

W201 The Individual and the State

Study notes on general defences

1. Self defence and prevention of crime

2. Consent

3. Reasonable chastisement

4. Duress

5. Intoxication

There are also partial defences (loss of control and diminished responsibility) relevant only to murder and general defences of insanity, automatism and infancy which are dealt with later in the course.

1. Self defence

This common law defence arises regularly in offences of violence.

What is the test?

“The test to be applied for self defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another”

Lord Griffiths in **Beckford v The Queen** 1988 Privy Council.

How much force can be used?

The force used must be reasonable (an objective test). But courts allow some leeway: “a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action”

Lord Morris in **Palmer v The Queen** 1971 Privy Council.

What if the accused mistakenly believes he is being attacked?

The test for the accused’s belief is a subjective one. It is what the accused **honestly** thought that matters not what a reasonable man may have thought. **R v Gladstone Williams** 1984 C A (W punches a man making an arrest in the face after he fails to produce a warrant card)

For example an accused who makes an honest mistake and believes he is being attacked when he isn't can still claim the defence.

The law on reasonable force for the purposes of self defence (and prevention of crime) has now been codified in Section 76 of the Criminal Justice and Immigration Act 2008. Section 76 does not alter the previous common law.

Prevention of crime

The use of reasonable force is allowed by statute to prevent crime or assist in the lawful arrest of an offender - Section 3 (1) of the Criminal Law Act 1967.

“a person may use such force as is reasonable in the circumstances in the prevention of crime... or assisting in ...lawful arrest”.

This means you can

- a) defend another person from being attacked
- b) defend property eg from a burglar
- c) prevent any other crime from being committed
- d) help in a lawful arrest.

2. Consent

This arises most often in less serious assaults but can be a defence in cases of really serious injury eg surgical procedure or sport such as boxing.

Traditionally consent has been valid even if obtained by fraud unless the fraud related to the nature of the act or to identity. **R v Clarence** 1888 CCCR (husband infects wife with VD who would not have consented to intercourse had she known. Held - consent to act valid as fraud did not relate to the nature of the act or to identity). (**Clarence** has now been disapproved on more general grounds in **R v Dica** 2004 C A.) **R v Richardson** 1999 C A (Dentist carried out dentistry while suspended. Held - no assault due to valid consent as there was no deceit about identity or the nature of the act).

Today if the fraud relates to the quality of the act (not just the nature or identity) this too may now invalidate consent. **R v Tabassum** 2000 C A (three complainants consented to breast examinations by an accused claiming he was medically qualified and creating a medical database – neither was true so the examinations did not have the quality of being for a medical purpose).

There is general agreement that one can consent to the harmless unavoidable everyday contacts which might otherwise be common assaults.

Where actual bodily harm or above is inflicted consent will be invalid on policy grounds subject to established exceptions eg

- sport
- medical treatment
- lawful chastisement (teachers and parents)
- tattooing, ear piercing
- dangerous exhibitions (knife thrower at circus)

In a sporting setting in **R v Barnes** 2005 C A consent was available even where an accused had broken the rules (causing a serious leg injury when committing a foul in football). It remained a matter for the jury.

In **R v Brown** 1994 Lords homosexual sado-masochists engaged in consensual torture raised the defence of consent. The Lords by 3 to 2 denied the defence to them essentially on the grounds of policy and public interest. The European Court of Human Rights dealt with the same case in **Laskey v UK** 1995 and held that interference in the accuseds' private lives could be justified on the ground of protection of health.

Brown was followed in **R v Emmett** 1999 C A (accused and female partner commit consenting sado-masochistic acts – consent no defence where where risk of harm is more than 'transient or trivial injury').

The decision in Brown is consistent with earlier decisions denying the defence of consent where actual bodily harm was involved eg

R v Donovan 1934 CCA sado-masochistic caning of a 17 year old girl - consent no defence.

AG Reference (No. 6 of 1980) 1981 C A consensual fist fight where actual bodily harm was intended or caused for no good reason - consent no defence (minor struggles not included).

A subsequent exception is **R v Wilson** 1996 C A where a wife was held to be able to consent to the branding of her husband's initials on her buttocks by her husband. The court treated the act as closer to tattooing than sado-masochism. The court went further and indicated that consensual activity between husband and wife in the privacy of the matrimonial home is not normally a matter for criminal investigation or prosecution.

