Module 4 – Criminal Law (Offences against the person)

Murder

There are 3 types of homicide:

- Murder - Direct intention
  - Indirect intention
- Voluntary Manslaughter
- Involuntary Manslaughter

Murder

It is a common law offence (not created by statute law)

Defined by Coke: - "When a person of sound memory and of the age of discretion unlawfully kills any reasonable creature in being under the Queens peace with malice aforethought so that the victim dies within a year and a day."

Sound memory – Sanity
Age of discretion – 10 - 13 Doli Incapax (not an assumption since 98)
14 – 17 Young person
18 – 21 Young adult
21 + Full liability

Law Reform Year and a Day Rule Act 1996 abolished the year and a day rule.

AG (Ref No 3) 1994 - Pregnant woman was stabbed and the baby was damaged; born alive but then died from the initial stabbing

R v Malcherek & Steel (1981) - Put victim in coma and on life support machine. Hospital turned off machine and victim died.
Defence was that doctors had killed victim
Court decided that death had already occurred at the time of coma (brain dead) and therefore the defendant was guilty.

Malice Aforethought – MR – Can't use it because of Cunningham

Murder is a result crime.

AR = Death
MR = Intention (Direct/Oblique intention to kill or cause GBH)

R v Smith (1961) - Armed robbery. Police officer jumps on bonnet of car, gets thrown off and dies.
Re interpreted law because murder is common law and included GBH as a MR. (basically transfer max to mandatory life)
S20 GBH turns into manslaughter

Intention to kill = Judge is told to overdo the direction towards the jury

Oblique intention = The intention is to do harm to the victim but not to kill them

Smith & Hogan gave an example of oblique intention: -

"A bomb is put on a plane, timed to explode over the mid Atlantic,

1. Bomb doesn't kill
2. 30,000 ft will kill
3. Drowning

Intention is fraud (not to kill)

Special directions for oblique intention in murder

Old law

Hyam v DPP (1975) - H is an arsonist. He was not happy for ex boyfriend with other woman. Set fire to new girlfriend's house for revenge.
2 children die as a result
Successfully convicted of murder but appealed
Appeal court said conviction was correct
COA said "H must have foreseen that death or GBH was a highly likely result of her actions"

Direction "Foresight of consequence was the same as intention"

New law

R v Maloney (1985) - M shot step father in head with shotgun. He claimed he had no intention to caused harm (both drinking and army discussions) Bet on who could load the gun and fire it the fastest. M won (obviously)

Intention? No
Foreseen death or GBH? No but convicted of murder

Appealed COA → HOL and decided to change the Hyam direction to the Maloney test (two tier test) (Lord Bridge)

1. Was death or GBH a NATURAL CONSEQUENCE of the defendants actions and did the defendant see that one or other of the consequences would follow this act?

2. If the defendant foresaw death or GBH to be a natural consequence of his actions the jury might INFUR from this evidence that the death was intended.

Therefore "foresight of consequence is evidence of intention"

Hancock & Shankland (1986) - Co-defendants
Appealed on the Maloney direction – jury not clear
2 miners aimed to stop miners going to work. Drop a concrete block onto the motorway to stop them. Hit taxi driver and kills him.

Applying Maloney 1 = Yes
Applying Maloney 2 = Yes, foresaw and did intend jury said.

Problem – Maloney used natural consequence (degree of probability)
H & S said natural consequence had to be explained in degree of probability to the jury.
HOL said they agree and natural consequence needs clarification

Lord Scarman – Handcock & Shankland Test

"The greater the probable of consequence, the more likely it was foreseen and therefore the greater the probability it was intended."

Direction – Natural Consequence replaced with probability of consequence

R v Nedrick (1986) - N set fire to a building having a grudge. Kills someone.
Used H & S direction and convicted of murder
Appeals – needs direction on the level of probability

New Direction – Nedrick direction

"In diffivcult and exceptional cases the jury should be given the following: -
"Where death or GBH is not the defendants aim or wish the jury may INFUR intention if they decide that death or GBH was a virtual certainty and the defendant foreseen this was the case."

There have been 3 cases to test the Nedrick direction: -

- R v Gregory & Mott (1995)
G gave M a knife and sais to stab the victim. She did and the victim died.
Both charged with murder
M said she didn't intenbd to stab victim, just did it.
Both convicted
M appealed – said judge didn't give Nedrick direction
Judge was right – not exceptional case (not oblique intention)

  COA said this was not a rare and exceptional case where N direction was needed. In cases were there is a direct attack on victim, it was unlikely that further direction to the jury would be needed as intention would be clear.

- R v Scally (1995)
Arsonist killed child in building.
Convicted of murder
Appealed – COA – Scally was an exceptional case and N direction should be used.
Judge gave direction but said "virtual certainty" (Hyam direction)
Conviction was quashed

- R v Woolin (1996)
W threw a baby at wall. Baby died. Police arrived and W said he didn't know what happened or how baby had died. Later on admitted to it.
Oblique intention, however judge used the words 'substantial risk' instead of 'virtual certainty'
Appeal judge said it was different to Nedrick because there were 2 pieced of evidence relating to the AR.
    1) Initially denied all knowledge (Had guilt in his mind)
    2) Then confessed

Criminal Justice Act 1967 - 'Jury must consider all evidence … reaching a verdict'

Summary of Murder

1. In cases of direct intention the role of the judge should be minimal as the events should be obvious to the jury.

2. Cases of oblique intention are very rare and exceptional

3. Only in these exceptional cases should the judge give the Nedrick Direction
   I.e. is death or GBH a virtual certainty, if so this is evidence from which the Jury may infer intention.

4. An exact Nedrick Direction is not required in instances where there is more than 1 source of evidence.

The Actus Reus of Murder

Murder is the best example of a result crime. If the victim was in being at the time of the defendants actions, only result acceptable for murder is death.

AG (Ref no 3) 1994 - This established time of life (taking first breath)

R v Malcherek & Steel (1981) - Established brain death was the point at which life ended.

Cokes definition: 'Within a year and a day' was abolished in 1996 by the Law Reform Year and a Day Rule Act 1996

Causation in Murder cases

With the abolition of the year and a day rule, there is now technically no limit to the time scale between the defendant's actions and the victim's death. Regardless of the time scale for a successful prosecution, the prosecution must prove 2 types of causation: -

1. **Factual Causation**
2. **Legal Causation**

Factual Causation

This is also known as the 'but for' test. If the victim had not died but for the defendants acts, the defendant can not be guilty of murder. In white for example, his intention was to murder his mother, but she died of natural causes before his plan was affective. When the defendant has taken action which was not the cause of the victims death, the defendants actions are described as DE MINIMUS.

Legal Causation

Under English law the prosecution must prove that the defendant's actions were an OPERATIVE and SUBSTANTIAL cause of death. In other words the defendant has accelerated the death of the victim.
Under English law there is no such thing as euthanasia. A person that accelerates the death of a terminally ill person is guilty of murder.

- Novus Actus Intervenies

The job of the prosecution is to prove that the defendant's actions were an operative and substantial cause of the victims' death. So called legal causation. The defence for its part will attempt to introduce evidence of an intervening act(S) which the defendant claims breaks the chain of causation. These submissions by the defence fall into several popular categories, however, an examination of case law suggests that intervening acts accepted by the courts are extremely rare.

1. **NATURAL CAUSES**

R v White (1910) - successful as a defence

2. **3rd PARTIES** (Anyone except the defendant or the medical profession)

R v Pagett (1983) - P was in his house with his girlfriend and police were outside. He used her as a human shield and she is shot and killed.
P said he didn't harm her.
Court said his actions were the operative and substantial cause of death.

3. **BY VICTIM**

R v Holland (1841) - Minor hand injury and was advised to have it amputated. Refused and became ill, had to have it amputated but too late and died.
Court said Holland was the operative and substantive cause of death

R v Blaue (1975) - Blaue stabbed a Jehovah witness and she refused a blood transfusion and died. Blaue convicted of murder and appealed.
Appeal was rejected - "You take your victim as you find him"
COA – When the victim makles a decision about their health it is a subjective test and best for them
COA – If the victim behaves in an unreasonable manner it is an objective test that MAY break the chain of causation

R v Dear (1996) - Dear slashed victim with knife. Victim died days later after medical treatment. Dears defence was that victim had reopened or neglected the wounds. Appeal is rejected
COA – "Only a daft response by the victim would break the chain of causation"

4. MEDICAL PROFESSION

R v Jordan (1956) - Victim stabbed and went to hospital. Died 8 days later in hospital. Jordan convicted of murder.
Hospital made mistakes: -

- Gave drugs that the victim had an allergy to
- Put victim on a drip and water logged his lungs

COA – hospital had broken the chain of causation
COA "TREATMENT WAS PALPABLY WRONG"

R v Smith (1959) - smith was a soldier at camp, got into a fight and victim is stabbed.
Victim seen to by medical auditory (not qualified) and dropped several times, also diagnosed as drunk only.
Later on seen by doctor, but too late and he dies.
Smith said treatment was palpably wrong, but court said it was only poor.

R v Cheshire (1991) - Cheshire got into a fight and shot victim in leg and stomach. Hospital didn't give affective treatment and victim develops breathing difficulties, they do a tracheotomy badly and he dies.
Cheshire was said to be the operative and substantial cause of death and the treatment was only poor.

