prospective purchasers of the car but, by carrying more than two passengers, he was infringing the express orders of his employers. The employers were convicted and appealed to the Divisional Court.

> It would be fantastic to suppose that a manufacturer, whether a limited company, a firm, or an individual, would, even if he could, always show cars to prospective purchasers himself; and it would defeat the scheme of this legislation if it were open to an employer, whether a company, or a firm, or an individual, to say that although the car was being used under the limited licence in contravention of the conditions upon which it was granted: 'My hand was not the hand that drove the car.' On these facts there ought to have been a conviction of the respondents and also the driver as aider and abettor. (*Per* Lord Hewart, CJ)

Thus, the conviction of Studebakers was affirmed by the Divisional Court.

***Comment*** Note that liability was not affected by the fact that the employee was told not to do the act.

## 530 *James and Son Ltd* v *Smee* [1955] 1 QB 78

Under the Motor Vehicles (Construction and Use) Regulations in force at the time the alleged offence occurred, the braking system of a vehicle or trailer used on the road had to be in efficient working order, and further anyone who used or caused or permitted to be used on the road a motor vehicle or trailer where the braking system was not in efficient working order was liable to a fine. James and Son Ltd sent out in the charge of their employee a lorry and trailer the braking system of which was in efficient working order. However, during the course of his rounds the employee had to disconnect the braking system of the trailer and forgot to connect it up again. James and Son were convicted of 'permitting to be used' the trailer in contravention of the regulation then in force. However, their appeal was allowed by the Divisional Court.

> In other words, it is said that in committing the offence of the user in contravention of the regulations he at the same time made his master guilty of the offence of permitting such user. In our opinion this contention is highly artificial and divorced from reality. We prefer the view that before the company can be held guilty of permitting a user in contravention of the regulations it must be proved that some person for whose criminal acts the company is responsible permitted as opposed to committed the offence. There was no such evidence in the present case. (*Per* Parker, J)

## 531 *Vane* v *Yiannopoullos* [1965] AC 486

Section 22(1) of the Licensing Act 1961, which was relevant in this case provided, 'If – (*a*) the holder of a Justices' on-licence knowingly sells or supplies intoxicating liquor to persons to whom he is not permitted by the conditions of the licence to sell or supply it . . . he shall be guilty of an offence'. Y was the licensee of a restaurant and had been granted a Justices' on-licence subject to a condition that intoxicating liquor was to be sold only to those who ordered meals. He employed a waitress and he instructed her to serve drinks only to customers who ordered meals but on one occasion whilst Y was in another part of the restaurant the waitress did serve drinks to two youths who had not in fact ordered a meal. Y did not know of that sale. He was charged with knowingly selling intoxicating liquor on the premises to persons to whom he was not permitted to sell contrary to s 22(1)(a) of the Act. The magistrates dismissed the information and the prosecutor appealed eventually to the House of Lords. The appeal of the prosecutor was dismissed and there was therefore no conviction of Y.

> So far, however, as the present case is concerned, I feel no doubt that the decision of the Divisional Court was right. There was clearly no ['knowledge'] in the strict sense proved against the licensee: I agree also with the Lord Chief Justice that there was no sufficient evidence of such ['delegation'] on his part of his powers, duties and responsibilities to render him liable on that ground. I would therefore without hesitation dismiss the appeal. (*Per* Lord Evershed)

***Comment*** Note that Y was on the premises when the drinks were served. Delegation was not, therefore, complete, as it must be.

## 532 *Ferguson* v *Weaving* [1951] 1 All ER 412

Section 4 of the Licensing Act 1921, which was relevant in this case, made it an offence for any person, except during permitted hours, to consume intoxicating liquor on any licensed premises. In a large public house of which W was the manager customers were found consuming liquor outside the permitted hours and were convicted of an offence under the section. The evidence did not show that W knew that the liquor was being consumed. It had in fact been supplied to customers by waiters employed by her who had neglected to collect the glasses in time. A charge against W of aiding and abetting the customers' offence was dismissed and the prosecutor appealed. The appeal was dismissed. 'There can be no doubt

that this court has more than once laid it down in clear terms that before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute the offence. . . .' (*Per* Lord Goddard, CJ)

***Comment*** Before a person can be convicted of aiding and abetting an offence, i.e. being a secondary party, he must know of all the essential matters which constitute the offence (see Lord Goddard CJ, in *Johnson* v *Youden* [1950] 1 KB 544). This is true even of a strict offence. Here there was no knowledge.

## SPECIFIC OFFENCES

### Murder

**533** ***R* v *Dyson*** [1908] 2 KB 454

Dyson was charged with manslaughter it being alleged that injuries which he inflicted on his child in November 1906 had caused its death in March 1908. His conviction was quashed. Lord Alverstone, CJ said: 'it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted . . .'.

***Comment*** (i) It should be noted that the 'year and a day rule' applied to all homicides but this case is obviously an authority also for murder. It was an ancient rule coming from the days when medical science could not be precise about causation.

(ii) It should be noted that the case still has relevance as an example of a case requiring the consent of the Attorney-General to a prosecution under the Law Reform (Year and a Day Rule) Act 1996, s 2.

### Voluntary manslaughter: provocation

**534** ***R* v *Camplin*** [1978] 2 All ER 168

Paul Camplin was 15 years of age. He went to the house of a Mr K who was in his fifties. While he was there K buggered him in spite of his resistance and after he had finished K laughed at him. Camplin then killed K by splitting his skull with a chapatti pan. He pleaded provocation to reduce a charge of murder to manslaughter. In reaching a decision that he was provoked, the House of Lords said his age must be taken into account. Lord Diplock said that if the jury thinks that the same power of self-control is not to be expected in an ordinary average or normal boy of 15 as in an older person, the boy's age is relevant to his response. A conviction for manslaughter must stand. Camplin's age was relevant.

