The above options are inserted into the Criminal Procedure (Insanity) Act 1964 by the Domestic Violence, Crime and Victims Act 2004. The main differences under the new system are that the Secretary of State no longer has a role in deciding whether or not the defendant is admitted to hospital, and a court can no longer order the defendant's admission to a psychiatric hospital without medical evidence.

It is not possible to avoid the above orders where the defendant raised diminished responsibility as a defence but the judge found unfitness to plead (see *R* v *Antoine (Pierre Harrison)* [2000] 2 WLR 703).

A further example is provided by *R* v *Grant (Heather)* [2002] QB 1030. Heather Grant had been found unfit to stand trial for the murder of her boyfriend. She appealed against the finding of the jury (now the judge) that she had committed the act as charged. She said she should have been allowed to raise the defences of lack of intent (i.e. appropriate *mens rea*) and provocation. The Court of Appeal dismissed her appeal. It was clear from the Criminal Procedure (Insanity) Act 1964 (as amended) that the jury, in reaching conclusions as to unfitness to plead, was not required to consider the defendant's state of mind at the time of commission of the criminal act. Thus the defences of lack of intent and provocation could not be raised at a fitness to plead hearing (*R* v *Antoine* (2000) above applied).

(b) On conviction. Here the accused's mental condition is relevant to punishment. Under the Mental Health Act 1983, the court can make a variety of hospital and guardianship orders, though not in the case of murder.

(c) After sentence. If the accused is found to be suffering from mental disorder after receiving a sentence of imprisonment, he may be transferred to a mental hospital under the Mental Health Act 1983.

We can now look at the essential ingredients of the defence of insanity.

Disease of the mind

The judiciary has never been entirely swayed by the evidence of practitioners in this field of medicine. The matter is, the judiciary says, basically one of *responsibility for the act*. In other words, a person may be suffering from a defect of reason due to a disease of the mind and yet be *responsible*, in the view of the court, for what has been done or not according to the circumstances of the case. The test is thus legal not medical.

It may be for this reason that the courts have considered as part of the issue of responsibility a variety of mental states which do not truly come within the normal definition of insanity.

R v *Kemp*, 1956 – A sufferer from arteriosclerosis (**547**)
R v *Hennessy*, 1989 – A sufferer from diabetes (**548**)

Defect of reason

The disease of the mind must cause a defect of reason so that the defendant (*a*) did not know the nature and quality of his act or (*b*) did not know that what he was doing was wrong. This means essentially that to establish the *M'Naghten* defence the defendant must be deprived of reason. The defence does not, therefore, apply to those who have retained the powers of reasoning but who in a moment of forgetfulness, confusion or absent-mindedness have failed to use those powers properly or to the full.

R v *Clarke*, 1972 – A shoplifter (**549**)

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Knowing that the act is wrong

It is this branch of the *M'Naghten* defence which has produced difficulty, not the rarely pleaded branch which relates to not knowing what was being done, i.e. failure to understand the physical nature of the act. The problems have arisen in regard to whether, if the act is contrary to law, there might be a successful plea of insanity because the defendant thought the act to be morally right. It would appear that knowledge that the act is *legally* wrong means the defence fails.

R v *Windle*, 1952 – A fatal dose of aspirin (**550**)

Automatism

As we have seen, it is a general rule of the common law that a *voluntary act* is required before liability for a crime can be established in terms of the *actus reus*. In addition, it is necessary that the defendant be *conscious of his acts*, otherwise there is no *mens rea*.

Sometimes a defendant will plead automatism as a defence which, if established, will negative the essential ingredients of the crime and result in an acquittal. The defence of automatism is difficult to establish but seeks to prove that the crime was committed by an *involuntary act* caused by an external factor.

Hill v *Baxter*, 1958 – A sudden illness while driving (**551**)

Distinguished from insanity

Where automatism is induced by a disease of the mind, this is insanity and the judge may withdraw the defence of automatism from the jury (*Bratty* v *Attorney-General for Northern Ireland* [1963] AC 386).

However, an overdose of insulin in diabetes leading to hypoglycaemia (a medical state with side-effects, e.g. double vision, and leading eventually to coma) is not a malfunction of the mind and may be put to a jury as automatism.

R v *Quick*, 1973 – Defence of automatism admissible (**552**)

Where automatism is self-induced

A court will not accept the defence of automatism if it is self-induced as by drink or drugs. This is clearly based upon public policy and is considered further below.