R v Mellor (1996) - Mellor assaults and old woman and breaks some ribs and cheek bones. She dies 2 days later from pneumonia.
Mellor said hospital broke the chain of causation by giving oxygen incorrectly which caused the pneumonia.
COA said Mellor was the operative and substantial cause of death

The position of the defendant who makes no contact with the victim

In these circumstances the defendant denies liability for the victim's death. Case law suggests that a murder conviction is unlikely, but there is plenty of case law on involuntary manslaughter.
This topic falls into 2 main types: -

1. **Frightening the victim to death**
2. **Victim trying to escape from the defendant.**

Frightening the victim to death

R v Towers (1874) - Towers assaulted a woman carrying a baby (in her arms). Woman screamed and the baby cried to its death (2 weeks later)
Guilty of involuntary manslaughter (unlawful act)

R v Hayward (1908) - Hayward went home to beat his wife and she ran outside onto the road, collapsed and then he kicked her in the arm.
Assumption – kick killed her.
What happened – She had a heart problem and died of fear.
Judge said – "Death by fright alone caused by an illegal act such as threats of violence would be sufficient enough"

Victim trying to escape from the defendant

R v Arobieke (1988) - In Wirral. Defendant went to train station to find victim. Victim seen him and ran across rails and died (electric)
Convicted of manslaughter
Physical presence was not enough for the conviction, and he did not say anything to the victim so the conviction was quashed.

R v Corbett (1996) - The victim was mentally handicapped and heavily drunk. They got into a fight and victim fell into gutter and was hit by a car and died.
Corbett convicted of involuntary manslaughter.

Problems & Reforms to murder

1. **Nedrick or Hyam? - Which is best for oblique intention?**

   Nedrick - Virtual certainty of death or GBH
   - Defendant foresaw death or GBH
   - Jury can infer foreseeing as only evidence
   - This favors the defendant and is currently used

   Hyam - Foresight is the same as intention
   - This favors the prosecution and us not currently used

2. **Extend murder to include not only intention but extreme recklessness**

3. **Make different degrees of murder available**

4. **The mandatory life sentence abolished**

   - This would favor judges as the mandatory life sentence restricts their freedom and expertise in sentencing
   - It is the most likely one to come into force.

Voluntary manslaughter

This is an entirely statutory offence brought about by common law.
It was created by the **1957 HOMICIDE ACT**

This act created 3 specific defences to murder: -

1. **Diminished Responsibility** 1957 Homicide Act **s2**
2. **Provocation** 1957 Homicide Act **s3**
3. **Suicide Pact** 1957 Homicide Act **s4**

However there are 3 defences, only the first 2 will be used as in our syllabus suicide pact is not seen.

Murder + Specific defence = Voluntary manslaughter

- Voluntary manslaughter may not seen a fair swap from the charge of murder, as if one of the defences are used, it means that the defendant has accepted guilt for his actions for the lower charge, and therefore is guilty and no acquittal will be given.
- Voluntary manslaughter does not have a mandatory life sentence; it has a maximum life sentence. This means that the judge can give any suitable sentence (even as low as community service)
- This conviction will be treated as any other conviction and not murder and therefore will allow the defendant to be released early for good behavior or parole. (unlike murder)

Involuntary manslaughter isdn pot an offence that you can be charged with. It is the product of being charged with murder and successfully pleading one of the defences above.
During the trail of murder the defendant has to plead of the defences by making a submission to the judge. However, the jury must not be present at the time of the plea.
If the defendant can prove that there is some evidence of the defence, then the judge will accept it. The juries are then told to return and are informed about the submission.
The judge will tell the jury that there is no option for an acquittal and that they have 2 options to their verdict: -

1. Guilty as charged (murder)
2. Guilty of involuntary manslaughter

Diminished responsibility s2

This was brought in because of the problems with insanity. Insanity for murder cases had 2 main problems: -

1. Extremely difficult to prove you are insane
2. Insanity could be imposed by the judge for the benefit of the defendant, who rejected it (because they were insane)

The judge is now no allowed to make any reference to the word insanity or comments to direct ion insanity or the case is ruined.

Diminished responsibility can be defined as, **"Abnormality of the mind, arrested or retarded development or disease or injury to the mind, as to severely affect the actions of the person."**

R v Byrne (1960) - Byrne was a sexual pervert and strangled and mutilated a young woman due to irresistible impulses.
He claimed diminished responsibility but was rejected.
Found guilkty of murder and appealed
COA said the judge had been thinking of insanity rather than diminished responsibility and the impulses would be sufficient for the defence.
Byrne's conviction for murder was substituted for voluntary manslaughter.

R v Lloyd (1976) - He murdered the victim saying he was suffering form uncontrollable impulses
Found guilty of murder but appealed on the judge misdirecting the jury but saying "totally irresistible impulses" which related to insanity
COA said "there doesn't need to be a totally irresistible impulse, it needs to be an impulse that the reasonable person would find difficult to control. It needs to be a significant impulse."
Convicted of voluntary manslaughter

R v Seers (1985) - Judge said 'was the defendant bordering on insanity'. This was misdirection of the judge and the conviction was changed to voluntary manslaughter.

The problem with diminished responsibility and the role of alcohol and drugs

In cases of murder the law allows both voluntary and involuntary intoxication as a defence. The law allows the defendant to plea diminished responsibility OR intoxication, but not both. Alcohol and drugs can not make the defence of diminished responsibility more effective.

R v Gittens (1984) - Gittens was suffering from depression and also heavily drunk. He raped and murdered both his wife and step daughter.
Raised the defence of diminished responsibility which was accepted by the judge, but also said that it was made worse by the alcohol.
The judge directed the jury to ignore the reactions of the alcohol and base their verdict on the depression alone.
COA said it was the correct way to do it.

R v Sanderson (1993) & R v Egan (1993) - Both cases had the some circumstances and outcomes

Following the case of Egan the judge said, "**We can not allow a situation where by a defence that the court accepts becomes a stronger defence because of the affects of alcohol or drugs**"

The role of alcoholism

Although alcohol doesn't add to diminished responsibility, it is possible that excessive alcohol abuse can cause diminished responsibility. In the case of TANDY (1988) she murdered her daughter whilst drunk and was convicted of murder. She appealed claiming that it was not the alcohol, but her alcoholism that was the problem and this had been ignored by the courts. The COA made the following observations: -

- **Alcoholism is a disease**
- **It is not automatically a disease of the mind**
- **Long term alcoholism can have an impact on the brain**
- **If the jury believed in a case of severe alcoholism the defence of diminished responsibility would be available**

Diminished responsibility and Intoxication

Intoxication is a defence applicable in cases of murder. The defendant CAN NOT plea diminished responsibility AND drunkenness.
During most ask whether the defendant would have committed this crime if suffering from depression alone. Alcoholism (as a disease) is acceptable as causing diminished responsibility.
It would be up to the barrister to decide which defence applies. Pleading an intoxication defence for murder can result in a finding of involuntary manslaughter. Pleading diminished responsibility as a defence can lead to a finding of guilty of voluntary manslaughter.

The impact of the defence on the burden of proof

A diminished responsibility can lead to a very bizarre situation. The defendant has to plead diminished responsibility himself.

- **Stage 1**

The defendant raises the defence (it needs to be supported by 2 medical experts) and, it has to be proven on the balance of probability

- **Stage 2**

Once the defendant has raised the diminished responsibility the prosecution is able to question this and ask whether or not it is insanity
This creates the situation where the defence is pleading guilty to voluntary manslaughter, while the prosecution's case is that the defendant is not guilty by reason of insanity. Insanity pleas lead to an acquittal.
The type of murder seems to impinge on this. If you are high profile case, the courts are less willing to accept a plea of diminished responsibility, because public opinion would not favor it.

R v Sutcliff (1981) - Insanity was suggested ands dismissed
Diminished responsibility was not accepted either
Eventually he was tried as mentally normal. However, after a while in prison he was moved to a psychiatric prison.
The defences he pleaded would have been accepted for a lower profile murder – seems unjust

Crimes of passion often, however, have diminished responsibility pleas allowed

R v Vinagrehe for example.

Provocation s3

This was introduced because the common law was not working to well. In 1957 the HOL was not allowed to change its mind. Almost certainly the case of R v Bedder (1954) gave raise to this section of the act dealing with provocation.

R v Bedder (1954) - Bedder was 18 and impotent. He attempted to have sex with a prostitute but couldn't and she taunted him and physically assaulted him about this. He immediately stabbed her to death

Provocation at the time was interpreted as '**THINGS SAID, OT THINGS DONE**'. Bedder pleads on these grounds.

The test for provocation is the **REASONABLE MAN TEST**. I.e. would the reasonable man have done the same?

The question 'what is a reasonable man?' was raised and the judge suggested that 'can you be seen as taunting / provoking someone for something which is irrelevant to him'
The jury was directed to consider whether or not a reasonable man would have behaved as Bedder did.
Bedder was convicted.
He appealed and the HOL upheld the conviction as at the time it could not change its mind.

This case created a lot of interest and the only way to redress it was the framing of a **statute of law.**

- In future characteristics of the defendant should be brought into play / defence.

The 1957 statute said '**The person was provoked by things done, or things said, or by both to loose his self control. It is a matter for the jury to decide if a reasonable man would have behaved as did the defendant**'

2 things were established: -

1. The jury , not the judge decides provocation
2. The test for provocation is SUBJECTIVE (what it meant to the defendant)

Case law of provocation

R v Brown (1972) - Brown reasonably mistakes that a gang was about to attack him. He killed one of the 'attackers' with a sword.
Provocation plea accepted

R v Doughty (1986) - (shows the lowest level of provocation)
Doughty could not hear the TV because the baby was crying so she struck the baby and killed it.
Judge did not allow this defence to be put to the jury but the COA concluded it should have been put to them.
Verdict of involuntary manslaughter was given

R v Johnson (1989) - (self induced provocation)
Johnson threatened a man and a woman. The man turned on Johnson who he then killed. In this case the judge allowed the plea of self induced provocation to be allowed.