***Comment*** (i) In *R* v *Morhall* [1993] 4 All ER 888 the Court of Appeal refused to take into account that the defendant had been glue-sniffing prior to a killing by stabbing and the victim had taunted him about this. This was not found a relevant 'characteristic', in terms of provocation. A conviction of murder must stand. *Camplin* is a different situation. Youth is not self-induced and is a 'characteristic' of each one of us at a certain stage in life (but see (iii) below).

(ii) The decision of the Privy Council in *Luc* v *The Queen* [1996] 3 WLR 45 is also relevant. It was decided that the *mental condition* of the defendant which impaired his powers of self-control could not be taken into account in provocation. Such a condition could not be attributed to the reasonable man. It should be pleaded as diminished responsibility and succeed or fail on that basis. Since the medical evidence did not establish diminished responsibility, the defendant's conviction for murder stood.

(iii) There was an appeal to the House of Lords in *Morhall* which reversed the Court of Appeal. In cases where a defendant's addiction is the subject of taunts said to constitute provocation, a jury should be directed to take into account the defendant's addiction as a matter going to the gravity of the alleged provocation.

The mere fact that the defendant has a discreditable characteristic does not exclude it from consideration. In the case of glue-sniffing, drug addiction or alcoholism, a distinction must be drawn between, on the one hand, situations where the defendant *is taunted with his addiction*, in which case it may be relevant to take the addiction into account as going to the gravity of the provocation, and on the other *the mere fact that the defendant was intoxicated by alcohol, glue or drugs at the time* since the latter is excluded as a matter of policy (see *R* v *Morhall* [1995] 3 WLR 330).

(iv) In *R* v *Roberts* [1990] Crim LR 122 Roberts, who was 23 years old, killed a person because he taunted him about his deafness. It was held that the judge had properly directed the jury to take into account the disability as part of the characteristics of the hypothetical reasonable man.

(v) Again, in *R* v *Smith (Morgan James)* [2000] 4 All ER 289 the fact that the defendant suffered from depression, which reduced his power of self-control, could said the House of Lords be taken into account as a characteristic of a reasonable person for the purposes of the objective test on a charge of murder.

(vi) *R* v *Smith (Morgan James)* [2000] 1 AC 146 was not followed by the Privy Council in *Attorney-General for Jersey* v *Holley* [2005] 2 AC 580. Holley and his girlfriend lived together in Jersey and were alcoholics. Holley killed his girlfriend by striking her a number of times with an axe. The judge did not refer in his summing up to the fact that Holley's alcoholism should be brought into account. What he said to the jury was: 'In your opinion, having regard to the actual provocation and your views

of its gravity for the defendant, decide whether a man of the defendant's age, having ordinary power of self-control might have done what the defendant did. If the answer to that question is "Yes" then the verdict is not guilty of murder but guilty of manslaughter. If the answer to that question is "No" then the verdict would be guilty of murder.' The jury convicted Holley of murder.

If we test the facts against the summing up, we shall see that the girlfriend had entered the flat they shared and announced that she had just had sex with another man and then said: 'You haven't got the guts.' Holley, who was going outside to chop wood, then lifted the axe and hit her seven or eight times. The evidence showed that the defendant had drunk a great deal of beer or lager during the day. However, no mention of this is made in the summing up. The standard is the reasonable person not a drunken or alcoholic reasonable person. The Court of Appeal said that the Jersey court should have followed *R* v *Smith (Morgan James)* (2000) and taken into account the particular characteristics of Holley. However, in *R* v *James* [2006] 1 All ER 759 the House of Lords preferred *Holley* to its own ruling in *R* v *Smith (Morgan James)* (2000) and followed Holley. James stabbed his wife to death. She had left home, having formed a relationship with another man. There was psychiatric evidence regarding James but the House of Lords ruled that this should not be taken into account when trying to establish the partial defence of provocation.

The House of Lords followed a persuasive precedent of the Privy Council rather than its own previous judgment in *R* v *Smith (Morgan James)* (2000). The point of precedent is considered in Chapter 7.

We may conclude, therefore, that special characteristics will not be taken into account except in cases such as *R* v *Roberts* (1990) (above), where the provocation is directed at the defendant's disability.

### 535 *R* v *Johnson (Christopher)* [1989] 1 WLR 740

Johnson killed his victim in a night club. His own behaviour had been unpleasant, resulting in a girlfriend of the victim taunting Johnson calling him a 'white nigger' since he affected a West Indian accent at times. Johnson drew a knife and stabbed the victim because matters were getting more violent and Johnson said he feared that the victim was about to cut him with a glass. A verdict of manslaughter was substituted for one of murder by the Court of Appeal. Watkins, LJ said that whether or not there were elements in Johnson's conduct which justified the conclusion that he started the trouble and induced others including the victim to act as they did, the defence of provocation should nevertheless have been put to the members of the jury and left to them. Since this had not been done, the verdict of murder must be set aside.

### 536 *R* v *Thornton* (1991) 141 NLJ 1223

Mrs Thornton was married in 1988. She realised from the start that her husband was a heavy drinker and jealous and possessive. He was violent in the home assaulting Mrs Thornton. In May 1989 he committed a serious assault which led to charges being brought. In June of that year Mrs Thornton told a workmate that she was going to kill her husband. Later that month after a series of rows with her husband in which he called her a whore Mrs Thornton went to the kitchen to calm down. While in the kitchen she picked up a carving knife and sharpened it. She then went back to her husband who was lying on a sofa. She asked him to come to bed but he would not and said he would kill her when she was asleep. She said she would kill him first. He then suggested sarcastically that she should go ahead. She made a downward movement with the knife expecting he would ward it off but it entered his stomach and killed him. She was charged with and convicted of murder. Her appeal to the Court of Appeal was dismissed. It was *held* that since provocation can only be put forward as a defence to a charge of murder if it caused a sudden and temporary loss of self-control on the part of the defendant, prolonged domestic violence does not of itself amount to provocation unless there is a sudden and temporary loss of self-control by the wife.