In other cases self-induced automatism may be put to the jury as a defence, as where a diabetic does not take sufficient precautions to prevent reduction of blood sugar (see *Moses* v *Winder* (1980)).

R v *Lipman*, 1969 – Automatism induced by drugs (**553**)

Drunkenness and drugs

Automatism induced voluntarily by drink or drugs could well prevent the defendant from committing a voluntary act or from being conscious of what he was doing. Nevertheless, on grounds of public policy it is not normally a complete defence to allege automatism by drink or drugs (see *Finegan* v *Heywood* (2000) *The Times*, 10 May where the defence of drink-induced automatism failed on a charge of drink driving). It can be partially successful where the crime requires a specific intent which the drink or drugs can negative. However, in offences against the person where the drink/drugs defence is most usually raised this does not result in an acquittal because these crimes are often bolstered up by a similar crime which does not require a specific intent. Thus, drink or drugs may reduce murder to manslaughter and wounding with intent to unlawful wounding under ss 18 and 20 of the Offences Against the Person Act 1861 respectively, but there will still be a conviction for the lesser crime which does not require a specific intent. The jury can be asked to consider drink or drugs as a defence where recklessness is involved.

The reason why drunkenness is not and never will be a *general* defence in crime is a matter of public policy because so many crimes are committed under the influence of alcohol that a high proportion of crimes would go unpunished. The same is true, on an increasing scale, of drugs.

DPP v *Majewski*, 1976 – Where no specific intent is required (**554**)
R v *Hardie*, 1984 – Drugs and recklessness (**555**)

The drink/drugs defence is certainly not applicable to rape where the issue before the court is the defendant's intent or the issue of the victim's consent nor in situations where the defence of mistake is raised.

R v *O'Grady*, 1987 – A mistaken self-defence (**556**)

In addition, where the defendant takes drink or drugs in order to pluck up courage to commit the offence, the drink/drugs defence will not be accepted by the court even as nullifying a specific intent. Thus murder remains murder and is not reduced to manslaughter.

Attorney-General for Northern Ireland v *Gallagher*, 1963 – Drinking to get 'Dutch courage' (**557**)

Drink/drugs states not self-induced

Here the court will consider the defence of automatism by drink or drugs where the defendant has lost control by drink or drugs administered to him without his knowledge.

Ross v *HM Advocate*, 1991 – Drugs in a can of lager (**558**)

Effect of drink on defence of diminished responsibility

The House of Lords ruled in *R* v *Dietschmann* [2003] 1 All ER 897 that a defendant is entitled to be convicted of manslaughter rather than murder on the grounds of diminished

responsibility even though he has been drinking if he can satisfy the jury that despite the heavy alcohol consumption his mental abnormality substantially impaired his responsibility for his acts. It would appear from the ruling of the House of Lords that the defence of diminished responsibility *operates as a separate defence* even in circumstances of drunkenness. The defence of diminished responsibility can be established even though the defendant has failed to prove that he would not have killed if he had not taken drink. The drunken state is no defence but the underlying mental state can still be. The Homicide Act 1957, said the House of Lords, does not require the abnormality of mind *to be the sole cause* of the defendant's acts. Drink may be an unacceptable contributory cause but the mental state defence remains.

Duress

Duress when raised as a defence may be said to amount to a defence of no voluntary *actus reus*. It may also negative *mens rea* because a person who is made to do an act by threats of a serious nature, e.g. death or serious personal injury, can hardly be said to intend to do the criminal act.

Duress by threats

Duress is not available as a defence to murder (*R* v *Howe* [1987] 1 All ER 771) or attempted murder. It is, however, available in offences of strict liability as in *Eden DC* v *Braid* [1998] Crown Office Digest (now Administrative Court Digest) 259 where a taxi driver was forced by threats to carry an excessive number of persons in breach of the licensing conditions. The defence of duress applied.

R v *Gotts*, 1991 – Attempted murder under duress (**559**)

The essential ingredients of duress by threats are as follows:

(a) The threats must be serious such as threats of death or serious personal injury. Threats to property are probably not enough. The threat of serious *psychological injury* is not it seems included. Thus in *R* v *Baker* [1997] Crim LR 497, the father of a child refused to return her after a contact visit. Her mother and her husband went to the father's house and hearing a child crying and fearing for her psychological health banged on the door and caused criminal damage. They were convicted of criminal damage and the defence of duress of circumstances was rejected.

(b) The response of the defendant to those threats must be reasonable. He must have acted as a sober person of reasonable firmness (*R* v *Graham* [1982] 1 All ER 801).