In **R v Dica** 2004 C A the court considered the position where an accused who had unprotected consensual sex was charged and convicted of S20 grievous bodily harm after his sexual partners contracted HIV. The court's conclusions were:

- If the HIV was inflicted deliberately (making it a S18 offence) consent would be no defence.
- If the HIV was inflicted recklessly (S20) on a person who does not consent the offence is complete and **R v Clarence** 1888 is no longer authoritative.
- If the HIV is inflicted recklessly then the consent of the victim to the risk of HIV can be a defence.

(Dica was sent back for a retrial).

In **R v Konzani** 2005 C A the accused who knew he was HIV positive had unprotected sex with three complainants without telling them of his HIV status and infected them all. At trial (for S20) he claimed that in consenting to sex each complainant consented to the possible risk of HIV. The Court of Appeal held that for consent to be effective where HIV is inflicted recklessly it must be informed and willing consent to the risk of HIV. Here the complainants had not been informed.

3. Reasonable chastisement

This defence is still available to a parent guardian or schoolteacher (if the parent also consents in a state school) when disciplining children. The chastisement must be moderate and reasonable. In practice what is reasonable depends on the contemporary view of justices and juries.

In **A v UK** 1998 ECHR a child (whose father was acquitted of S47 using this defence) after being beaten and bruised with a garden cane went to the ECHR where they found a breach of Article 3 (torture inhuman or degrading punishment). The government have now introduced the Children Act 2004 which removes this defence for charges contrary to S47, S20 and S18 but allows it for common assault or battery where there is no injury.

4. Duress

Duress can be a defence to any crime except murder, attempted murder or treason.

The crime will be complete (with both actus reus and mens rea present) but allowing the defence represents a concession to human frailty because the accused's will has been overcome by threats of death or GBH. The test for the existence of duress involves a subjective and an objective element.

The subjective part

The accused must reasonably believe that either he or a person for whom he is responsible is soon to be killed or seriously injured. **R v Safi and others** 2003 C A (accused hijacked a plane in Afghanistan and flew to Stansted claiming they were escaping death from the Taleban).

It is wrong to direct a jury that the threat must exist as a fact. It is the accused's belief in the threat that triggers the defence. This is a subjective test with an objective element as the belief must be reasonable.

The threat need not be 'immediate' if it is 'imminent' in the sense that it is operating on

the accused's mind so as to overbear his will. **R v Abdul Hussain** 1999 C A (Iraqis hijacked plane to escape death by Saddam).

Persons for whom an accused is responsible have been held to include a wife partner family and car passenger.

The objective part

Would a reasonable person sharing the accused's characteristics do as the accused did? **R v Safi and others** 2003 C A.

This objective test was previously laid down in **R v Graham** 1982 C A and in **R v Howe** 1987 Lords. In **Graham** the test was explained as - would a sober person of reasonable firmness sharing the characteristics of the accused have so responded? Voluntary consumption of drink or drugs is not relevant.

Characteristics include age and sex and any which affect the gravity of the threat. **R v Bowen** 1996 C A (low IQ not to be attributed to reasonable person as a low IQ does not make a person less courageous).

When does duress not apply?

A threat can not be relied on if the Crown prove that the accused failed to avail himself of the opportunity which was reasonably open to him to render the threat ineffective (eg by seeking police protection). **R v Hudson & Taylor** 1971 C A.

If you join a violent gang and they threaten to shoot you if you do not join in a crime duress is not a defence. **R v Sharp** 1987 C A. But if the gang's activities extended only to shoplifting and **not** violence duress would still be available. **R v Shepherd** 1988 C A. Today this rule extends to a person who voluntarily exposes themselves to unlawful violence (without going as far as joining a gang) **R v Heath** 2000 C A (duress not available to a drug user who feared violence from a drug dealer) followed in **R v Harmer** 2002 C A. In **R v Hasan** 2005 Lords (accused engaged in aggravated burglary) the test was explained in the following terms "policy pointed toward an objective test of what the accused ought reasonably to have foreseen". In **Hasan** the accused should have foreseen the risk of compulsion by threats of violence.

Duress of circumstances

This is a recent development. Usually duress means that you commit a crime because you follow someone's instructions when **threatened**. In duress of circumstances you commit a crime as a result of **other** circumstances for example to escape from someone eg **R v Conway** 1988 C A where the accused drove his car recklessly believing his

passenger was to be assassinated. This case established that duress of circumstances still requires the accused to be trying to avoid death or serious injury to someone. In **R v Pommell** 1995 C A (accused took loaded weapon from man who was intending to shoot a third party) it was confirmed that duress of circumstances could apply not just to driving cases like **Conway** but to any crime except murder attempted murder and treason.