***Comment*** (i) Although the decision is in some ways an unfortunate one which does not assist the position of the battered wife, there does in all honesty seem to have been a 'cooling-off' period while the wife was in the kitchen and actually sharpening the knife. Some lawyers took the view that in cases such as this the cumulative effect of wife-beating should be taken into account. In other words, there may be a slow wearing down of the wife's self-control.

(ii) There was an appeal to the Court of Appeal (see *R* v *Thornton* [1996] 2 All ER 1023). The court reiterated the requirement of a sudden and temporary loss of control being clearly anxious not to allow premeditated killings to come under the shelter of provocation. It did, however, somewhat enlarge the defence by accepting the possibility of 'cumulative provocation'. A jury should consider the whole history of a prior abusive relationship between the accused and the victim on which the sudden loss of control was based rather than simply looking at the last provocative act before the killing. This act might be minor in itself but could be 'the last straw which broke the camel's back'. The Court of Appeal ordered a new trial which took place at Oxford Crown Court. The jury substituted a verdict of guilty of manslaughter and sentenced Mrs Thornton to five years' imprisonment. In view of the fact that she had already served five-and-a-half years on the murder conviction, she walked free immediately.

(iii) The principle of a slow wearing down of the accused was raised again in *R* v *Humphries (Emma)*, *The Independent*, 11 July 1995. H appealed to the Court of Appeal against a conviction of murder on the basis of her defence of provocation. She was 17 at the time of the offence and was described as having explosive, immature and attention-seeking traits. She had worked as a prostitute for her boyfriend who used to beat her and she had cut her wrists on a number of occasions. On the day of the murder she had again cut her wrists and he taunted her saying she had not done a good job of it. She lost control and stabbed and killed him. Her appeal was allowed, and her sentence adjusted to provide for her immediate release. The judge's summing up should have dealt with the victim's behaviour during the whole of her relationship with the victim because the latter's conduct over that period of time was capable of building up and culminating in the final provoking event.

## Diminished responsibility: use of alcohol

### 537 *R* v *Tandy*, *The Times*, 23 December 1987

Linda Mary Tandy was an alcoholic who drank nine-tenths of a bottle of vodka over part of a day and then strangled her daughter aged 11. They had had a good relationship over the years. She was convicted of murder. The defence of diminished responsibility was not available. Her drinking was not involuntary. She had bought the vodka on Monday but had not started to drink it until the Wednesday of the killing. Her first drink was not involuntary even if later drinking was. This amounted to voluntary drinking and could not amount to a disease of the mind as diminished responsibility required.

### 538 *R* v *Gittins* [1984] 3 All ER 252

Gittins killed his wife and raped and killed his stepdaughter while suffering from depression *and* the effects of drinking and drugs. He was charged with murder and convicted. He then appealed to the Court of Appeal. His conviction for murder was reduced to manslaughter on the ground of diminished responsibility. The court was careful to point out that normally the taking of drink or drugs would not amount to diminished responsibility, but where other elements were present, such as the mental state of depression in this case which might have been brought on by an extended period of drink and drugs, nevertheless it remained an abnormality of the mind whatever its source and, provided it existed, could be a ground for reducing murder to manslaughter on the grounds of diminished responsibility.

***Comment*** Presumably in the absence of a medically certified mental state of depression, the defendant would not have had the defence of diminished responsibility merely because he was under the influence of drink and drugs at the time.

## Involuntary manslaughter by unlawful act

### 539 *R* v *Church* [1966] 1 QB 59

Church had an argument with a woman and had a fight with her. She was knocked unconscious and, having failed to revive her, he threw her in a river. She was, in fact, alive at the time and died of drowning. He was convicted of manslaughter and appealed. The problem basically was that he had not killed her in the fight and he did not foresee the risk of death when he threw her in the river because he thought wrongly that she was already dead. Nevertheless, his conviction for involuntary manslaughter was upheld. The court said that his act was unlawful in the sense that throwing a woman into a river deliberately is unlawful even if the defendant did not intend or foresee that death or serious bodily harm would result. Such an act at least created a risk of physical harm and that was enough.

***Comment*** The unlawful act must in general involve the infliction of *physical* as distinct from *emotional* harm. Thus, where in the course of robbing a petrol station the robbers so frighten the attendant that he dies from a heart attack of which neither he nor they knew he was at imminent risk, there can be no conviction of manslaughter (see *R* v *Dawson* (1985) 81 Cr App R 150).

## Statutory offences against the person

### 540 *Director of Public Prosecutions* v *K* [1990] 1 All ER 331

K, a 15-year-old schoolboy, left a chemistry class to wash his hands following a spillage of acid. He took a test tube of the acid with him and while in the toilet he heard footsteps approaching and panicked. He poured the acid into a hot air drier. He then returned to his class intending to clean out the drier later. Before he could do so the next user of the drier was squirted in the face by the acid and scarred. K was charged under s 47 of the Offences Against the Person Act 1861. He was reckless in that he had given no thought to the risk of a subsequent use of the machine before he could clean it. *Caldwell* and *Lawrence* were applied. K was convicted (but see now *R* v *Parmenter* (1991), Case **542** below).

