that generally the 'lesser of two evils' defence is not generally applicable in English law was the following.

LEADING CASE

R V DUDLEY AND STEPHENS (1884), 14 QBD 273

Three men and a boy were shipwrecked in an open boat. They had no food or water with them. They were far from land and there was no sign of rescue. After several days the men killed the boy and ate him. As a result they survived long enough to be rescued. When charged with murder the three men claimed, in essence, that it was better for the boy to be killed and eaten, and three of them live, than for all four of them to die. Their defence failed and they were convicted of murder. However, it is noticeable that their sentences were commuted to six months' imprisonment, suggesting that although they were technically guilty of murder the court did not think they deserved the normal sentence for that crime.

Although the courts have made it clear there is no general defence of necessity, there are particular situations where it appears to be availiable. One is where a patient lacks the ability to consent, and a doctor needs to perform surgery on them urgently. A good example would be where a patient is brought to hospital unconscious following a car accident and needs an operation. In such a case the courts have recognised that a doctor can be permitted to do the

procedure. No criminal offence would be committed because the doctor could rely on the defence of necessity.

In a much publicised case in 2001 the Court of Appeal accepted that the defence of necessity could be relied upon in a highly unusual case:

LEADING CASE

RE A (CHILDREN) (CONJOINED TWINS: SURGICAL SEPARATION), COURT OF APPEAL

Jodie and Mary were conjoined twins, joined together at the lower abdomen. Jodie was doing well and described as 'bright' and 'alert' by the doctors. Mary, however, was not doing well. It was said her brain was 'primitive' and she had no effective heart or lung function. Indeed, she was kept alive only because a common artery enabled Jodie's heart to circulate the blood for both of them. It would be possible for Jodie to live without Mary, but not for Mary to live without Jodie. The doctors dealing with the twins wanted to perform an operation which would separate them. The effect of that operation would be that Jodie would live but Mary would die. Without the operation the pressure on Jodie's heart would lead to her death and both twins would die. The hospital sought a declaration that the operation would be lawful.

The Court of Appeal agreed that the operation could go ahead and was justified under the defence of necessity. The evil of doing an operation which would kill Mary was justified because without the operation both children would die. There was no other way of saving Jodie's life and the operation involved less evil than allowing both twins to die would. The court made it clear it was dealing only with the particular case before it and was not setting a general precedent.

There has been much debate over why the defence of necessity was available in the case of *Re A* when it had not been in the case of *Dudley and Stephens*. One explanation is that in *Re A* Mary was almost attacking Jodie. Although the court accepted that the case was not one of self-defence, it was very close to it in that although Mary was not threatening Jodie her existence was part of the threat

to her life. By contrast in *Dudley and Stephens* the cabin boy was in no sense part of the threat.

BIZARRE CASE

SIMPSON AND YATES ON THE MOUNTAIN

Two experienced climbers, Joe Simpson and Simon Yates, climbed Siula Grande, an 'extreme peak'. The adventure was recorded in a film entitled *Touching the Void*. According to reports the two climbers were tied together when they attempted the ascent of the mountain. Simpson fell and broke his leg and was in great pain. Yates was seeking to support Simpson on the rope. The weather was appalling and Yates was holding Simpson's weight on the rope. The weight was pulling Yates down the precipice. Feeling that both of them were about to be pulled off the face of the mountain, Simpson indicated that Yates should cut the rope. He was then able to dig a cave and tried to recover.

Yates gave Simpson up for dead, but in fact Simpson, remarkably, had fallen on to powder snow and managed eventually to drag himself back to the camp in three days. Three days later they were able to reach hospital. Apparently he had to wait another two days at the hospital before his medical insurance cleared.

In this case might it be said that the situation was analogous to the conjoined twins case? Or do you think self-defence would be available? It is hard to predict how a court would deal with such a case, if it were to be prosecuted.

INSANITY

There are two separate ways in which insanity can provide a defendant with a defence:

- The defendant was insane when he committed the offence.
- The defendant is insane at the time of the trial and so a fair trial cannot take place.

It is the first of these that is the most common and raises the most difficult issues.

First, there is the issue of how we define insanity. Rather surprisingly (and unfortunately) the courts have not sought to follow the medical definition of insanity or mental illness but have rather developed a special legal definition. This is that:

- The defendant suffered from a defect of reason caused by a disease of the mind.
- The defendant did not know the nature or quality of his actions.
- The defendant did not know what he was doing.