(c) Where the defence of duress is applicable it must also be shown that the overpowering of the defendant's will was operative at the time when the crime was actually committed by him, though this general rule is not always applied.

R v *Hudson*, 1971 – Duress and perjury (**560**)

(d) There is also a duty to neutralise the threat as by informing the police where this is possible, having regard to the age of the defendant and the circumstances and risks involved.

It should be noted that the defence of duress does not apply where the defendant *voluntarily entered a situation likely to end in duress*. (See also Membership of a gang, below.) Thus, if A owes his drug dealer money, he can expect that pressure might be brought to bear upon him by the dealer to clear the debt by helping him to supply drugs to others on the basis of threats of violence (see *R* v *Heath* (*Patrick Nicholas*) [2000] Crim LR 109). The House of Lords gave a similar ruling in *R* v *Hasan (Aytach)* [2005] 2 AC 467, where the defendant alleged duress in that a drug dealer with a reputation for violence had threatened him and his family unless he carried out the burglary with which he was charged. The dealer was the boyfriend of his employer, who ran an escort agency, and was involved in prostitution. The House of Lords ruled that the defence of duress was excluded because of his voluntary association with criminals who he foresaw or ought to have forseen might make threats of violence.

It is not, however, necessary for the defendant to prove that a perceived threat is real. Thus, in *R* v *Cairns* (*John*) [1999] 2 Cr App R 137 the victim climbed on the bonnet of C's car. As he drove away, he saw a group of the victim's friends following in what he took to be a hostile way. He braked and threw the victim off the bonnet and ran over him inflicting serious injuries. The defence of duress was accepted by the Court of Appeal. It appeared that the victim's friends meant no harm, they said, to C but merely wished to prevent the victim from acting as he was; nevertheless, the perceived threat was enough to make C's conviction unsafe.

Duress and low intelligence

In *R* v *Bowen (Cecil)* [1996] 4 All ER 837 the Court of Appeal dealt with the defence of duress in the case of persons of low intelligence. The defendant had obtained electrical goods on credit by deception as to his intention to pay for them in due course. He was charged with obtaining goods by deception and claimed that he had been under duress because of threats to petrol bomb his home by the two men for whom he obtained the goods. The Court of Appeal held that although the defendant was a person of low intelligence, this was not a relevant factor in duress since it would not necessarily make an accused person more timid or suggestible to threatening behaviour. The defence of duress failed.

Membership of a gang – an aspect of voluntary exposure to threats

In some recent cases the court has had to consider whether the voluntary joining of a gang of persons by the defendant affects his ability to raise the defence of duress when he is caused to become involved in gang crime by threats from other members of the gang. It would appear that the defence is not available to a person who knows when he voluntarily joins a gang that he might be put under some pressure to commit an offence. It can be available if at the time of joining the defendant failed to appreciate the risk of violence.

R v *Sharp (David)*, 1987 – The risk of violence was known (**561**)
R v *Shepherd*, 1988 – Risk of violence not appreciated (**562**)

Duress of circumstances

In some recent cases there has been a blurring of the so-called defence of necessity (see below) with that of duress. This form of duress has been referred to as 'duress of circumstances'.

This is probably a more accurate analysis of certain necessity cases. Thus, if A who is disqualified from driving drives his son to work because he will otherwise be late and might

lose his job because his wife becomes hysterical and threatens to kill herself unless he does so, this situation of 'threat' is called 'duress of circumstances' and can operate as a defence.

R v *Martin*, 1989 – A threat of suicide (**563**)

Duress – the special case of a wife

Duress is clearly a defence for a wife. Section 47 of the Criminal Justice Act 1925, which abolished the presumption that a wife who committed a crime in her husband's presence did so under such compulsion as entitled her to an acquittal provides as follows:

> Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of and under the coercion of the husband.

It was decided in *R* v *Shortland* [1995] Crim LR 893 that in applying s 47 of the 1925 Act and to invoke a defence of marital coercion it was necessary for a defendant to prove on a balance of probabilities (as distinct from beyond a reasonable doubt) that the offence was committed because her will had been overborne by the wishes of her husband and that she was therefore forced unwillingly to take part in the offence. However (and importantly), the defence did not necessarily require proof of physical force or the threat of physical force.

The Court of Appeal allowed an appeal by Malena Iris Shortland against a conviction for two offences of making a false statement to procure a passport. It appeared that she had applied for a visitor's passport and a 10-year passport, the latter in the name of Valerie Lopez, a dead child. All of this was done under the coercion and in the presence of her husband.