***Comment*** (i) In *R* v *Spratt* [1991] 1 WLR 1073 the Court of Appeal doubted the above decision. Spratt fired an air

pistol from the bedroom window of his flat. Two pellets struck a seven-year-old girl who was playing in the forecourt. He was charged under s 47 of the 1861 Act. He pleaded guilty on legal advice because although he was unaware of the girl's presence he had given no thought to the risk of his action and was, therefore, *Caldwell* reckless. Nevertheless, he appealed against conviction and the Court of Appeal said *Caldwell* recklessness was not enough for the s 47 offence. The *mens rea* of every type of offence against the person under the 1861 Act involved intention or recklessness, i.e. taking the risk of harm ensuing *with foresight* that it might happen. *Caldwell* recklessness was not enough, and this even though s 47 did not use the word 'malice'. The court in *DPP* v *K* had not been referred to *R* v *Cunningham* (1957) and the definition of recklessness there. The conviction was quashed. (But see now *R* v *Parmenter* (1991), Case **542**.)

(ii) In *DPP* v *Smith (Michael Ross)* [2006] 2 All ER 16 the defendant cut off the complainant's ponytail without her consent with a pair of kitchen scissors. She was his former girlfriend. The issue was whether this had caused 'actual bodily harm' for the purposes of the s 47 offence. The Dudley justices had ruled that the defendant had no case to answer because there was no evidence of bruising, bleeding or cutting of the skin and in the absence of evidence of any psychiatric or psychological harm the facts alleged could not amount to actual bodily harm.

The Queen's Bench Divisional Court, to which the DPP appealed, did not agree. Even if, scientifically speaking, hair above the surface of the skin was dead tissue, it remained part of the body and was intrinsic to each individual. Therefore, the lopping of hair as part of an assault on the victim was capable of amounting to an assault occasioning actual bodily harm.

The case was sent back to the justices with a direction to continue hearing it. It will be appreciated that the fact situation here could be the basis of an action for damages for assault and battery and could be used to illustrate the civil scenario if care is taken to point out that it was a criminal prosecution.

## 541 *R* v *Martin* (1881) 8 QBD 54

Just before a theatrical performance came to an end M, intending to terrify people leaving the theatre, put out lights on the staircase which he knew a large number of people would use when leaving the theatre. He then placed an iron bar across an exit door. As a result of his actions several people were hurt as they tried to leave the theatre. M was convicted on a charge of unlawfully and maliciously inflicting grievous bodily harm under s 20 of the Offences Against the Person Act 1861. 'The prisoner . . . acted "unlawfully and maliciously", not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured. The prisoner was most properly convicted.' (*Per* Lord Coleridge, CJ)

***Comment*** (i) This would appear to be an early formulation of *Cunningham* recklessness.

(ii) Did Martin 'inflict' the harm as s 20 of the 1861 Act requires? The Court thought so and yet, oddly enough, would the case not have been better brought under s 18 of the 1861 Act, which only requires the 'causing' of grievous bodily harm? An unresolved problem. Changes in the Act may be required. Perhaps the major offence in s 18 should require an assault and the lesser one in s 20 should not do so.

## 542 *R* v *Parmenter* [1991] 2 WLR 408

Parmenter admitted injuring his baby son and was charged amongst other things with inflicting grievous bodily harm contrary to s 20 of the Offences Against the Person Act 1861. The Court of Appeal had eventually to decide upon the *mens rea* for the s 20 offence and the s 47 offence. It *held* as follows:

(*a*) a direction to the jury on the intent necessary to found a conviction of unlawfully and maliciously inflicting grievous bodily harm contrary to s 20 should indicate to the jury that it was necessary that the defendant actually foresaw that some physical harm to some other person would result from his act. A direction that it was sufficient that the defendant ought to or should have foreseen the physical harm was a misdirection;

(*b*) on the suggestion that Parmenter might be convicted on the lesser offence in s 47, the Court of Appeal said no. The necessary *mens rea* for s 47 was intention or subjective (or *Cunningham*) recklessness. Since the trial judge's direction had been objective in form Parmenter's conviction on s 20 was quashed and a s 47 offence could not be substituted.

*R* v *Spratt* (1990) was applied.

***Comment*** (i) On appeal to the House of Lords, [1991] 4 All ER 698, their Lordships decided that:

(a) in order to establish the offence under s 20, the Crown must prove that the defendant intended or actually foresaw that his act would cause harm. This physical harm need only be of a minor character and it is unnecessary for the Crown to show that the defendant intended or foresaw that his unlawful act might cause physical harm of the gravity described in s 20, i.e. either wounding or grievous bodily harm;

(*b*) in order to establish the offence of assault under s 47, it is sufficient for the Crown to show that the defendant

committed an assault; the Crown is not obliged to prove that the defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused (*R* v *Spratt* (1990) was disapproved);

(*c*) a verdict of guilty under s 47 is a permissible alternative to a charge under s 20.

(ii) The House of Lords did not agree entirely with the Court of Appeal as to the *mens rea* required for s 20, and not at all on s 47. The position is, therefore, as stated by the House of Lords.

(iii) The House of Lords' ruling was applied in *R* v *Rushworth* (*Gary Alan*) (1992) 95 Cr App R 252, where the Court of Appeal decided that the defendant was guilty under s 20 when he attempted, during sexual activities, to insert a vibrator into the complainant's vagina, causing laceration to her vulva and bowel. The jury decided on the evidence that he actually foresaw some physical harm.