LEADING CASE

R V M^C^NAUGHTEN, HOUSE OF LORDS

Despite being one of criminal law's best known names, there is even disagreement over its spelling, with some preferring M^c^Naghten or McNaughten. Born in 1813, he was a Scottish wood turner. However, he sufferer paranoid delusions and believed that he was the victim of an international conspiracy involving the Pope and the conservative government of the day. He was in London when he saw a man approaching 10 Downing Street and shot him. He may have been under the impression the man was the Prime Minister, Robert Peel. In fact it was his secretary, Edward Drummond. Drummond died from his wounds several days later.

At his trial M^c^Naughten was found not guilty by reason of insanity. The House of Lords reviewed the case and developed what has become known as the M^c^Naughten test of insanity: the defendant suffered from a defect of reason caused by a disease of the mind such that he did not know the nature and quality of his actions or did not know what he was doing was wrong. M^c^Naughten was sent to Broadmoor Institution for the Criminally Insane, where he died many years later.

If the defendant is able to prove that they were insane at the time they committed the offence then they will not be guilty but, rather, found 'not guilty but insane'. This enables the judge to make an

order requiring the defendant to be detained so that they can receive medical treatment, if that is thought necessary to protect them or the members of the public from harm. Once such an order is made it will be for the doctors to determine what treatment he should receive and when, if ever, it would be safe for the defendant to be allowed to live in the community.

As already mentioned, the legal definition of insanity does not match the medical one, and this has led to the law in this area falling into some disrespect. In *R v Sullivan* the House of Lords upheld the finding that a defendant who caused grievous bodily harm while suffering an epileptic seizure was insane. Of course, no medically qualified person would regard a person who suffers from epilepsy as suffering from insanity. As happened in that case, some defendants who suffer epilepsy choose to plead guilty of the crime they are charged with rather than be labelled insane.

AUTOMATISM

Automatism is closely allied to a defence of insanity. It arises where the defendant is acting involuntarily and is not acting in a free and responsible way. Where it is sucessful it leads to a complete acquittal.

The courts have interpreted the defence narrowly. Indeed, the House of Lords has noted that 'I had a blackout when I committed the crime' is a popular excuse for desperate defendants to raise! The courts have, therefore, put in place a number of restrictions on the availiability of the defence:

- *There must be complete lack of control.* In one case the defendant claimed that while driving he had fallen into a sleep-like state when he crashed into a broken-down vehicle, which had been parked on the hard shoulder. The Court of Appeal held that he should not have been able to rely on the defence of automatism because the expert evidence was that although his awareness of what was happening and ability to control the lorry were impaired, they were not competlely lost. He had not suffered complete loss of control.
- *The automatism must be caused by an external factor.* Where the state has been caused by an internal factor (e.g. a mental illness) then

the proper defence to use is insanity. An example of an external factor might be a brick falling on someone's head. However, the normal disappointments of life cannot be an external factor. So a man who claimed that when he was told by his girlfriend that she was leaving him he went into a strange state could not use the defence. A relationship coming to an end is one of the normal trials and tribulations of life and cannot cause automatism.

- *The defendant must not be to blame for falling into the state*. This is particularly relevant in driving cases where a driver falls asleep at the wheel. Here the courts find that the defendant should have realised that he was falling asleep. A similar argument may mean that a diabetic who carelessly failed to control their insulin level and therefore suffered an attack would not be able to use the defence.

AGE

Children under the age of ten cannot be guilty of a crime. This is true however blameworthy their actions may have been and however mature they are. Where a child has committed a crime it may be that an adult can be charged as having committed the crime through the 'innocent agency' of the child. This might arise where, for example, a parent instructs a child to shoplift for him or her. If a child under ten does engage in what would otherwise be criminal behaviour a local authority may decide that it should arrange for the child to be taken into care.

A child over the age of ten can be convicted of a crime. In 1998 the rule (known as the presumption of *doli incapax*) that a child between the ages of ten and fourteen was presumed not to know the difference between right and wrong was abolished. Where a child is prosecuted there are special courts, procedures and punishments availaible.