R v Acott (1977) - This case suggests there is a difference between pleading provocation as a defence and actually producing evidence
Acott's mother had fallen down the stairs and he had tried to resuscitate her, so he said. The prosecution said he had murdered her by beating her. They also added that he had killed his mother because she had provoked him.
He was convicted but appealed because the judge did not direct the jury on provocation

The COA upheld the conviction because the prosecution could give no evidence
Therefore : IS THERE EVIDENCE OF PROVOCATION?
DID THE DEFENDANT LOOSES HIS SELF CONTROL?

R v Duffy (1949) - Duffy talked about 'a sudden and temporary loss of self control' judges tended to add this to the provocation direction, despite it being overruled by the statute

This was bad news for women and a male dominant description of the defence became apparent. Characteristically men are prone to act in this way, whereas women are likely to pick their moment to kill. This can be constructed as malice aforethought and although not necessary for murder it is evidence. In the 1957 the statue simply says 'lose his self control' not 'sudden and temporary' which was a result of the case of Duffy. However the courts tended to continue with the Duffy timescale. The quicker the death following the provocation the better the defence.

Case law for provocation

R v Ibrams (1981) - (Timescale)
The victim had threatened Ibrams and over long periods of time (5 – 7 days) they reported him to the police who did nothing
Ibrams et al incapacitated there would-be attacker. They plied him with drink and then broke his arms and legs, he died.
Prosecution brought a charge of oblique intention
Defendant claimed provocation – this defence was rejected because of the timescale was too long and therefore sudden and temporary loss of self control did not apply.
COA rejected appeal.

R v Baille (1995) - The provocative action was directed at his son. Baille went after a drug dealer who had threatened his son. He drove to the victims house which was about 30 minutes away and then chased the victim for about 15 minutes before catching him. Therefore his 'mad rage' lasted for 45 minutes.
The judge rejected his plea for provocation on the time scale; however at appeal the COA accepted it.

Rule of some guidance seems to be that provocation is accepted when action occurs within one hour of provocation.

Loss of self control

The defence of provocation assumes an explosive loss of temper caused by things said or things done. The defendant who is worn down by his victim and eventually submits doesn't meet the requirements of the defence.

R v Cocker (1989) - Terminally ill wife who repeatedly over a period of time asks him to kill her. Eventually he does due to her nagging.
Cocker tried to claim the defence of provocation but judge rejects it saying it 'wasn't a sudden loss of self control'
Jury say he was provoked but it wasn't put to them so therefore he is guilty of murder
COA said judge was correct in the direction as Cocker hadn't had a loss of self control

The characteristics of a reasonable person

This was one of the main reasons for the introduction of the statutory defence. Bedder was judged as a non impotent man when in fact he was an impotent youth. The 1957 statute talked about a reasonable person, but gave no guidelines as to what this meant.

R v Camplin (1978) - Camplin was 14 and he had been rapped by an adult man. Then taunted by him about what he had done to him. Camplin hit man with a pan and killed him.
Judge accepted provocation and directed jury on the 'reasonable person' but Camplin was a reasonable boy.
Jury said they would not have convicted if the direction was a reasonable boy.
Conviction changed to voluntary manslaughter

R v Newell (1980) - Newell was a chronic alcoholic and recently dumped by his girlfriend. Someone he knew taunted him about these things so he beat him to death with an ashtray.
Jury convicted him of murder
COA said that provocation will include

- Characteristics being taunted had to be permanent
- Characteristics had to be a part of your personality

Conviction changed to voluntary manslaughter

R v Raven (1982) - Ravens characteristics were he was 22 years old but had a mental age of 9. He had also been living rough for 2 ½ years. Allowed mental age but not living rough as a characteristic

R v Roberts (1990) - Roberts was 22 years old and has impaired hearing which has lead to impaired speech

R v Marhall (1005) - Marhall is a heavy solvent abuser and during a session he is taunted about it.
Judge said "reasonable person" but did not mention solvent abuse.
COA said direction was correct
HOL overturned conviction

HOL said
"Persons entire situation must be considered even if the defendant brought it on himself"
"Condition doesn't have to be permanent"
"Doesn't need to be a part of your personality"

Psychological characteristics

The test for provocation is objective; would the jury with the defendant characteristics have suffered from the same sudden ands temporary loss of control? However, the courts appear unwilling to accept the defendant subjective mental state. The reasonable person test assumes that everyone has the same level of self control. When the defendant has a very short 'fuse' and explosive personality the judge won't direct the jury to take this into account. Therefore suggesting diminished responsibility (mental characteristics)
The reason the courts are not willing to accept mental characteristics is that this would lead to a blurring of the distinctions between diminished responsibility and provocation.

R v Dryden (1995) - Dryden built something and the local authorities were coming to take it down. He pulled out a gun and shot the planning officer to death.
Had been provoked and was eccentric and obsessive.
He said the judge should have built this into the direction
Judge said mental characteristics are not provocation

R v Humphreys (1995) - Battered wife and her characteristics were: -

1. Extremely immature
2. Attention seeking
3. Explosive personality

The first 2 were accepted but the last was a mental state and not provocation.

R v Luc Thiet Thuan (1996)- Luc had been taunted by his former girlfriend about the size of his penis. And he had brain damage.
He claimed the direction should have included the brain damage

Provocation is based on RESPONSE FACTORS. Brain damage is a CONTROL FACTOR and not acceptable for the defence of provocation.

R v Smith (2000) - Smith got into an argument and killed someone.
Raised 3 defences: -

1. Provocation
2. Diminished responsibility
3. Self defence

He was convicted of murder and appealed to the COA and then HOL who said, "His clinical depression which may have reduced his level of control should have been put to the jury"

Cumulative provocation – Battered wife syndrome

One of the main criticisms of provocation is that it was a male dominated defence that appears to discriminate against women. This was due to the common law wording which led judges to look for 'sudden and temporary' loss of self control. Battered wives in particular who chose their moment to kill their partners tended to fail with this defence.

R v Thornton (1992) (1995) - She had been a victim of battered wife syndrome and murdered him and pleaded provocation.
It failed on 3 things: -

1. She sharpened the knife (cooling off time)
2. Waited for him to go to bed
3. When ambulance came she told them not to bother with him.

R v Ahluwalia (1992) - Long term abuse, arranged marriage, he had lots of affairs, and he had tried to kill her so she set fire to him in bed

R v Humphreys (1995) - Same as other Humphreys case.
She leaves home very young – prostitute at 16 and living with her pimp at 17
He suggests to men pub to come back for group sex with her. They come back.
He makes sexual advances to her and she thinks she is going to be gang rapped by them all so she slashes her wrists.
He taunts her about this so she stabs him to death.
Judges direction was about taunts to slashing wrists and the jury convicted on this direction

A change in the law

All convicted of murder and serving mandatory life sentences the plight of these women only came to light following a plot in 'Brookside' regarding the abusive character 'Jordash'. The media highlighted Humphreys etc… as real life examples of this long term abuse. Under the weight of public opinion these women were allowed to appeal. When their full story came to light about the abuse that lead to their attacks on their partners the appeal courts decided that the original trial court judges were incorrect to use the Duffy direction of a 'sudden and temporary' loss of self control. The appeal courts accepted that these women were the victims of cumulative ort 'slow burn' provocation. Although these cases are exceptional this recent development in the interpretation of provocation has led to much greater justice in the way the defence works for women.

Criticisms of provocation

1. **It is a male orientated defence**

   Has got better due to the acceptance of battered wife syndrome but it still works on the words seen in Duffy (sudden and temporary)

   A possible reform could be to change it to the Australian version of SELF PRESERVATION which allows the defendant to put forward the whole story rater than the immediate reasons why they killed.

2. **It is difficult for the Jury to understand**

   More characteristics are being accepted but the jury can't imagine characteristics that are unimaginable.

3. **The blurring of the distinction between provocation and diminished responsibility**

   R v Luc Theit Thuan (1996)- Brain damage was a control factor and not accepted as provocation as it hinted at diminished responsibility. This become very persuasive precedent as it was decided in the Privy Council

   R v Smith (2000) - The HOL claimed that depression was a characteristic for provocation.

   This case of Smith has made the 2 defences be come blurred

Involuntary Manslaughter

The top level of involuntary manslaughter is: -

- **UNLAWFUL ACT** or
- **CONSTRUCTIVE INVOLUNTARY MANSLAUGHTER**

You are charged with this rather than claim it as a defence, like voluntary manslaughter.

Goodfellow (1986) - Created 3 guidelines for proving this offence

1. **Mens Rea of the offence** → Intention or subjective recklessness to commit any unlawful act short of death

To be guilty of this offence the defendant must cause death but the defendant must not have intended (direct or oblique) to cause death as that would be a murder charge. The prosecution has to prove that the defendant intentionally or subjectively recklessly committed a crime and as a result of that crime the victim, subsequently dies.
E.g. s47 ABH OAPA 1861 is a crime which can be committed intentionally or recklessly. The level of injury would be soreness, tenderness, or bruising would not lead the defendant to consider the possibility that the victim could die. If the victim does die as a result of s47 AB a murder conviction is not possible! But it would be an ideal opportunity for the prosecution to press for involuntary manslaughter as a result of an unlawful act.

R v Lamb (1967) - Have to start by proving common assault.
He shot his friend dead and convinced court he had no intention to kill. So charged with unlawful act
Had a revolver and said he didn't understand the workings of the gun and believed that the bullet (only 1 in the gun) was far away from the firing chamber.

Fagan – 'put victim in immediate fear of unlawful physical violence'
Lamb's friend had no fear.
Lamb is not guilty because he has no MR of the offence of s47

2. Unlawful act actually means criminal act

The term unlawful is misleading, it covers not only criminal but also civil behavior such as contract, nuisance, trespass etc… therefore in practice at the very least unlawful actually means criminal and probably criminal that results in harm.