### 543 *R* v *Belfon* [1976] 3 All ER 46

Belfon attacked a man called Paul Horne with a razor causing him serious injury. He was charged under s 18 of the Offences Against the Person Act 1861. At his trial the judge directed the jury that intention or *Cunningham* recklessness as to the infliction of grievous bodily harm constituted the *mens rea* for an offence under s 18. He was convicted and appealed to the Court of Appeal. His conviction was quashed and a conviction for unlawful wounding under s 20 was substituted. The Court of Appeal laid it down that in directing a jury in relation to an offence under s 18 the judge should direct the jury that what has to be proved is (*a*) the wounding; (*b*) that the wounding was deliberate and without justification; (*c*) that it was committed with intent to cause really serious bodily harm; and (*d*) that the test of intent is subjective.

## Sexual offences: rape

### 544 *R* v *R* [1991] 4 All ER 482

A husband and wife were having matrimonial problems. The wife left her husband and went to live with her parents. She left a note at the matrimonial home saying she was going to petition for a divorce. Some three weeks later the husband forced his way into the house of his wife's parents who were out at the time and attempted to have sexual intercourse with his wife against her will. In the course of doing so he squeezed her neck and, therefore, assaulted her. He was tried, amongst other things, for attempted rape. His defence was that he could not in law commit rape or attempted rape upon his wife. Her consent was presumed. He was convicted, the trial judge following an existing rule that rape could take place if the wife had ceased, as in this case, to live with her husband. Nevertheless, the husband appealed saying there could be no rape of a wife in the absence of a court order of divorce or separation or a separation agreement.

The House of Lords eventually heard the appeal. It decided that a husband could rape his wife if he had intercourse with her without her consent even if they were not divorced or separated but were cohabiting. It was unacceptable that by marriage a wife submits to sexual intercourse in all circumstances.

### 545 *R* v *Williams* [1923] 1 KB 340

Williams taught singing. He told a 16-year-old female pupil that if she had intercourse with him it would improve her voice. The girl allowed him to have intercourse with her and made no resistance. She believed what he said and in any case was not mature enough to know that he was having sexual intercourse with her. She did not know that that was what they were doing. He was convicted of rape. His appeal was dismissed. Lord Hewart, CJ said: 'She was persuaded to consent to what he did . . . because she thought it was a surgical operation.' Therefore, there was in effect no consent.

***Comment*** A further example of deception nullifying consent is to be found in *R* v *Tabassum (Navid)*, *The Times*, 26 May 2000 where the Court of Appeal found the defendant guilty of indecent assault where he had, by pretending to be medically qualified, fondled the breasts of three women on the basis that he was demonstrating breast self-examination.

### 546 *Director of Public Prosecutions* v *Morgan* [1975] 2 All ER 347

Morgan and his three companions were members of the RAF. Following a drinking session Morgan took the three men home to have sexual intercourse with his wife. He told them she might resist because she was a bit 'kinky' and this was the only way she could get 'turned on'. When they got to Morgan's home Mrs Morgan was in bed asleep. She did not habitually sleep with her husband. She was frog-marched to another bedroom and laid on a double bed; each of her arms was held and her legs were held apart. All three men then had intercourse with her. When they had finished and left the room Morgan had intercourse with her himself. Mrs Morgan immediately left the house and went to a nearby hospital. She said she had done all she could to resist. The three men

(not Morgan, who could not commit rape upon his wife in those days) were charged with rape and all four with aiding and abetting the rapes.

The case eventually got to the House of Lords where it was decided that:

(*a*) The crime of rape was committed by having sexual intercourse with a woman with intent to do so without her consent or with reckless indifference as to whether she consented or not. The test of recklessness is subjective and not objective because if the defendant believes the woman is consenting that belief need not be based on *reasonable* grounds.

(*b*) There could have been no subjective belief in the circumstances of this case that Mrs Morgan was consenting and so the convictions for rape and aiding and abetting rape must stand.

***Comment*** The Sexual Offences Act 2003 contains statutory provisions regarding consent. The decision in *Morgan* is replaced by the statutory definition. Under the new provisions, the prosecution must prove that B did not consent and that A did not reasonably believe that B was consenting. An honest but unreasonable belief as to the consent of the victim will no longer entitle the defendant to an acquittal. In deciding whether the defendant's belief in consent is reasonable, the court must have regard to all the circumstances at the time in question, including any steps that the defendant may have taken to establish that the victim did consent to the sexual activity. In addition, the 2003 Act introduces rebuttable and irrebuttable presumptions about consent.

The *Morgan* case is included only to show the previous position and to provide a contrast with current law.

## AGE AND RESPONSIBILITY – GENERAL DEFENCES

### M'Naghten rules: disease of the mind

**547** ***R* v *Kemp*** [1956] 3 All ER 249

The accused struck his wife with a hammer without, so he said, being conscious of doing so and was charged with causing grievous bodily harm. He was an elderly man of good character who suffered from arteriosclerosis. Medical opinions differed as to the precise effects of this disease on his mind. It was *held* that, whichever medical opinion was accepted, arteriosclerosis was a disease capable of affecting the mind, and was thus a disease of the mind within the M'Naghten Rules, whether or not it was recognised medically as a mental disease.

***Comment*** In *R* v *Sullivan* [1983] 2 All ER 673 the House of Lords held that the definition of insanity in *M'Naghten* could apply to a person suffering from epilepsy. Mr Sullivan admitted inflicting grievous bodily harm on a friend of his at a time when he was recovering from a minor epileptic seizure. His defence was automatism which could have resulted in an acquittal but the judge ruled that the defence amounted to one of insanity which would, if successful, have led to Mr Sullivan's immediate detention in a special institution. Mr Sullivan changed his plea to guilty of occasioning actual bodily harm and was convicted and sentenced to probation with medical supervision.

Previously it had been thought that for *M'Naghten* to apply the mind had to be working but not as it should. It seems from this decision that *M'Naghten* applies even if, as in this case, the mind is not working at all.