INTOXICATION

Intoxication itself is never a defence to a crime. If you think about it, it would be very odd that a person who was intoxicated would have a defence when a sober person in the same position could not. However, in some circumstances intoxication can be used as

evidence that a person lacks the required mental state for an offence. This was discussed in Chapter 1, but it will be mentioned again. Where the defendant is charged with an offence which requires proof that the defendant intended a particular consequence (crimes of 'specific intent') he or she can use intoxication as evidence that he or she lacked the required mental state. So if a defendant shoots a victim dead, a jury would normally find it very hard to believe that the defendant did not intend to kill the victim. However, if the defendant was very very drunk at the time it is sightly more plausible that they did not know what they were doing. Notice that if such an argument suceeded the defendant would be found not guilty because they lacked the required mental state rather than because they were intoxicated. In crimes involving recklessness (crimes of 'basic intent') the defendant who is intoxicated is presumed to have been reckless in relation to those consequences they would have foreseen had they been sober.

So far we have presumed that the inoxication is voluntary, but the rules are slightly different if the defendant was involuntarily intoxicated (e.g. his or her drink was spiked). In such a case in recklessness-based crimes the rule is that if a defendant did not see the risk because he was involuntarily intoxicated then he should be found to be not guilty. However, in relation to intent-based crimes the defendant who had the necessary intention can be found guilty even if they committed the crime only because they were involuntarily intoxicated. That can produce some harsh decisions, as the following case shows.

R V KINGSTON, HOUSE OF LORDS

The defendant's coffee was spiked with a drug by a man who was seeking to blackmail him. The man then took the defendant to a room where there was a boy who was also drugged. The defendant assaulted the boy. The defendant admitted he had paedophilic inclinations but was normally able to resist any temptation to put them into practice. However, he said that his inhibitions were removed by the spiked drink and he therefore committed the crime. The Court of Appeal suggested that an accused could have a defence where alcohol or drugs were administered against the accused's will by another. The Crown appealed and the House of Lords upheld the appeal. It

accepted the principle that intoxication could be relevant only as evidence that the accused did not have the necessary *mens rea* for a crime. Here the accused admitted having the necessary recklessness and so the involuntary intoxication could be relevant only to mitigation.

CHASTISEMENT

The criminal law allows parents to use force against their children if the force used is reasonable chastisement. This is a controversial issue and the law is under constant review. The current law is that a parent can rely on the reasonable chastisement defence only if the harm done to the child does not involve actual bodily harm or a more serious injury. Many campaign groups hoped that the government would make all corporal punishment illegal. The argument was that hitting a person is wrong and so hitting children should be wrong too. The Government argued:

> it would be quite unacceptable to outlaw physical punishment of a child by a parent. Nor, we believe, would the majority of parents support such a measure. It would be intrusive and incompatible with our aim of helping and encouraging parents in their role.

The government approach could be supported by referring to surveys indicating that a majority of parents hit their children. Although many fewer parents think it right to hit children than in fact do hit children.

The defence is available only to parents. Schools may not use corporal punishment on children. This is so even where the parents have given permission for their children to be beaten.

SUMMARY

In this chapter we have considered the defences offered by the criminal law. These acknowledge that there are occasions on which even though the elements of an offence may be proved, the defendant may nonetheless not deserve a criminal conviction. As we have

seen this can create difficulties, especially where a defendant appears to have been acting appropriately, but it is difficult to pinpoint precisely a defence for them to use.

STATUTE

Criminal Justice and Immigration Act 2008.

CASES

Re A (Children)(conjoined twins: surgical separation) [2001] Fam 147, Court of Appeal.
R v Ahluwalia [1992] 4 All ER 889, Court of Appeal.
R v Dudley and Stephens (1884) 14 QBD 273.
R v Howe [1987] AC 417, House of Lords.
R v Kingston [1995] 2 AC 355.
R v Martin [2001] EWCA Crim 2245 Court of Appeal.
R v M'Naughten, House of Lords (1843) 10 Cl and F 200.
R v Sullivan [1984] AC 156, House of Lords.
Southward LBC v Williams [1971] Ch 734, Court of Appeal.

FURTHER READING

Self-defence is discussed in Ashworth, Leverick, Horder, Simester, Smith and Uniacke. Intoxication is considered in a helpful article by Gardner. Mental state defences are looked at in Horder and Mackay.