R v Franklin (1883) - He threw a machine off the pier into the sea that hit swimmers
Charged with unlawful act (trespass to goods)
It was not strong enough to be found guilty of involuntary manslaughter

R v Cato (1976) - Cato injected mixed heroin into friend (another addict who had mixed it fro himself) he overdoses and dies
Misuse Of Drugs Act 1971 – injecting in this way is not a criminal offence (doctors have to do it)
Criminal offence was the possession of heroin (was seen as likely to do harm)
Convicted of voluntary manslaughter

R v Dalby (1982) - Similar to Cato
Dalby convicted on same legal grounds as Cato. He appealed saying the drugs being used were not illegal but prescribed.
Conviction overturned

R v Kennedy (1998) - Kennedy sold a ready made syringe of drugs. The victim used it, overdoses and dies.
Offence was 'encouraging the misuse of drugs'

3. The crime has to be a dangerous crime

In addition to the act needing to be criminal, case law has confirmed on several occasions that the act must be dangerous. However, the test for whether or not the act was a dangerous one is an objective test as seen through the eyes of the jury. Even if the defendant didn't subjectively see the danger, it is no defence if the jury regards the act as dangerous.

R v Church (1996) - He was attempting to have sex with a woman in his van but couldn't. They got into a fight and he knocked her out. He wrongly concluded she was dead and tried to revive her. He couldn't so he dumped her body by a river bank and she rolled into the river and drowned.

Charged with unlawful act

1. MR? Yes (for a crime)
2. Crime? Yes
3. Was it dangerous? He said no because he thought she was already dead
   The jury was directed it was an objective test and concluded it was. Therefore guilty.

R v Dawson (1985) - involved in attempted armed robbery but attendant raised alarm and they left unsuccessful.
A short time later (1/2 hour) the attendant who was over 60 and had a heart condition had a heart attack and died.
Defendant's defence was the firearms were not real and he hadn't seen the possibility that someone would die.
Judge told the jury that the old man had a heart condition (that the defendant didn't know about)
Jury had an advantage of hindsight
Convicted on the direction
Overturned because of direction

R v Watson (1989) - Similar to Dawson. Burgled a house and the householder had a heart attack a short while later
Watson denied it was dangerous
Judge said to jury 'Do you think it is dangerous to burglar a frail 87 year old mans home?'
This was a miss-direction and he appealed.
Judge said that Watson would have seen the mans age and frailty and therefore the jury should know this fact to.

R v Ball (1989) - Ball had a dispute with a neighbour and had a shotgun, he also carried around blanks and live rounds in his pockets. He pulled out a bullet (unknown whether it was live ort not) confronts the neighbour and shoots him dead
Found guilty of murder (straight forward intention)
He put A cartridge into the gun and cant be guilty of murder through recklessness therefore reduced to involuntary manslaughter unlawful act.

Recap

Unlawful Act Involuntary manslaughter (UAIM)

You can't be charged with voluntary manslaughter. In voluntary manslaughter it is the next step down from a murder charge.

4 tests of GOODFELLOW

1. **Has the defendant got the necessary MR?**

For involuntary manslaughter the MR is intention or recklessness (section 47 – subjective recklessness)
Lamb 1967 no MR therefore no prosecution

2. **Unlawful = Criminal**

Oldest case Franklin. More recent Cato 1976 and Dalby 1982. the most recent Kennedy 1998

3. **Dangerous criminal act**

Church 1966, the judge directed jury to apply an objective test as to what was dangerous. NB. The jury must only know the same as the defendant new at the time of the offence.
Daby 1982 – Dalby did not know the victim had a weak heart
Watson 1989 – Watson did not know victims age but would have realised how old and frail he was from his appearance

4. **Was the aft aimed at the victim?**

Particularly in arson cases defendants would claim his act was only aimed at the building etc… however, as long as the victim dies, the law will include victim in the defendant's range of intention.

R v Mitchell (1983) - Mitchell assaults someone in a bus queue. His victim fell onto a frail old woman that ultimately died of her injuries
Was this transferred malice? Yes and No
Yes because his intention was section 47
No because you cannot transfer malice from section 47 (battery) into a homicide offence.

Mitchell's defence was that he might have transferred his malice to the victim but he was not intending to cause death

- You cant mix transferred malice, the charge must be like for like

Court decided this was irrelevant – it was enough that he had committed an unlawful act.

R v Goodfellow (1986) - Goodfellow was a perfect example of 1, 2, and 3
Goodfellow engineered a hate campaign against himself to deceive the council into re-housing him. He firebombed his own home and killed 3 occupants.
Goodfellow decided to defend himself using step 4. He said his intention was towards the building not towards the occupants.
Court decided that Goodfellow's MR was in committing the offence. It did not matter that he did not direct his intentions at the occupants. Therefore he was found guilty of involuntary manslaughter.

R v Williams & Davies (1992) - Similar to Goodfellow but: -
Williams & Davies picked up hitchhikers who believed the defendant's would rob him. The hitchhiker jumped out of the car and died.
The defendant's appealed on the grounds that their actions was not aimed at the victim, but as the victims money
COA decided that the defendant's were responsible provided that the victim's actions were to be expected.

Criticisms of Unlawful Act Involuntary Manslaughter (UAIM)

Although compared with other types of IM, UA has not been affected by the HOL recent rulings. However, in legal circles the offence is unpopular and both the HOL and the Law Commission have suggested the need for reform.
The criticisms take 2 main forms: -

1. The level of MR required for this offence can be extremely low

If the jury believes that common battery was objectively dangerous, the defendant could be found guilty of UAIM and face a maximum life prison sentence. This could be for an offence where the MR would normally carry a maximum of 6 months

2. The offence does refer to unlawful acts

This raises the question of whether an offence can be committed by an omission. There is no absolute rule on this issue but it is generally accepted that unlawful omissions are inadequate for this offence.

Gross Reckless Involuntary manslaughter (GRIM)

There are 3 types of involuntary manslaughter: -

1. Constructive Unlawful Act Involuntary manslaughter
2. Gross Reckless - Caldwell 1957 – Objective
3. Gross negligence - Defined as objective and subjective recklessness

    - 2 and 3 are almost identical

Until the early 1990's prosecutors considering MR in homicide cases considered 3 main offences: -

1. Direct and oblique intention resulted in murder
2. Intention or recklessness to commit a dangerous criminal act short of death or GBH resulted in UAIM
3. Levels of recklessness which were considered to be gross resulted in GRIM

Throughout the English legal system there were plenty of cases of people being convicted of GRIM

R v Seymour (1993) - Had a row with girlfriend and accidentally backed his lorry over her car and killed her.
GR driving – appealed
COA said offence was correct. Recklessness was Caldwell

R v Kong Cheuk Kwan (1985) - Captain of a high speed hydrofoil. On a clear day he smashed into a ferryboat in the harbor and killed the passengers
GRIM

In the early 1990's the COA gave several cases of GRIM the right to appeal against their conviction. In all cases the appellants appeal was based on the fact that their actions were not reckless but were in fact negligent.

R v Prentice & Sulman (1992) - 2 doctors held jointly responsible for injecting a patient into the spine with a drug that was meant to be introduced via a drip.
Both doctors were found guilty of GRIM
Appealed and conviction was overturned

R v Holloway (1992) - Found guilty of GRIM after he (electrician) rewired the main supply of a house to the water taps and the householders died.
Appealed on GRIM as he was negligent
Conviction overturned

R v Adomako (1993) - Convicted of GRIM after not monitoring the air supply of patient (anesthetist)
Appealed he wasn't reckless but gross negligent
HOL the correct / preferred conviction is GNIM
Defined it in SUBJECTIVE and OBJECTIVE terms

The impact of Adomako

As GRIM was defined in both subjective and objective terms. The objective definition (not seeing the obvious risk) was virtually identical to what would have been gross negligence. Unfortunately in the case of R v Prentice (1994) the COA and later the HOL defined gross negligence in the following ways: -

a) The defendant is indifferent to an obvious risk of injury to health
→ OBJECTIVE (Caldwell recklessness)

b) Actual foresight of the risk coupled with the determination to run it
→ SUBJECTIVE (Cunningham recklessness)

c) Appreciation of the risk with an intention to avoid it (high degree of negligence)
→SUBJECTIVE (Cunningham recklessness)

d) Inattention or failure to avert to the risk
→ OBJECTIVE (Caldwell recklessness)

From these definitions it would appear that the HOL considers gross negligence in both subjective and objective terms. The definitions are remarkably similar to Cunningham and Caldwell; subjective and objective recklessness, therefore it would appear that this broad definition of gross negligence means there is no longer any need for gross recklessness.
Since this direction the appeal courts seem to have no idea of what is the correct definition of gross negligence.

In R v Litchfield (1998) the appeal court defined gross negligence in subjective terms
In R v Singh (1999) the courts said the best way to deal with gross negligence is objectively.
In R v Lidar (1999) a short while after Singh the courts said that the best way to deal with gross negligence in subjective or objective terms

Conclusions of Gross Recklessness and Gross Negligence

1. UAIM is affected by Adomako although this type of manslaughter is unpopular with the legal profession because: -
   * It requires a very low level of MR
   * It may / may not cover unlawful omissions

2. The future of GRIM is unclear. In the case of Adomako, Lord Mackay concluded that GNIM should replace GRIM. However, some observers suggest that GRIM could still exist in the form of subjective recklessness. This was the basis of the case of Khan & Khan (1998). They were found guilty of subjective recklessness but on appeal the COA concluded there was no such offence and ordered a retrial.

3. The current state of GNIM is still uncertain, at the present time it appears to be both subjective and objective.

4. The whole issue if involuntary manslaughter is currently being reconsidered by the Home Office, they suggest 5 new definitions if IM would be introduced by statute: -

   - Reckless killing → GR
   - Killing by gross carelessness → GN
   - Killing with the intention to injure → UA
   - Corporate killing → ?
   - Substantial contribution to corporate killing → ?