**548** ***R* v *Hennessy*** [1989] 1 WLR 287

The defendant was charged with taking a motor vehicle without consent. He suffered from diabetes and had to take insulin every day. He had been having marital and employment problems causing stress and depression and he had not taken his insulin for two or three days before the incident. He claimed that as a result he did not know what he was doing and did not, therefore, have the necessary *mens rea*. The judge took the view that this was a disease of the mind and he was insane within the *M'Naghten* rules. The defendent changed his plea to guilty and then appealed against the insanity ruling. The Court of Appeal *held* that the hyperglycaemia caused by the lack of insulin was a disease of the mind within *M'Naghten*. The defence of automatism was not available. The defendant was insane. The trial judge's ruling was correct.

***Comment*** (i) In *R* v *Burgess*, *The Times*, 28 March 1991 a man claimed to have been sleepwalking when he wounded a woman. He said he was suffering from non-insane automatism and lacked the necessary *mens rea* for the offence. The Court of Appeal held that he was insane and that an appeal by him against a verdict of not guilty by reason of insanity failed. He was suffering from insane automatism in spite of the transitory nature of the disorder.

(ii) The fact that an epileptic (as in *Sullivan*) and a diabetic (as in *Hennessy*) can be regarded as insane is an illustration of the fact that the test is legal not medical and is based on responsibility for the act in the circumstances of the case.

**549** ***R* v *Clarke*** [1972] 1 All ER 219

May Clarke was convicted of theft from the International Stores in Leicester. She had put certain

items into her shopping bag and not into the wire basket provided by the store which she presented at the check-out. She suffered from diabetes but did not claim not to have taken her insulin. She had not entirely recovered from 'flu and on the Friday previous to the theft her husband had suffered a broken collar bone and she had become, she said, very depressed and forgetful. In her own words, 'Everything seemed to get on top of me.' She pleaded guilty rather than face a decision that she was not guilty by reason of insanity. She appealed against her conviction on the guilty plea. The Court of Appeal *held* that her conviction must be quashed. She had been wrongly advised by the Assistant Recorder that if she did not do so the insanity verdict would be appropriate. It would not have been. The *M'Naghten* rules relating to insanity do not apply to those who retain the powers of reasoning but who in moments of confusion or absent-mindedness fail to use those powers to the full.

### 550 *R* v *Windle* [1952] 2 QB 826

The defendant gave his wife a large and fatal dose of aspirin. He was admittedly suffering from mental illness but he did admit he had administered the aspirin and said he supposed he would hang for it as he later was! His only defence was insanity. He was convicted, the trial judge having ruled that there was no evidence to support such a defence. The defence did not go to the jury. Windle appealed and his appeal failed. Lord Goddard, CJ said:

> In the opinion of the court there is no doubt that in the *M'Naghten* rules 'wrong' means contrary to law and not 'wrong' according to the opinion of one man or a number of people on the question of whether a particular act might or might not be justified. In the present case it could not be challenged that the appellant knew that what he was doing was contrary to law, and that he realised what punishment the law provided for murder.

## *Actus reus*: automatism

### 551 *Hill* v *Baxter* [1958] 1 All ER 42

The defendant had been charged with dangerous driving and failing to conform with a traffic sign under ss 11 and 49(b) of the Road Traffic Act 1930, respectively. He said in his defence that he had been unconscious at the time because a sudden illness had overtaken him. The magistrates accepted his defence and dismissed the charges and the prosecutor appealed. The appeal was allowed and the defendant therefore convicted.

> I agree that there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or an attack by a swarm of bees I think introduces some conception akin to *novus actus interveniens*. In this case, however, I am content to say that the evidence falls far short of what would justify a court holding that this man was in some automatous state. (*Per* Lord Goddard, CJ)

***Comment*** In *Attorney-General's Reference (No 2 of 1992)*, *The Times*, 31 May 1993 the defendant, who was described as driving without awareness induced by the repetitive stimuli of motorway-driving over a long period, was charged with motor manslaughter and convicted. The Court of Appeal affirmed that conviction and did not accept the defence of automatism. There was no destruction of nor total absence of voluntary control on the part of the defendant in his driving though it was impaired or reduced.

### 552 *R* v *Quick* [1973] 3 All ER 347

Quick was a nurse employed at a mental hospital. He assaulted a patient and claimed that he could not remember doing so. He was a diabetic and had taken insulin as recommended by his doctor. He then had a small breakfast and no lunch. He had also been drinking before the assault took place. Medical evidence showed that at the time of the assault he was suffering from a deficiency of blood sugar following the insulin injection. The trial judge ruled that this state could only be relied on to support the defence of insanity. Quick changed his plea to guilty and then appealed against his conviction. The Court of Appeal *held* that the improper functioning of his mind had been caused by an external factor not a disease of the mind. The use of the insulin was that external factor. He was, therefore, entitled to have the defence of automatism put to the jury and since this had not been done his conviction must be quashed.

***Comment*** (i) All that the Court of Appeal was deciding in this case was that the defence of automatism could and should have been put to the jury after proper argument by counsel. The Court of Appeal does indicate that the defence may not have succeeded because the deficiency of blood sugar might very well have been regarded as

self-induced. Those who take insulin should eat regularly afterwards. Quick did not. He had also been advised to take a lump of sugar if he felt an attack coming on. He had not done so. However, the conviction had to be quashed because the jury might have accepted the defence. It is important to know that it is available in these circumstances even though it is by no means certain that it will succeed.