Necessity

English law does in extreme circumstances recognise a defence of necessity, but when it does so it arises from some pressure on the defendant's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the defendant or others when it is called by the judiciary 'duress of circumstances' (see *R* v *Martin* (1989), above and *A (Children)* (2000) *The Times*, 10 October: necessity to separate conjoined twins – court consents to inevitable death of one twin).

In the absence of the elements of threat or objective danger where the defence is probably better regarded as duress, there is no general defence of necessity in English law.

It is, therefore, murder to take another's life to save one's own unless it is a case of self-defence (see below).

R v *Dudley and Stephens*, 1884 – Killing a member of the crew (**564**)

However, situations of genuine necessity not set in a background of duress can be taken into account by the court in the sentence imposed and at an earlier stage, where there is discretion, by the authorities in not bringing a prosecution.

Mistake

It will be appreciated that a normal sane and sober person may make a mistake and it is the effect of such mistakes on criminal liability with which we must now deal.

Suppose that a defendant X saw A apparently attacking B. X believed that A was mugging B and fought A off. It then turned out that A was trying to arrest B who had just mugged an old lady. Can X raise the defence of mistake, i.e. that he believed he was acting to prevent crime (see below)?

The only major problem arising in the case law from attempts to establish the defence of mistake have been as to whether it is enough that the defendant had an honest belief that the facts were as he mistakenly thought them to be or whether that belief must be not only *honest* but also *reasonable*. The defence of mistake should therefore be put to the jury in the trial of our defendant X. Indeed, his mistake may be both honest and reasonable – not that the latter is relevant in *law* rape apart.

However, although the courts do not require as a matter of law that an honest mistake be at the same time reasonable, it is unlikely that a jury will accept that the defendant made an honest mistake in circumstances where an ordinary person would not or could not reasonably have made the mistake. So whatever the test, it can be said with some confidence that a defendant is unlikely to be acquitted following a pleading of 'honest' mistake in 'unreasonable' circumstances. Finally, and as would be expected, a mistake as to law is no defence.

R v *Kimber*, 1983 – An indecent assault **(565)**
R v *Bailey*, 1800 – A mistake as to law **(566)**

In *R* v *Lee (Dennis Percival)* [2001] 1 Cr App R 19 the Court of Appeal reviewed the law in this area. The defendant was convicted of assault on police with intent to resist arrest. He mistakenly believed he had passed a roadside breath test and punched one of the police officers during the course of an arrest. His appeal on the grounds of mistake was dismissed. The Court of Appeal ruled:

- that persons under arrest are not entitled to form their own view as to the lawfulness of an arrest; they have a duty to comply with the police and hear the details of the charge;
- a belief that one is innocent however honestly or genuinely held cannot afford a defence to a charge of assault with intent to resist arrest.

Consent

Genuine consent of the victim may negate liability for offences such as assault (properly called battery) and rape, though consent must be genuine (see *R* v *Williams* (1923) in Chapter 24). However, even where consent is genuine there may be a successful prosecution for reasons of public policy. Thus in *R* v *Brown* [1993] 2 All ER 75 the House of Lords held that, in the absence of good reason, the consent of the victim was no defence to a charge under ss 20 and 47 of the Offences Against the Person Act 1861 (see Chapter 24). In that case the appellants belonged to a group of sado-masochistic homosexuals who over a period of 10 years willingly participated in acts of violence against each other including genital torture for the sexual pleasure which it induced by reason of the giving and receiving of pain. The acts were committed in private. However, video tapes were made and the case was largely

conducted on these. The House of Lords held that the above activities constituted offences contrary to ss 20 and 47 of the 1861 Act regardless of the consent of the victims. Public policy required that society be protected against cults of violence.

However, in *R* v *Wilson* (1996) *The Times*, 5 March, the Court of Appeal decided that consensual activity between husband and wife in the privacy of their home was not a proper matter for criminal investigation or prosecution.

In that case the wife had undergone a medical examination which revealed that there was a scar on both her buttocks. On her right buttock, as photographs before the court showed, there was the capital letter W and the left buttock the capital letter A. It appeared that her husband had burnt these initials into her buttocks by using a hot knife. She had consented and even instigated the branding because she wanted his initials on her body. A prosecution under s 47 of the 1861 Act failed. The Court of Appeal distinguished *R* v *Brown* (above) on the basis that the facts in that case were truly extreme.