Non-Fatal offences

1. Common Assault
2. Common Battery (1 & 2 are separate charges but can have both together)
3. OAPA 1861 s47 ABH
4. OAPA 1861 s20 GBH (1, 2, and 3 are linked)
5. OAPA 1861 s18 GBH

Common Assault & Battery

Common = Common law offence (non statutory offences. Case law not statute offence)

These common law offences have been developed by the courts and not by Parliament. However, the Criminal Justice Act 1988 (s39) tells us that these offences are summary with a maximum penalty of 6 moths custodial sentence and/or £5,000 fine.

Definitions COMMON ASSAULT - Words and action
'Causing the victim to apprehend immediate physical harm'

R v Fagan 1969 - 'It is to intentionally or recklessly put the victim in fear of immediate unlawful personal violence'

Intentionally = OBLIQUE or DIRECT INTENTION

Recklessly = SUBJECTIVE or CUNNINGHAM

AR of Common assault is words and actions

R v Mead & Belt 1823 - Just words & actions

Assault can also be no words → Stalkers phone and say or do nothing.

R v Constanza 1997, R v Ireland 1996, R v Burstow 1997

Actions

R v Lewis 1970 - Husband chased wife into bedroom
Common assault (she fell out of window)

R v Smith 1983 - 'Peeping Tom' she saw Smith at the window. Fear of immediate danger.

Common Battery

Common Battery is any application of force to the body of the victim.

1. Don't have to touch the body of the victim
   Touching clothing of victim (R v Thomas 1985 – Skirt lifted. She jumped out of the moving car)

2. Don't touch anything at all
   Indirect battery – Victim harms their self to avoid it.
   R v Martian 1881 – Locked doors in theatre, turned the lights off and shouted fire – People inside
   D.P.P v K (a minor) 1990 – Put acid in hairdryer – indirect battery

MR. – DIRECT or OBLIQUE INTENTION or SUBJECTIVE RECKLESSNESS

Key words used by the courts for battery – 'Trifling, injuries - broken fingernail-standard.'

Timberville v Savage 1669 - Put hand on sword and threatened the person – 'If I wasn't for the magistrates. I would give you a running through'

- Common assault charge failed because it was clear that he wasn't going to do it.

S47 ABH OAPA 1961

Level of harm necessary for s47

R v Miller 1954 - 'ABH includes hurt or injury calculated to interfere with health or comfort.'

R (a person) v Raigate 1984 - 'ABH is any sore or tenderness although it doesn't necessary have to manifest itself in a physical form.

R v Chan Fook 1994 - He believed that someone owed property/money. He asked aggressively. Locked the victim in a room. Tried to escape but fell out, suffered mental trauma. COA said, 'mental' would include this.

COA said about Chan Fook: -

1. Trial judges should not normally elaborate on ABH.
   E.g. harm → injury/actual = Not so trivial as to be significant.

2. The word bodily may need elaboration.
   Bodily → A person's state of mind. E.g. fear, distress, panic is not capable of being injured. However, ABH may include psychological damage supported by medical evidence.

R v Cox 1998 - They broke up a relationship. C threatened her by saying 'Go on holiday and you will die!' she suffered mental break down, stress, and migraines.

S18/20 GBH OAPA 1861

- S20 is the lesser offence. It carries 5 years imprisonment.

- S18 is the more serious offence. It carries life imprisonment.

    - The difference is INTENTION

GBH occurs when the injury becomes serious. All serious injuries are GBH, therefore the key to s18 and s20 has nothing to do with different types of serious injury, but is defined on the MR. of the defendant when the offence was committed/injuries caused. Old law assumed that s20, s18, like s47 were crimes of causation. They could only be proven following the evidence of common assault or battery. However, this is now considered to be bad law. Therefore s20 and s18 no longer require proof of common assault and/or battery.

GBH	**Mens Rea**	**Actus Reus = Serious**
S20	?	Fractured Skull
S18	?	Broken leg

Both of the above are serious and are therefore GBH. To determine the section, the MR. has to be looked at and not the AR.

S20 GBH OAPA 1861

Unlawfully and maliciously wounding or inflicting any GBH upon any other person with or without any weapon faces up to 5 years imprisonment. This is now a trial either way offence.

Maliciously: R v Cunningham

Following appeal, the court said that the word malicious meant either intention or reckless (subjective)

Unlawfully - Distinguishes between legal excuse and not.
E.g. Police Officer – Lawfully → Public unlawful.

Malicious - Intention or Recklessness.

Wound - Breaking all layers of the skin to produce blood.
E.g. R v Wood 1830 – Charged with malicious wounding – broke victim's collar bone.
Found not guilty – Wrong charge → GBH but not wounding

Elenshower v C (a minor) - C shot victim with air rifle. Hit victim in the eye. Massive hemorrhage of eye, but no blood spilt. Indictment wrong, therefore found not guilty. Should be inflicting GBH, not malicious wounding.

Inflict → Old law suggested that type word 'inflict' required the injuries required the commission of an actual assault. This meant that s20 was a crime of causation similar to s47. In other words the resulting injuries were the product of an earlier assault and/or battery.

R v Clarance 1888 - GBH. Infected wife with a VD. This was clearly GBH. Charged with s20. Unlawful? Yes. Malicious? Yes – Reckless. Wound? No. Inflict? Yes.
Not Guilty – Victim not common assault and or battery

- Word inflict required common assault and battery

OAPA 1861

The law requiring this process made an s20 offence little more than an aggravated version of s47. However, Wilson 1983 concluded that it was bad law. The HOL rules that the word inflict simply required that force was violently applied to the body of the victim so that the victim suffered GBH. This gave the prosecution an enormous advantage. They could now consider 2 separate charges. The failure of one charge no longer meant the automatic failure of the alternative charge.

The difference between s47 and s20

1. **MR.** → S47 – Intention or Subjective Recklessness to commit common assault or battery
   S20 – Intention or Subjective Recklessness to do harm – R v Mowalt 1967

   R v Grimshaw – Pushed glass into someone's face. Cut victim. Intention not needed to prove harm.

2. **Level of harm** → s47 = ABH
   S20 = GBH (If ABG proven, GBH also proven)

3. **s47 requires causation**
   s20 does not

The recognition of these differences enables the prosecution the possibility to charge the defendant with s20 GBH, but faced with the possibility that the charge will fail, the prosecution can lower the charge to the lesser offence of s47.

1861 – 1983 Wilson

The law was interpreted so as: -

MR. = Intention or Subjective Recklessness to assault or battery

+

AR = Actual injuries = Soreness = s47

+

AR = Grievous injuries = Fractures =s20

If s47 can not be proven, then s20 can not either. If you cant have proof for s20, then you can not prove s47.

Can prove s47 → Can prove s20

Can prove s20 → Can prove s47

Wilson 1983 →

MR. = Intention or Subjective Recklessness to assault or battery

+

AR = Actual injuries = Soreness = s47

MR. = Intention / Recklessness to do harm

+

AR = Grievous injuries = Fractures = s20 GBH

R v Savage 1991 - Saw boyfriend chatting up another girl. Threw glass and cut her.
S20 GBH – Malicious wounding

MR. – Prove intentional recklessness to do harm. She said, 'I didn't intend to harm and wasn't reckless' Intention was to throw drink over her, but glass slipped out of hands
Technically not guilty.

R v Parmenter 1991 - The defendant was 'baby juggling'. When he caught baby it caused internal bleeding.
Inflicting GBH. MR. = Intention (incorrect) Reckless (incorrect)

R v Savage 1991 - The appeal court said that he way to go about to s47 ABH (correct) Actual injuries (correct)

R v Parmenter 1991 - the HOL said that battery – ask parent, No – wouldn't give permission. Guilty of s47

Level of harm required for GBH

Until recent years the courts have been very vague on what GBH meant. They had given little guidance other than the word grievous meant serious. However, in the last 5 years the appeal courts have accepted the Crown Court needs more guidance on what is GBH.

Chan Fook 1994 - ABH
Burstow, Ireland 1996 - Severe physiological = GBH
R v Brown & Stetton 1998 - Severely beat up father
- Wanted to be a transsexual
Caused lacerations to face - GBH
Knocked out teeth - GBH
Broke nose (sometimes ABH) - GBH
(Used both weapons and fists)

Summary for OAPA 1861

	MR.	AR
Common Assault	Intention/Recklessness	Victims fear
Common Battery	Intention/Recklessness	Unlawful contact
OAPA 1861 s47 ABH	Intention/Recklessness (1 & 2)	Sore / Tender / Mind
OAPA 1861 s20 GBH	Intention to do harm/Recklessness	GBH
OAPA 1861 s18 GBH	Intention GBH	GBH

Conclusion to common assault and battery

1. Common law offence with a statutory punishment

2. Statute imposes a maximum penalty of 6 months imprisonment for each separate offence

3. Offence itself may not be important. The significance may be the fact that forms the link to more serious offences.

Conclusion to OAPA 1861 s20

1. Trial either way offence with a maximum penalty of 5 years

2. AR to s20 is serious harm which includes: -

   - Wounding
   - Inflicting
   - Serious physiological harm

3. Both s20 and s47 carry the same penalty, but have different MR. and AR. They can be regarded as alternative charges to each other.
   E.g. Savage and Parmenter 1991

4. S47 is judged Objectively (was the victim in fear?)

   S20 GBH is entirely Subjective (was the defendant intending or recklessly regarding the victims harm?)

S18 GBH – OAPA 1861

To be able to convert a GBH charge into a murder charge if the victim dies to rules relating to MR. for s18 and Murder need to be identical, as the courts had already decided the MR. for murder was direct or oblique intention. The same rule would apply fort s18 GBH. This was confirmed in R v Bryson 1985 when it was concluded that the MR. for s18 was direct intention to do GBH or oblique intention to do GBH (GBH was a virtual certainly following the defendants actions)

Recklessness as MR for s18

The statute clearly stated that s18 should be a crime if intention, however, in the case of Cunningham 1957 the word malicious was interpreted to mean, intention; direct or oblique or subjective recklessness.
This potentially meant that s18 could be interpreted as a reckless offence from 1957 onwards.
Eventually the courts decided that s18 GBH could be committed recklessly providing that the defendant was resisting lawful apprehension.