(ii) In *Moses* v *Winder* [1980] Crim LR 232 the defendant had been a diabetic for 20 years. He felt a diabetic attack developing and took a dose of sugar which usually postponed the attacks for about an hour. However, whilst driving home he drove his car on the wrong side of the road, colliding with an oncoming car. He stopped a few minutes later in a daze, examined his car and then drove a further half mile. It was *held* by a Divisional Court that the defendant was nevertheless guilty of driving without due care and attention. His defence of automatism did not succeed and would rarely succeed without medical evidence. The defendant had not taken sufficient precautions to deal with the threat of a diabetic coma.

### 553 *R* v *Lipman* [1969] 3 All ER 410

L was charged with murder of a girl but convicted of manslaughter. Both he and the girl had taken LSD together in her room and L said that while under the influence of the drug he had an illusion of being attacked by snakes and that he must have killed the girl during this time. The girl had received two severe blows on the head but the immediate cause of her death was asphyxia as a result of having part of a sheet pushed down her mouth. The Court of Appeal affirmed the conviction, saying that when the killing results from the unlawful act of the accused, no specific intent was to be proved to convict of manslaughter and mental states which are self-induced by drink or drugs are no defence to a charge of manslaughter.

## Drunkenness and drugs

### 554 *Director of Public Prosecutions* v *Majewski* [1976] 2 All ER 142

There was a disturbance at the Bull public house in Basildon, Essex. Majewski attacked the landlord and two other persons. He also assaulted three police officers. He was charged with assault occasioning actual bodily harm. At his trial he said he did not know what he was doing by reason of drink and drugs. The case eventually reached the House of Lords which ruled that unless the offence charged required a specific intent a drink/drugs defence was not applicable. Since the assaults charged did not require solely a specific intent (see Chapter 23) the defendant's submissions as to drink and drugs were no defence and his conviction must be upheld.

***Comment*** (i) It seems difficult to find the ingredients of crime in *Lipman* and *Majewski* in terms of the *actus reus* and *mens rea* requirements. Perhaps the law punishes the act of becoming intoxicated on drink or drugs, the punishment being then based on the act which the defendant did while in that state.

(ii) Involuntary intoxication by way of drink or drugs is capable of negativing *mens rea*. In *R* v *Kingston* [1993] 3 WLR 676 the defendant, a paedophile, was drugged by another man so that the defendant could be photographed in a compromising sexual situation with a boy aged 15 and so that the other man might blackmail him. The defence was that because of the drugs the defendant had no recollection of acting as he did. The defence of involuntary intoxication succeeded in the Court of Appeal. See also *Ross* v *HM Advocate* (1991) below.

(iii) The House of Lords reversed the decision of the Court of Appeal in *Kingston* (see *The Times*, 22 July 1994). They did not accept that the drugs had sufficiently affected his *intent*. He was still excited by the boy and he acted with the *intent of a paedophile*, i.e. to commit acts of indecency with a young boy. The decision shows how difficult it is, and always has been, to plead involuntary intoxication in crime.

### 555 *R* v *Hardie* [1984] 3 All ER 848

Hardie lived with a woman at her flat. The relationship broke down and she insisted that he leave. He was upset and took several tablets of valium, a sedative drug, belonging to the woman. Some hours later he started a fire in the bedroom of the flat while the woman and her daugher were in the sitting room. He was charged with damaging property with intent to endanger life or being reckless as to whether life would be endangered (Criminal Damage Act 1971, s 1(2)). The trial judge said in answer to the defence of no *mens rea* that because the valium was voluntarily self-administered it could not negative *mens rea* and was no defence. Hardie was convicted and appealed. The Court of Appeal decided that although self-induced intoxication from alcohol or a dangerous drug was no defence to crimes involving recklessness because the taking of the alcohol or drugs was itself reckless a drug which was merely soporific was different. The jury should have been asked to consider what effect the valium might have had upon the defendant's ability to appreciate the risk. Since they had not been asked to do so the conviction must be quashed.

### 556 *R* v *O'Grady* [1987] 3 WLR 321

O'Grady and his acquaintances were given to heavy drinking. On the day in question he had drunk at least eight flagons of cider. His companions, Brennan and McCloskey, who had been drinking with him went back to O'Grady's flat. During the night McCloskey attacked O'Grady and in the ensuing fight O'Grady punched McCloskey to death. He put forward self-defence. It seemed from the circumstances that McCloskey's attack was severe but not so severe as to warrant killing him in self-defence. O'Grady asked the court to acquit him because being drunk he had not appreciated the nature of McCloskey's attack. The Court of Appeal heard an appeal by O'Grady against his conviction at his trial of manslaughter. The appeal failed, the Court of Appeal ruling that so far as self-defence is concerned reliance cannot be placed on a mistake as to the nature of the attack induced by voluntary intoxication.

***Comment*** Much depends upon the wording of statutory offences. For example, s 5 of the Criminal Damage Act 1971 requires that a person causing damage to property has a defence if he believed that the owner of the property would have consented to it. The Act says it is immaterial whether the belief is justified if it is honestly held. This means that the test as to belief is subjective. In addition the section does not go on to say 'if it is honestly held other than because of self-induced intoxication'.

In *Jaggard* v *Dickson* [1980] 3 All ER 716 a girl who was drunk broke into a house thinking it was a friend's house which he had said she could use as her own. It was an identical house in the same street but not her friend's. The girl was acquitted of criminal damage because the Divisional Court said if she honestly believed it was her friend's house then the defence in the Act was established even though the honest belief arose from drink. It is doubtful whether there will be much scope to extend this decision into other areas.