Necessity

Courts have long been reluctant to recognise a defence of necessity (ie circumstances forcing one to choose to commit a crime). **R v Dudley and Stephens** 1884 Div Ct (two accused adrift in open boat killed and ate cabin boy - no defence of necessity).

This reluctance is less important today as this area is now broadly covered (for offences excluding murder, attempted murder or treason) by the defence of duress of circumstances.

In **Re A** 2000 C A (permission sought for operation by doctors on conjoined twins likely to result in the death of one to save the other) there was a discussion of necessity as a defence to murder and it was accepted it should be available on the particular facts as a response to a 'unique problem'.

5. Intoxication

This includes drink or drugs.

Voluntary intoxication

Restrictive rules have grown up to stop people obtaining acquittal due to absence of mens rea or due to honest mistake simply because they voluntarily got drunk or drugged.

You can only rely on voluntary intoxication to show absence of mens rea in crimes of specific intent eg murder attempted murder S18 and theft.

In crimes of basic intent eg S47 S20 voluntary intoxication is no defence.

This is the rule in **DPP v Majewski** 1976 Lords. Whilst the rule is clear the theoretical distinction between offences of basic and specific intent is not.

Three reasons were given in Majewski for the distinction. First it was said that this is because the mens rea of recklessness is sufficient for crimes of basic intent and you are by definition reckless if you get drunk or drugged voluntarily (Lord Elwyn Jones). Secondly it was said to be based on the distinction between offences of basic intent and ulterior

intent (Lord Simon). Thirdly it was said to be founded on common sense and not logic at all (Lord Salmon).

Subsequently the case of **R v Heard** 2007 C A has made it clear that where courts are asked to categorise new offences (sexual assault contrary to Section 3 Sexual Offences Act 2003 in Heard) rather than base their decisions on theoretical distinctions they will tackle the task on an offence by offence basis and be guided by policy.

What if a man decides to kill his wife and then gets drunk before he does it so he can't form any intent at the moment of the crime?

AG v Gallagher 1963 Lords Lord Denning held the accused was guilty - he had already formed the intent before he got drunk and that was sufficient. To get drunk to give yourself Dutch courage is no defence.

How does voluntary intoxication affect self defence?

In self defence if you honestly believe you are being attacked you can use reasonable force to defend yourself.

If you are voluntarily intoxicated and honestly believe you are being attacked when a sober person would not - is self defence still available?

In **R v O'Grady** 1987 C A the court found that a mistaken belief due to voluntary intoxication was not sufficient for self defence to a charge of manslaughter (or murder **R v O'Connor** 1991 C A and **R v Hatton** C A 2005 following **O'Grady**). This decision owes as much to common sense as to logic.

Footnote: In contrast mistake due to voluntary intoxication can provide a defence to a charge of criminal damage **Jaggard v Dickinson** 1980 Div Ct based on the wording of Section 5(2) of the Criminal Damage Act 1971.

Involuntary Intoxication

The law here is completely different.

An accused can argue absence of mens rea (whether intent or recklessness or specific or basic intent) because of involuntary intoxication and he may be acquitted.

If the prosecution prove the accused had an intention (albeit a drunken one) he will still be convicted **R v Kingston** 1994 Lords (the paedophile whose coffee was spiked with drugs but who still formed the intent for indecent assault).

Courts have decided there are two categories of drugs in this context - dangerous and non

dangerous. The Court of Appeal have suggested that the intoxication which results from taking a non dangerous drug will be involuntary. **R v Hardie** 1985 C A (arsonist took valium before starting fire - appeal allowed - it was a non dangerous drug and he was not reckless in taking it. Intoxication was therefore involuntary).

Reform of the law on intoxication

The present law

Originally at common law voluntary intoxication was no defence to **any** charge.

The rule allowing a defence in crimes of specific intent was developed in the 19th century as a 'merciful relaxation' to avoid people being hung or transported in 'hard luck' cases.

Majewski confirms the rule based on specific/basic intent (while conceding it is not logical) on the grounds that:

- a) it removes harshness (in crimes of specific intent eg murder)
- b) it protects the public against physical violence (by denying any defence at all in crimes of basic intent eg S20 S47).