R v Morrison 1989 - Resisted arrest when trying to escape form the police. He escaped through a window. The police officer cut herself.
- S18 GBH – Malicious wounding.

S18 GBH – OAPA 1861

MR.: Intention AR: GBH

S18, 'unlawfully and maliciously by whatever means wound or cause GBH: -

1. With intent to do harm
2. With intent to resist or prevent the lawful apprehension or detention of any person

…… Crime trial of Indictment – Crown Court only
…… Maximum of life imprisonment'

We can see from the statute that intention is required for both causing GBH and resisting arrest, therefore it appears that the difference between s20 and s18 is that s20 has the MR. of Intention or Recklessness (Subjective) to do harm, whereas s18 is only Intention to commit GBH.

Intention for s18

S18 is the most serious non-fatal offence which can be committed short of killing the victim and facing a subsequent murder charge. In R v Smith 1961 the appeal court concluded that the intention necessary to commit murder was the intention to kill or cause GBH.

Murder - Intention to Kill
Or - GBH (s18)
Or - Direct or Oblique Intention

Nedrick 1986 - Was death or GBH a virtual certainty. Did the defendant see this? Jury can conclude he did.

Defences – Criminal

There are 2 types: -

- **General** – Covers a wide range of offences
- **Specific** - Covers only a few offences such as murder

To select an appropriate defence for an offence there Are 2 things to ask: -

1. **What defence is it?** (Specific or general)
2. **It is a total or partial defence?** (Specific are all partial, General tend to be total but can be partial**)**

E.g.,

Involuntary intoxication	- Total to all crimes
Voluntary intoxication	- Total to some crimes – Theft
Voluntary intoxication	- Partial to some crimes - Murder

General Defences

1. Insanity

Should be able to plead it for all offences, however, the courts usually only accept it for serious offences

- **Insane automatism is its full name –** this relates to involuntary actions and therefore involves no MR

- If not guilty a verdict of **'Not guilty by reason of insanity'** must be given

Pre 1991 – Wouldn't go into criminal justice system (prison) you would go into the mental health system (Mental institution)
1991 → Outcome of special verdict depends on particular offence committed
- Criminal procedure (insanity & unfitness to plead) Act 1991
- If you use this defence in a murder case the outcome (if successful) is a mental hospital sentence. For all other offences it is the judge's discretion on what the sentence should be. The judge may give an absolute discharge (except for murder)

4 stages to insanity

The defendant must prove that he is insane. This is proved on the balance of probability. The judge can impose the defence if the defendant is so insane he doesn't know that he is insane.

R v M'Naughten (1843) - He believed the prime minister was out to kill him so he tried to kill him but killed a civil servant in the attempt
M'Naughten rules of criminal insanity was created

Test 1

- **The defendant must prove he had a 'defect of reason'**

R v Clarke (1972) - Charged with minor theft. She said she had no MR because she had absent mindedly walked out of the shop without paying → defect of reason.
Defence of insanity was rejected because she merely forgot to pay and didn't have a 'defect of reason'

Test 2

- **A disease of the mind** (mind includes the whole body)

It is based on whether the problem is an internal or external factor

- Internal → Insanity (automatism)
- External → Automatism (Non insane)

R v Quick (1973) - Injects insulin and forgets to eat
Judge said he was suffering from insanity
Quick pleaded guilty & Appeals saying the judge had imposed insanity on him so that is why he pleaded guilty
COA said judge was incorrect as it was an external factor (Hypoglycemic) which is automatism. Not insane

R v Hennesey (1989) - Driving whilst disqualified. The reason for it was that he had forgotten to take his insulin & raised the defence of non-insane automatism. Judge disagreed
Pleaded guilty & appealed on the pressure of the judge
COA said judge was correct
Internal factor – Insanity
- Hyperglycemic

R v Kemp (1957) - Kemp suffered from hardening of the arteries. During the effects of the diseases he attacks his wife with a hammer and charged with s20 GBH
He raised the defence of insanity
Prosecution argued that M'Naughten required a disease of the mind
Judge said it is a disease of the person, not just mind
Not guilty by reason of insanity

R v Sullivan (1984) - Suffering form epilepsy and during a fit he caused GBH
Found guilty and appealed to the HOL
HOL ruled that epilepsy was a disease of the mind
Not guilty by reason of insanity

R v Burges (1991) - Attacked girlfriend and caused her injury. Burges said at the time he was asleep.
Tried to plead automatism but judge said it was insanity
Pleaded guilty instead
Appealed to the COA, COA said judge was correct

Test 3

- **Nature and Quality of the act**

R v Cadere (1916) - He was so ill that he sliced his victim's throat believing it was bread

Test 4

- **Knowledge that the act was wrong in law**

R v Windle (1952) - Had problems of medical illness which led to him poisoning his wife to death with aspirin. He didn't know it was wrong in law

- **If ANY of the 4 tests fail, they all fail**

Criticisms of insanity

1. It is very unpopular as a defence – people don't like it. Criminal procedure (insanity and unfitness to plead) act 1991 stopped the automatic entry into the mental institutions.

2. The defence is a criminal defence and is not in any way related to medical science
   British Medical Association said insanity defences was out of date

3. It had been liberalized → Common complaints can be included in it
   Labeling millions of people as potentially insane

4. The defence is criticized because it is more acceptable by judges when the defendant has committed a serious crime
   R v Bratty (1963) – Lord Denning said 'any mental disorder which has manifested itself in violence and is prone to reoccur is a disease of the mind'
   This suggests that it leads to violence and it is prone to reoccur. This makes the defence harder to plead for minor offences
   Recent case law shows that Denning was wrong
   R v Dickie (1984) – Charged with arson and successfully claimed insanity
   R v Horse Ferry Road Magistrates (1996) – Magistrates concluded that insanity should be acceptable for a summary offence

5. The defence of insanity goes against the normal burden of proof in a court of law
   The defendant has to raise the defence himself
   Once the defence has been raised the defendant has to prove that he is not guilty by reason of the insanity
   Butler Committee (1975) said the burden of proof should always lie with the prosecution.

6. The difference between insanity and automatism is unrealistic

7. Under the European Convention Of Human Rights (Article No. 5) the way we deal with insanity (M'Naughten) is unlawful

8. Change the name of the defence of insanity to anything that excludes the word insane
   E.g. Butler Committee (1975) → mental disorder

Insane Automatism

Bratty v AG (1963) - No act is punishable if it is done involuntary without any control of the mind, such as spasm, reflex or convulsion
- Not conscious of what they are doing
- However, it is not involuntary when the defendant fails to control an impulse

Broom v Perkins (1987) - Broom drove home & on arrival noticed the car was damaged. Attempted to defend with insane automatism – a state of glaze
Not accepted because he was bale to drive home so must have been conscious

AG Ref No. 2 (1992) - Lorry driver hit a car and killed a passenger (on the hard shoulder)
Pleaded insane automatism – Trance like state – Acquitted
Prosecution referred to AG for guidance. The AG said 'Wasn't correct if truly in a glazed state as he couldn't drive so far.

R v Bailey (1983) - Diabetic had gone into shock and then attacked someone with an iron bar. Claimed it wasn't available – had been reckless (not took insulin)
COA said 'trial judge was correct, when someone is reckless in behavior, even when achieving a state of automatism, the defence will not be available.
Not guilty – new evidence, hadn't been completely reckless as he had taken sugar

Automatism

Bratty (1963) - Total involuntary act amounts to automatism

An Involuntary Act

The definition of Bratty (1963) talks about the Actions being involuntary, however, the defence will fail if the involuntary action is preceded by voluntary action. For the defence to be successful the action should be totally involuntary.
E.g. a bank robber carrying a gun voluntarily may claim he involuntary pulled the trigger, such a situation can not be defended with automatism.

R v Ryan (1967) - Tying up victim in armed robbery. He claimed he pulled the trigger involuntary. Privy Council said even if this was the case, you were carrying the gun voluntarily, and therefore the defence fails

Grey v Barr (1971) - Armed robbery and Barr claimed he didn't know he pulled the rigger. Voluntarily put finger on the trigger therefore guilty

Criticisms and Reforms

The defence of insanity and automatism create illogical distinctions: -

- The burden of proof relays on the defendant raising the defence early in the trial. For common conditions like being diabetic the defence is both confusing for the defendant and for the judge.

- In the case of Quick (1973) the judge wrongly interpreted the effects of too much insulin as being the defence of insane automatism

- In the case of Hennasey (1989) the defence was wrongly interpreted as failing to take insulin as non-insane automatism

- As a result the Butler committee in 1975 and the draft criminal code suggested new wording for the defence of automatism
  "A person is not guilty of an offence if: -
  1. He acts in a state of automatism that is his act
     * Is a spasm or convulsion
     * Occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness etc…)
  2. The act or condition is the result of neither anything done or ommitted with the fault required for the offence nor of voluntary intoxication

- The outcome of this defence if adopted would range from acquittals to mental disorder verdicts which could result in hospital treatment

The meaning of the above

1. This defence makes no distinctions between insane and non-insane automatism

2. It is less strict than the current defence and includes impaired consciousness. E.g. Broom v Perkins (1987)

3. The defence attempts to make a distinction between automatism and voluntary intoxication, at present this distinction is confused

Consent – For non-fatal offences (low level)

The law accepts there are situations of implied consent

- The law assumes you have reasonable consent to chastise your children
- Normal bodily contact (bumping into someone in the street)
- Sexual activities between consenting adults
- Sporting contact (football – boxing)
- Medical examinations

Limitations on the concept of consent

The above situations of applied consent would not occur in special situations. These situations include: -

1. **The age of the victim**

R v Burrell & Harmer (1967) - Approached by two 13 year old boys who signed consent forms for tattoos.
Courts decided that these boys couldn't consent so charged with s20 GBH

Gillick v West Norfolk Area Health Authority (1986) - She said doctors were encouraging under age sex by prescribing girls with contraception and advice. Went to the HOL who said that 16 is an arbitrary age and the nearer you get to it the more choice you have → "Gillick competence" test was created

R v W (a minor) - W was a 16 year old anorexic and in real danger of killing herself. Parents wanted her to be force fed. She wasn't a competent 126v year old (not Gillick competent) courts said she was Gillick competent and she died.