### 557 *Attorney-General for Northern Ireland* v *Gallagher* [1963] AC 349

G was convicted of murdering his wife. In his defence he pleaded insanity under the *M'Naghten* rules or, as an alternative, that he was too drunk at the time to form the necessary intent for murder so that he was only guilty of manslaughter. G had shown intention to kill his wife before taking the drink. The case eventually reached the House of Lords where Lord Denning gave a useful summary of the effect of drunkenness when he said:

> 1. If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention is an answer. . . . 2. If a man by drinking brings on a distinct disease of the mind such as *delirium tremens*, so that he is temporarily insane within the M'Naghten Rules, that is to say, he does not at the time know what he is doing or that it is wrong, then he has a defence on the ground of insanity. . . .

However, G's original conviction for murder was upheld because he did not fit the above categories. As Lord Denning said:

> My Lords, I think the law on this point should take a clear stand. If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter.

### 558 *Ross* v *HM Advocate*, 1991 SLT 564

This was a trial for attempted murder. The evidence was that on the day of the attempted murder the defendant had been drinking lager from a can. He did not know that five or six tablets of temazepam and a quantity of LSD had been squeezed into the can. The defendant drank the lager. Shortly afterwards the defendant started lunging about with a knife and screaming. He injured various people who were strangers to him. On a charge of attempted murder the defendant said that he had no self-control and therefore no *mens rea*. He was nevertheless convicted. He appealed and his appeal was allowed. He should be acquitted because his absence of self-control was not self-inflicted. But see also *R* v *Kingston* (1994), above, where the House of Lords did not apply the *decision* in *Ross* but were able to apply certain of the reasoning in the *Ross* case to the effect that the particular decision should not be of universal application.

## Duress

### 559 *R* v *Gotts* [1991] 2 All ER 1

Ben Gotts was charged with the attempted murder of his mother. The mother had left the family home after arguments with the father and gone to a women's aid refuge with two of the younger children. One morning as the mother left the refuge to take one of the children to school Ben then aged 16 armed with a knife supplied by his father ran up behind her and stabbed her. He was charged with attempted murder

and wounding with intent. He pleaded duress: that his father had ordered him to kill his mother. The Court of Appeal *held* that duress was not a defence to attempted murder and his appeal was dismissed. There was no verdict on the count relating to wounding with intent.

The decision of the Court of Appeal was affirmed by the House of Lords (see *R* v *Gotts* [1992] 1 All ER 832).

### 560 *R* v *Hudson* [1971] 2 All ER 244

Two girls aged 17 and 19 were the main witnesses for the prosecution on a charge in Manchester of wounding. At the trial they both failed to identify the defendant Wright. He was acquitted as a result of this. The girls were tried for perjury and put in the defence of duress. They had been approached by a group of men who threatened to 'cut them up' if they 'told on' Wright in court. They were nevertheless convicted and appealed. The appeal turned on the trial judge's direction to the jury that duress can only arise where there is a threat of death or serious personal injury at the moment when the crime is committed. The threat here was to do something in the future. The Court of Appeal said that their convictions must be quashed. Lord Parker, CJ said that the threats in this case were none the less compelling because they could not be executed in the court room if they could be carried out on the streets of Salford the same night.

### 561 *R* v *Sharp (David)* [1987] 3 WLR 1

David Sharp was involved in the armed robbery of a post office. He participated in the robbery. He was charged with aiding and abetting murder but he was in fact convicted of manslaughter. He claimed that he had not wished to go on with the robbery but had been forced to because a member of the gang to which he belonged which had masterminded the robbery had held a gun to his head to make him proceed. He appealed because the trial judge rejected the defence of duress. The Court of Appeal dismissed the appeal. The defence of duress was not available where, as here, a person had voluntarily and with knowledge of its nature joined a gang which he knew might put pressure on him to commit an offence.

### 562 *R* v *Shepherd* (1988) 86 Cr App R 47

Shepherd and other persons entered retail premises and stole goods. He was charged with burglary. He said that he had participated willingly at first but later lost his nerve but stayed on because a member of the gang threatened him and his family with violence if he did not continue. The trial judge ruled that the defence of duress was not available because he had voluntarily participated in a criminal act. He appealed and the Court of Appeal *held* that his conviction must be quashed. The defence of duress was available if at the time he joined the gang he did not contemplate that violence would be used against him if he did not continue to participate.

## Duress of circumstances

### 563 *R* v *Martin* [1989] 1 All ER 652

Mr Martin was found guilty of driving whilst disqualified. He appealed on the basis that his wife had suicidal tendencies, and that on the day in question his stepson had overslept and was bound to be late for work and, it was said, at risk of losing his job unless Mr Martin drove him to work. Mr Martin was disqualified from driving but his wife started screaming and beating her head against the wall and threatening suicide unless he drove the stepson to work which he then did. He was stopped and later prosecuted for driving whilst disqualified. His defence was necessity and the Court of Appeal accepted it in this case though referring to the situation as 'duress of circumstances'.

***Comment*** It was held by the Court of Appeal in *R* v *Pommell*, *The Times*, 22 May 1995 that the duress of circumstances defence, though developed in relation to road traffic offences, also applied to other crimes, but not murder, attempted murder and some forms of treason. A person was permitted to break the law to prevent a greater evil from happening to himself or others. P had appealed against conviction for possessing a firearm. The police, having a search warrant, had found him in bed holding a loaded gun which he said he had taken from a visitor to his house the previous night to prevent the visitor from carrying out his threat to kill persons whom he said had killed his friend. He claimed that he intended to take the gun to the police station in the morning. His conviction was set aside and a new trial ordered.

## Necessity

### 564 *R* v *Dudley and Stephens* (1884) 14 QBD 273

A yacht was shipwrecked, and three men and a boy escaped in an open boat. They were adrift for eight days without food when the men killed the boy, who was by then very weak, in order to eat his body and keep themselves alive. They were rescued four days later by a passing ship. They were tried for, and convicted of, murder. It was *held* that there is no principle