Proposed reforms

The Law Commission in a Consultation Paper LCCP 127 (of 1993) proposed abolishing **Majewski** so that voluntary intoxication would be taken into account to decide whether mens rea existed along with all the other evidence in cases of both specific and basic intent. In addition a new offence of criminal intoxication would be created (so no one got off scot free).

When the Law Commission received its responses to its consultation paper (including objections from senior judges) it changed its mind. In their final report No 229 of 1995 the Law Commission proposed **keeping** the **Majewski** rule subject to minor changes ie abolishing the rule in **O'Grady** and **O'Connor** for intent offences so in future in those offences an accused would be allowed to rely on a drunken mistake in putting forward self defence.

This would have meant that for offences of intent voluntary intoxication would be taken into account both for formation of intent and for mistake in self defence and for offences of recklessness voluntary intoxication would not be taken into account either for formation of mens rea or mistake in self defence.

However in 1998 the Home Office in a consultation paper setting out proposed reforms to the Offences Against the Person Act proposed to **retain** the **O'Grady** rule.

It therefore seems that there is no present intention on the part of the government to

change significantly either the **Majewski** or the **O'Grady** rule. Section 76(5) of the Criminal Justice and Immigration Act 2008 has now given statutory effect to the **O'Grady** rule.

Mistake

This is dealt with in Elliott & Woods as a separate topic as part of mens rea. Manuals 3 and 4 deal with it in passing eg under self defence and intoxication.

This note explains how mistake is relevant both to mens rea and to different defences. The objective of this summary is to explain where mistake fits into the larger picture and bring together in one place the rules which apply when an accused claims he has made a mistake.

Mens rea

If an accused says "I made a mistake" this can be relevant to his mens rea (not actus reus).

For most serious criminal offences the prosecution must prove mens rea (intent or subjective recklessness) so for example if an accused destroys property believing it is his own he can not be convicted of intentionally or recklessly destroying property belonging to another. He will lack an essential element of the mens rea of criminal damage. An honest mistake can therefore negative mens rea **DPP v Morgan** 1977 Lords (such a mistake need not be on reasonable grounds).

For other criminal offences (sexual offences under the Sexual Offences Act 2003 for example) mens rea is now determined using an objective test. Belief in the absence of consent must be on reasonable grounds. This means that to afford a defence any mistake must be a reasonable one.

Defences

Self defence

Here an honest mistake (whether or not on reasonable grounds) can trigger the defence. An accused may use such force as is reasonable in the circumstances as he honestly believes them to be **Beckford v The Queen** 1988 P C. An honest but mistaken belief affords a defence **R v Gladstone Williams** 1984 C A. (The same rule would apply to Prevention of Crime).

Duress

In contrast this defence requires a reasonable belief in an imminent threat of death or

serious injury to the accused or another. A mistake may trigger this defence as long as the mistake is reasonable **R v Safi** 2003 C A.

Voluntary intoxication

Can an accused take advantage of a drunken mistake? Generally the answer to this question is no.

If the mens rea or defence uses an objective test then a drunken mistake is not likely to be a reasonable one.

If the mens rea is subjective then the rule in **DPP v Majewski** 1977 Lords will apply. For offences of general intent a drunken mistake is no defence. For offences of specific intent (murder, attempt murder, S18 or other attempts) a drunken mistake can negate mens rea if due to intoxication no intent was formed (the accused may still be liable for a lesser offence of general intent).

Contrast this with the rule in self defence where a drunken mistake can **not** be relied on (whether the offence charged is one of specific or general intent). **R v O'Grady** 1987 C A (manslaughter) and **R v O'Connor** 1991 C A (murder).

Unusually in criminal damage voluntary intoxication can provide a defence because of the wording of Section 5(2) of the Criminal Damage Act **Jaggard v Dickinson** 1980 Div Ct.

Conclusion

From this brief outline you will see there is no single legal rule governing all mistakes. You must look at the context of the mistake. You must ask:

- is it relevant to mens rea
- is the mens rea required objective or subjective
- is it relevant to a defence
- does the defence allow an honest mistake (self defence) or require a reasonable mistake (duress)
- is it a drunken mistake (Majewski, O'Grady and O'Connor will apply)
- is it a drunken mistake raised as a defence to criminal damage (Jaggard v Dickinson will apply).