This applies to both chronological and mental age! Works more based on the mental age.

2. Sporting contact outside the rules of the game (cheating)

R v Birkin (1989) - Brtoke victims jaw in a late, high tackle. Said it was consent in the game
Failed → wasn't part of the game → s20 GBH

3. Consent obtained by fraud

R v Clarence (1888) - Gave wife a VD. He didn't tell her he had it so there was no deception. Therefore not guilty

R v Flattery (1877) - Flattery convinced victim that he was performing a surgical operation. However he was in fact having sexual intercourse.
She reports it and he says she consented to it. The courts said she consented because of his deception

R v Williams (1923) - Williams was a music teacher and convinced his 16 year old female pupil that she needed to do breathing exercises (by sexual intercourse)
She didn't consent o the intercourse

R v Papadimitropoulos (1957) - Prosecution was so eager to have sex he convinced his fiancée they were married.
Convicted of rape

Social policy issues

As well as the general expectations mentioned above, I.e. age, fraud etc… the defence of consent is generally unsuccessful because of public policy issues. In similar situations to the defence of necessity the authorities are reluctant top accept the defence of consent as it would open the flood gates leading to increasingly dangerous acts becoming acceptable under the law with the danger being that defendant might attempt the defence of consent in homicide cases.

Case law on consent

An examination of case law would suggest that under English law at the eminent the defence of consent only extends to common battery even when there is good evidence of consent between consenting adults the courts appear to be unwilling to accept it.

R v Donovan (1934) - He claimed he had consent because he had paid the woman for her sexual services (spanking)
Charged with s47 ABH
Found guilty and appeals
COA set the precedent that *"consent was not given as they were not transient or trifling injuries"*

R v Leach (1969) - Claimed consent had been fully given as the 'victim' was a performing artist and could do crucifixion. He asked Leach to help and he did.
Charged with s18 GBH
'Victim' said to the court that he gave consent but the court said that he was not able to consent to it.

AG Ref (No 6) (1980) - Case involved 2 youths who wanted to settle a dispute via a fist fight. They said they should be able to do this because of the sport of boxing.
The COA said Donovan was correct therefore guilty

R v Jones (1987) - Jones and other school boys were tossing their victims up into the air and dropped him. Broken arm and bad internal bleeding occurred. S20 GBH reckless causing grievous injury
Jones appealed saying he should have been able to use the defence of consent
COA decided there was implied consent and described the act as 'rough horseplay'
Jones conviction was quashed

R v Brown & Others (1993) - Group of sadomasochistic homosexual's video taped their 'play' and the tape got into the hands of the police. They were all charged with s18 GBH (high level)
All consented but found guilty and convicted
COA rejected their appeal → Went to the HOL
Lost on a 3 to 2 verdict so they went to the ECHR but lost their and said the UK courts had not interfered with their human rights

The impact of Brown

Brown clearly established the continuing public policy issues of not allowing adults to deliberately harm themselves or each other for personal gratification. Unfortunately the impact of Brown was to lead several other cases to be dealt with under Brown guidelines even though the facts of the cases were clearly different to those of Brown.

R v Slingsby (1995) - S finds himself in court on UAIM charge. His ring cut her during sexual play and she got infected and died.
Never had intention to inflict any pain or injury
Found not guilty
Judge said, " * There was no sexual reason for this act, there was no similarity between Brown or Donovan in this case
* Brown should not be extended any further than its own specific and extreme factors
* Consent and criminal assault must deal with continuingly changing circumstances and this case by case development is preferable to a rigid formulation
* Public Policy Considerations remain highly relevant factors

R v Emmett (1999) - E found guilty of s47 ABH. He put a bag on her head and suffocated her during sex play and caused internal bleeding of the eyes. Then put lighter fuel on her breasts and set her alight
Appealed saying it had nothing to do with Brown because Brown was homosexual and he was not
Appeal failed.

Criticisms of the defence of consent

1. **Consent and the level of harm**

It seems quite clear starting with Donovan and more recently Emmett that consent cannot extend to s47 ABH. This implies that it does extend to common battery. Common battery is a legal requirement for proving s47 ABH it is therefore not easy to establish when battery finishes and ABH starts

2. **Inconsistent application of the defence**

In Brown nobody complained to the police, nobody required medical treatment and everybody consented. Brown and his co-defendants were all found guilty
In Jones the victims complained and needed serious medical treatment and he did not consent, however, the COA said that consent was implied.

3. **The over application of Brown**

Brown was such a high profile case that cases with different factual situations, i.e. Slingsby and Wilson were wrongly assumed to fall within the precedent of Brown

The future position

The defence of consent although limited in its uses clearly does exist under English law. The law commission suggests that it should be a statutory defence and renamed 'INFORMED CONSENT' the victim should only be assumed to have consented if in full possession of the facts. E.g. would Mrs. Clarence have given consent f she knew her husband had a VD?

R v Richardson (1999) - R was a qualified dentist but temporarily struck off but continued to practice. She said the 'victims' had consented
COA said they would they have consented if they knew you had been struck off?

Intoxication

1. **Involuntary -** can be used as a defence for all crimes (basic intent)
   Creates an acquittal (absolute rule)

2. **Voluntary -** Applies to certain types of crime (Specific intent)
   Outcome is variable, lesser offence – sometimes an acquittal

Both types assume no MR. in effect blackout stage. No knowledge of what has been done

Involuntary intoxication

R v Kingston (1993) - homosexual pedophiliac tendencies and aware that he can control reactions
Set up with a young boy (K was blackmailed) got intoxicated with boy (filmed) succeeded with sexual acts on boy (15yr)
Defence can be used (any defence)
Defence fails as he admitted intoxication had lead to loss of self control
He had MR (aware he had consciousness) rule absolute

Court may show compassion if volunteered for a good reason: -
May allow voluntary drug taking with an involuntary reaction from the drug

R v Hardie (1985) - Involved in an argument – agitated stage
Suggested he might want to take valium (someone else's drugs) made more agitated and he set fire to the bedroom window – Arson and Criminal Damage as to endanger human life
Intoxication rejected – voluntary intoxication
Criminal damage act (1971) intention or recklessness
Basic intent
Can't use involuntary intoxication for these crimes
Appeal under normal circumstances would be correct
Possible exception to rule where drug is normally a sedative and has the opposite effect there is another way of dealing with it.
If you take a sedative for good reason and it makes you intoxicated the court can regard it as involuntary intoxication: -

1. Drug was not unlawful when nor prescribed by doctor
2. Other people had encouraged him – also believing drug would do no harm
3. Wasn't reckless, had no idea drug would do harm
4. Drug was a sedative and didn't normally produce such a reaction

They will allow mistakes like Hardie but will not allow mistakes based upon ignorance

R v Allen (1988) - low alcohol (wine) and became intoxicated. Opposite of what had been expected
Problem some confusion on what offence it is
Automatism – blurting some familiar

Voluntary Intoxication

The rule establishes Kingston (1993) applies to this defence. The defendant must be totally intoxicated. However, that is where the similarity with involuntary intoxication finishes.
Voluntary intoxication is a much more complicate defence; the key is whether or not the crime committed was one of specific or basic intent.
Voluntary intoxication is only a defence to specific intent crimes. This rule is established by case law.

R v Lipman (1970) - L was a hippy and took LSD. While in a 'trip like' state he believed his girlfriend was a snake and he killed her.
Charged with murder – voluntary intoxication
Murder is specific intent and therefore accepted

How to identify specific and basic intent crimes

1. **By using rules operated by the courts**

Many crimes can be committed intentionally or recklessly. The act of becoming voluntary intoxicated is regarded as reckless behavior. Therefore a defendant can not use voluntary intoxication as a defence for a crime such as s47 ABH which can be committed recklessly. Rather than a defence in these circumstances leading voluntary intoxication is a virtual admission of guilt and therefore crimes of intention are SPECIFIC intent and crimes which include recklessness are Basic intent

SPECIFIC INTENT → **Intention only**
BASIC INTENT → **Intention and Recklessness**

2. **Look up previous case law**

Working out what basic intent and specific intent are is not 100% reliable. If the issue was raised in a court of law the safest way to deal with it is to look up previous case law decisions

Specific intent: -

Murder →Lipman (1970)
GBH →Bratty (1963)
Theft Act (1968) S1 → Majewski
S8 Robbery
S9 Burglary
S10 Aggravated Burglary

Basic intent: -

Involuntary manslaughter – Lipman (1970)
Rape (Sexual Offences Act 1956)
S20 GBH
S47 ABH
Common Assault & Battery
Criminal Damage Act (1971)

The outcome of a successful voluntary intoxication defence

No acquittal for murder so can drop from murder to involuntary manslaughter
The outcome of the defence depends on the offence which must always be specific intent

The impact on murder

The successful use of the defence leads to the defendant being found guilty of a lesser offence. As the lesser offence is involuntary manslaughter (basic intent) involuntary manslaughter becomes the final outcome of the defence
Same with s18 GBH → s20 GBH

The impact on theft

Theft, robbery, and burglary are all specific intention crimes. Once the crime is dropped to s1 theft there is no lesser offence and so the defendant is acquitted

Intoxicated mistake

The defence of mistake in a sober state allows a honest and reasonable mistake to be used as a criminal defence. In reality mistakes are more common when a person is intoxicated. This condition in theory could lead to a lea of intoxicated mistake, however, case law shows that intoxicated mistake is not an acceptable defence and will be rejected by the courts.