Consent of the victim is raised in the civil law by way of the defence of *volenti non fit injuria* (or the rule of assumption of risk) and more rarely in the criminal law, where the courts are more reluctant to allow consent as a defence at least where there is infliction of bodily harm the ground being public policy (see *R* v *Brown* [1993] 2 All ER 75) (above). However, the Court of Appeal has now ruled and set out guidance in relation to the criminal prosecution of alleged offences resulting from sporting injuries.

In *R* v *Barnes* [2005] 2 All ER 113, the Court of Appeal quashed the conviction of the defendant, who had been found guilty of causing a serious injury to the leg of an opponent following a tackle during an amateur soccer match. The prosecution had contended that the tackle was late, unnecessary, reckless and high up on the legs. The defence contended unsuccessfully at the trial that the tackle, while 'hard', was a fair sliding tackle in the course of play, resulting in an unintended accidental injury. The defendant was convicted of inflicting grievous bodily harm under s 20 of the Offences against the Person Act 1861.

In quashing that conviction, the Court of Appeal ruled that criminal proceedings should be reserved for grave cases; sufficiently grave to be classified as criminal. Those who take part in sports said the court consented to physical injury that was an inevitable risk and an instinctive error, reaction or misjudgement in the heat of the game was not to be classed or categorised as criminal activity.

This judgment will go a long way to stopping the growing practice of disgruntled players using the criminal law to compensate for defeat or humiliation on the field of play.

Self-defence

A person may use such force as is reasonable in all the circumstances in his own defence. What is reasonable force is a matter of fact for the jury, but there must be some reciprocity or mutuality between the force being offered and the force used in defence. If A kissed B against her will, she may not succeed with self-defence if she stabbed A in the chest with her hatpin! There is no duty to retreat or run away in the face of force. Failure to do so before providing countervailing force is merely a factor to be taken into account when deciding whether (*a*) force was necessary at all and (*b*) if so, whether it was reasonable or whether backing off might have solved the problem.

If excessive force is used and death results, the defence fails. Murder is not reduced to manslaughter unless the defendant is regarded as having acted reasonably on the spur of the moment and under stress.

The test of whether the force used was reasonable or not is, however, *objective*. So if the prosecution shows that *in fact* excessive force was used, the defence fails. The use of excessive force is *not* at present decided in terms of *the defendant's perception of events*, which would be a *subjective test*.

R v *McInnes*, 1971 – Greasers and skinheads: an affray (**567**)

Apprehended imminent attack

There is no need for an attack to be taking place. A person can make preparations for self-defence where there is an apprehension of imminent attack.

Attorney-General's Reference (No 2 of 1983), 1984 – Fear of a riot (**568**)

Self-defence and mental states

In dealing with the defence of provocation the court may take into account the mental state of the defendant. In *R* v *Martin (Anthony Edward)* [2002] 2 WLR 1, Mr Martin appealed against his conviction for murder. He shot two people who were engaged in burglary at his home. He killed one and wounded the other. When tried he pleaded unsuccessfully self-defence. After conviction he was found to be suffering from a longstanding paranoid personality disorder. Mr Martin said that this had affected the risk he perceived to his safety from the burglars. This he said was relevant in deciding whether the force he used against the burglars was reasonable. The Court of Appeal ruled that the defences of provocation and self-defence were distinguishable. A mental condition that affected the degree of self-control could not except in exceptional circumstances be relied upon when dealing with reasonable force in self-defence. However, Mr Martin's mental state had resulted in diminished responsibility and his conviction for murder was quashed and a conviction of manslaughter substituted with a sentence of imprisonment for five years. It is also worth noting that as regards protection of property, Art 2(2) of the European Convention on Human Rights does not permit the taking of life in order to protect property.

Preventing crime

Section 3 of the Criminal Law Act 1967 provides that: 'A person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.' This provision would, given reasonable force, cover acts in defence of other persons whether relatives or not. It would also cover defence of property as where reasonable force is used by A against B to prevent B from stealing A's briefcase.

R v *Rose*, 1884 – A son shoots his father (**569**)

Genuine religious belief

Finally, it should be noted that the defendant's genuine belief that he is carrying out God's instructions will not provide a defence. Thus, in *Blake* v *DPP* (1993) *The Times*, 19 January Blake (who was a vicar) had, during a protest at the use of military force in the Gulf, written words from the Bible on a concrete pillar. He was charged with criminal damage and said that he had been carrying out God's instructions to him. A Divisional Court held that this could not provide a defence of lawful excuse.

Part 6

CASES AND MATERIALS