Ashworth, 'The Human Rights Act and the Substantive Criminal Law' [2000] *Criminal Law Review* 564.
Gardner, 'The Importance of *Majewski*' (1994) *Oxford Journal of Legal Studies* 279.
Horder, 'Cognition, Emotion and Criminal Culpability' (1990) 106 *Law Quarterly Review* 469.
Horder, 'Drawing the Boundaries of Self-defence' (1995) 58 *Modern Law Review* 431.
Leverick, 'Is English Self-defence Law Incompatible with Article 2 of the ECHR?' [2002] *Criminal Law Review* 347.
Mackay, *Mental Condition Defences in Criminal Law* (1995, Oxford University Press).

Mackay and Reuber, 'Epilepsy and the Defence of Insanity: Time for Change?' [2007] *Criminal Law Review* 782.
Simester, 'Mistakes in Defence' (1992) *Oxford Journal of Legal Studies* 295.
Smith, 'The Use of Force in Public or Private Defence and Article 2' [2002] *Criminal Law Review* 958.
Sullivan, 'Making Excuses', in Simester and Smith (eds), *Harm and Culpability* (1995, Oxford University Press).
Uniacke, *Permissible Killing* (1994, Oxford University Press).
Wilson, 'The Structure of Criminal Defences' [2005] *Criminal Law Review* 108.

INDEX

Abetting 113
Abortion 34
Accessories 111–18
    Abetting 113
    Aiding 112
    Counselling 113
    Joint Enterprise 115–17
    Principals 112
    Procuring 113
    Theories 117
Actual Bodily Harm 60–62
Actus Reus 11–17
Age 136–37
Aiding 112
Appropriation 82–84
Assault 57–59
Assistance after Offence 118
Attempts 102–6
    Actus Reus 103–4
    Failed 103
    Impossible 103, 105–6
    Mens Rea 106
    Thwarted 103
Automatism 136–37

Battery 59–60
Beer 62
Blackmail 96
Burglary 96–100

Cannibalism 34–35
Causation 12–13
Chastisement 138–39
Civil Law 23–24
Computer Crime 94–96
Conduct Element 11–17
Conjoined Twins 133–34
Consent 65–69
Conspiracy 109–11
Constructive Manslaughter 47–49
Counselling 113
Criminal Damage 92–93
Criminalisation 5–8

Defences 121–41
    Age 137–38
    Automatism 136–37
    Chastisement 139–40
    Duress 128–32
    Insanity 135–36
    Intoxication 138–39

Necessity 132–35
Self-Defence 122–28
Diminished Responsibility 43–45
Dishonesty 85–87
Dog Fouling 6
Domestic Violence 40, 45, 59, 128
Drafting 7–8
Duress 127–31

Fair Labelling 10
Football 67–68
Fraud 87–91
Abuse of Position 90
Failure to Disclose 89–90
False Representation 88–89

Gladioli 70
Grievous Bodily Harm 62–64
Gross Negligence Manslaughter 49–51

Harassment 69–70
Harm 4
Harm Principle 2–6
HIV 64–65
Homicide 32–54
Manslaughter 37–45
Murder 34–37
Reform 53–54
Human Rights 7, 127–28

Infanticide 46
Insanity 135–36
Intention 19–20
Intoxication 138–39

Joint Enterprise 115–17
Jury 24–25

Littering 1

Making Off without Payment 91–92
Manslaughter 37–45
Constructive 47–49
Gross Negligence 49–51
Involuntary 37
Voluntary 37
Mens Rea 9–10, 19–22
Mental States 19–22
Intention 19–20
Negligence 21–22
Recklessness 20–21
Transferred 22
Mobile Phone 1
Moralism 3
Murder 34–37

Necessity 132–35
Negligence 21–22

Offence to Others 4
Omissions 16–17

Personal Responsibility 13
Picking your Nose 3
Poisoning 71–72
Presumption of Innocence 30
Prevention of Crime 122–28
Principles 112
Procuring 113
Property 84–85
Property Offences 81–100
Prostitution 5
Provocation 38–42

Rape 72–77
Recklessness 20–21
Retrospective Law 28–29
Robbery 93–94

Sado-Masochism 65
Self-Defence 122–28
Serious Crimes Act 107–9
Sexual Assault 77–79
Sexual 78
Sources of Law 24–25
Statistics 2, 33, 56–57, 72
Strict Liability 22–23

Suicide Pact 46–47

Theft 81–87
  Appropriation 82–84
  Belonging to another 85
  Dishonesty 85–87
  Intention to deprive 87
  Property 84–85
Thin Skull 15–16
Transferred 22

Wolfenden Report 3