R v O'Grady (1987) - Drinking very heavily and became voluntary intoxicated and mistakenly believed his friend was attacking him so he killed him.
Court said if he was sober he couldn't make such a mistake and therefore can't use the defence

R v Fotheringham (1988) - Drinking until intoxicated and gets into bed with and has sex with the baby sitter who he believes was his wife. He said it is an intoxicated mistake
Can't have intoxication – Basic intent crime
Can't have mistake (because intoxicated)

Public policy issue → If intoxicated mistake was allowed lots would use it

Dutch courage intoxication

This is not a defence – Will not be accepted
Create the MR before the intoxication and then do the AR whilst intoxicated

AG Northern Ireland v Gallager (1963) - Formed the MR of murder then drank heavily (either to get the courage to do it or to trigger a medical condition that he had which was trigged by alcohol)
Guilty – MR before the intoxication

Problems of the defence of intoxication

1. The illogical distinction between specific and basic intent crimes. This produces very doubtful results

   Rape → Basic intent so defence is rejected

   Attempted Rape → Specific intent therefore defence is accepted

2. Very difficult for juries to understand
   E.g. S20 GBH in a pub (all parties drunk heavily) the judge must say to ignore the fact that they were all drunk
   If the defence is accepted the judge must then give a direction to the jury "If the defendant is not intoxicated would he have realised what he was doing was dangerous?"

3. Even when the defence can be used (specific crime) it is unjustifiably inconsistent
   E.g. Murder → Involuntary manslaughter
   Mandatory life→ Maximum life

   Robbery → Acquittal
   Maximum life → Acquittal

4. The defence makes no distinction between the person who becomes intoxicated and the person who sets out to become intoxicated

Reforms of intoxication

- 1995 Draft Intoxication & Criminal Liability Act produced by the law commission

    1. The difference between specific and basic intent crimes for the purpose of intoxication should be abolished

    2. The defence of intoxicated mistake should be allowed as this is usually the case

    3. Drugs taken for medical reasons that were not prescribed should be regarded as involuntary intoxication (Reference to Hardie)

    4. Intoxication would affect awareness, understanding, control etc… People can have affects before they blackout (Reference to Kingston)

- Alternative reforms

    1. 'Special verdicts' would be a verdict of intoxication. It is not a defence but would affect sentencing

    2. Butler Committee 1970's suggested that you would make intoxication an offence → Offence of dangerous intoxication
        * 1st Offence – 1 Year in prison
        * Repeat offender – 3 years in prison

        (Whilst intoxicated you commit any crime)

    3. In Australia, intoxication is always a total defence

Self Defence - Public & Private Law (Full acquittal)

Statute – Public
Common law – Private

Private Defence (Common law)

All assume you are using reasonable force for one of 3 possibilities: -

1. To defend yourself from attack
2. To prevent an attack on another person
3. To defend your property

Criminal Law Act (1967) s3 (statutory or public defence) created situations where it may be desirable to use reasonable force for: -

1. Apprehension / Arrest
2. Stop people committing a crime

A person may use such force as is reasonable in the circumstances: -

1. In the prevention of crime
2. In effecting or assisting of the lawful arrest of offenders suspected of offences or persons unlawfully at large

Therefore by combining common law ands statutory law defences, self defence can be used in 5 situations: -

1. Protecting yourself
2. Protecting another
3. Protecting property
4. Preventing a crime
5. Assisting arrest

If the self defence is effective the outcome is always an acquittal

Process of proving self defence

1. The defendant must believe that he or others are under threat

Situations of self defence may happen very quickly. The courts will allow the defence if the defendant makes a mistake. **Mistaken self defence is acceptable**

R v Williams (Gladstone) (1987) - W sees a man attacking a by in the street (he thinks) and challenges the man who says he is a police officer. W asks for evidence, the man couldn't give any so he prevents the 'attack'
S47 ABH on man
Common law No 2 – Mistaken private defence

R v O'Connor (1991) - O was drinking heavily and had an argument with a man in the pub. He believed the man was going to attack him so head butted him and immediately killed him - Mistaken private defence
Was accepted because he was intoxicated

2. Was the Attack imminent?

The shorter the time scale after the threat, the more likely the courts will accept it. Allow a bit more time than sudden and temporary loss of self control

AG Ref (No 2) (1983) - Asian shop keeper was subject to racial attacks so arms himself with fire arms. Police find these fire arms and charge him. He pleas self defence

- Yes – court behavior
- Threat wasn't imminent

Court said he believed he was in imminent danger
Subjective rather than objective test

Malrick v DPP (1989) - Believed he had property stolen from him so he armed himself went to confront the 'thrives'
Police stopped him and found the weapons on him
Imminent danger fails – Put himself in danger

3. **Duty to retreat**

In reality you don't owe a duty but if you can run the law assumes you should have avoided it. It means don't begin the threat – make it obvious you don't wish to get involved.

R v McInnes (1971) - Was involved in an assault and claimed self defence
He was in a pub and the argument was that he didn't retreat
The defence was not allowed by the courts
The COA said that he had shown some form of intention to not get involved 'a willingness to disengage'

R v Bird (1985) - Bird was involved in an argument in a pub. He struck the woman with a glass
The courts said it wasn't self defence as he didn't retreat because he could have left the pub
He had tried to 'disengage' as the courts said he had acted reasonably and accepted the defence

4. **Was the force reasonable?** (Was it proportionate?)

Objective view (Caldwell)

What is reasonable force has never been defined by the court. Each case can be judged on its own circumstances. The decision as to whether or not the defendant needed to use force is one taken subjectively. The issue of how much force is being used has been the subject of some indecision. The courts have applied both subjective and objective tests. Currently the objective test seems to be favoured.

R v Williams (1989) - COA said that the level of force used was an objective test

R v Scarlett (1993) - Scarlett was throwing someone out of a pub. The person fell down the stairs and sustained serious injuries.
Scarlett was convicted on the objective test but appealed
COA said that he was not guilty if he believed the level of force was reasonable.

R v Owino (1995) - Attacked by wife and used reasonable force to defend himself. He believed he was subjectively innocent
Judge applied the objective test and he was found guilty
COA said the objective test was correct and the conviction was upheld

AG Ref (No. 1) (1975) - Soldier shot someone trying to get away. The prosecution argued that he couldn't use self defence and that the force was excessive. The AG said the jury needed special direction. They should be asked to consider the threat at large rather than the individual soldier
Subjectively the soldier believed that the victim was an IRA member
Objectively the jury had to consider if this response was reasonable compared to the overall threat

Criticisms & Reforms of self defence

1. Self defence is a very popular and very effective defence when used against a charge of murder. It is particularly effective as it leads to an acquittal. The defence of provocation which has similarities results in conviction of a lesser offence. Intoxication is also available to murder but again results in guilty of a lesser offence of murder. Self defence should produce a conviction for a lesser offence

2. In murder cases self defence becomes an 'all or nothing' defence. If the defence of self defence in a murder charge fails, the defendant receives a mandatory life sentence. There is no mitigation. However, a failed self defence in s18 GBH case may help the defendant as the defendant need to respond may be mitigating evidence which leads to a lesser sentence.

3. The unfair application of self defence. Like provocation self defence tends to favor men rather than women. Self defence is most commonly used by males under 21 involved in street fights. The common law has developed with this in mind. Women on the other hand are mote likely to be attacked in their homes by someone they know. The requirement of imminent threat often works against these women.

Mistake

- The defendant made an '**honest and reasonable**' mistake

- **Mistake of fact**

R v Tolson (1889) - 'Honest and Reasonable' was established here
She believed her husband was dead at sea and remarried. He then showed up and she was charged with bigamy
Not guilt as charged

- **Mistake of law**

R v Reid (1973) - Stopped by police on suspicion of drink driving. He wrongly concluded that he didn't have to give a specimen and was charged with failure to give a specimen.
He said it was a mistake – he didn't know he had to give one
Guilty – ignorance to the law is not a defence

Honest & reasonable mistake

R v Morgan (1972) - Wanted to get revenge on wife who he believed was having an affair. He recruited men in the pub to rape his wife saying it sex play and she likes it to be very realistic
They rape her. Mistake but convicted of rape
Appealed based on Tolson (Honest and reasonable)
'Honest' is subjectively tested
'Reasonable' is objectively tested
Convicted of rape which is intention or recklessness
Honest mistake was all that was required as they had no intention and recklessness is subjectively tested.

On appeal Morgan argued that recklessness in rape cases was subjective and therefore mistake needed to be honest but not reasonable
The COA agreed with this but concluded that if the jury had been given this fact they would have still found him guilty
Conviction was upheld

B (a minor) v DPP (2000) - Same argument was raised and same outcome was reached

Conclusion to mistake

When a defendant pleas mistake the type of mistake and the judge's direction depends on the particular offence

- **Offences of subjective recklessness**

Rape
Common Assault and Battery
S47 ABH
S20 GBH

In these cases the mistake only needs to be honest. It does not need to be reasonable. The judge must direct that the jury y must accept the mistake if the defendant subjectively believed the circumstances even if his actions were totally unreasonable

- **Offences of objective recklessness**

This is based on the Caldwell direction: -

1. The defendant saw the risk and took it anyway
2. The defendant failed to see the risk even though the risk was obvious

Therefore under the Criminal Damage Act 1971 a person pleading the defence of mistake would have to convince the jury that they made an 'honest' and 'reasonable' mistake