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# Recent developments 2009

## 2650010 Criminal law

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### Current edition of the subject guide

The current edition of the subject guide was published in 2006. It was reviewed in 2007 to take account of the Fraud Act 2006 so these *Recent developments* should be read in conjunction with those published in 2007 and 2008 as they illustrate how the law has developed. The 2007 and 2008 *Recent developments* follow the 2009 developments below.

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### Recent developments 2009

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#### The following developments should be noted

You will also find these Recent developments on the VLE and that version will contain live links to the relevant newsletters and other publications.

All cases and materials in this update can be accessed through the University of London online library at <http://www.external.shl.lon.ac.uk/>

Please note that newsletters on some of these developments have been published on the VLE. You will be directed to the relevant newsletter when this is the case. You are strongly advised to read these newsletters, especially if you have not already done so.

#### Chapter 1 Introduction

##### *Doli incapax*

- *R v T* [2008] EWCA Crim 815

It would now appear that the common law doctrine of *doli incapax* did not survive s.34 of the Crime and Disorder Act 1998 despite Lady Justice Smith's 'tentative' conclusion in *Crown Prosecution Service v P* [2007] EWHC 946 that the section had abolished only the rebuttable presumption but that the defence still formed part of the law. This was considered in the May 2007 newsletter on the VLE.

In *R v T*, the Court of Appeal decided that the conclusion of Lady Justice Smith did not reflect the intention behind s.34.

Lord Justice Latham, delivering the judgment of the court, stated that:

'Parliament must be taken to have intended "the presumption" to encompass the concept of *doli incapax* when it was abolished in section 34.'

This further development is considered in the July 2008 newsletter on the VLE.

## Chapter 5 *Actus reus*: consequences

- *R v Campbell (Andre), R v Yateman (Jermaine), R v Henry (Lloyd Rudolf)* [2009] EWCA Crim 50

The victim had been attacked by a number of men including Campbell and Henry. Sometime later, Yateman, who had been a member of the original group of attackers, further assaulted and attempted to rob the victim who subsequently died. Campbell and Henry appealed against their convictions for murder and manslaughter respectively, arguing that the victim's death was caused by the subsequent attack, with which they were not involved. The Court of Appeal dismissed their appeals. There was medical evidence on which the jury was entitled to conclude that their actions in the earlier incident were a significant cause of death and that causation could be established from the injuries sustained by the victim before Yateman's attack. The judge's summing up on causation was appropriate, as was his direction to the jury that it was for them to decide whether Yateman's use of his fists in the course of the attempted robbery went beyond any pre-existing purpose. Therefore, the jury was entitled to conclude that Campbell and Henry were parties to a joint enterprise which extended to Yateman's actions.

## Chapter 6 *Mens rea*: 6.7 Strict liability

- *R v G* [2008] UKHL 37

This case involves an offence contrary to the Sexual Offences Act 2003 which is **not** on the University of London **Criminal law** syllabus and which you, therefore, do not need to know. However, one of the grounds of the defendant's appeal was that the conviction violated his right to a fair trial and the presumption of innocence under Article 6 of the European Convention on Human Rights because it was an offence of strict liability. This case is considered in the April 2008 newsletter on the VLE.

## Chapter 7 Unlawful Homicide: murder and manslaughter

### Bringing the law of homicide into the 21<sup>st</sup> century: The Law Commission proposals

In its report Murder, Manslaughter and Infanticide, (Law Com No 304) the Law Commission has recommended a three tier structure to the law of homicide to replace the existing two tier scheme of murder and manslaughter. In descending order of seriousness the proposed offences would be known as:

- *First tier murder*, which would carry a mandatory sentence of life imprisonment,
- *Second tier murder*, which would carry a discretionary life sentence,
- *Manslaughter*, which would also carry a discretionary life sentence.

The structure recommended by the Law Commission is designed 'to bring greater order, fairness and clarity to the law of homicide'. The law of murder, it feels, is too broad, to the extent that it includes killings committed with an intention to cause serious harm even if D had no intention to endanger life and did not foresee that his or her acts might lead to the victim's death. In addition, the Law Commission

feels it is too narrow, in so far as it excludes cases where D, without intending to kill or to cause serious injury, nonetheless foresaw that his or her conduct posed a serious risk of causing death and unjustifiably took that risk.

This is further considered in the October 2008 newsletter on the VLE. Please note that these are recommendations and not the current law

## Chapter 8 Voluntary manslaughter: the defences of provocation and diminished responsibility

### Proposed legislation – Coroners and Justice Bill

Many of the provisions in the Bill (which you can download at <http://www.publications.parliament.uk/pa/cm200809/cmbills/009/09009.i-v.html>) concerning provocation and diminished responsibility were considered in the consultation paper 'Murder, manslaughter and infanticide: proposals for reform of the law', Ministry of Justice, Home Office and Attorney General's Office, July 2008.

The aim of the Coroners and Justice Bill, so far as provocation and diminished responsibility are concerned, is to:

- abolish the existing partial defence of provocation and replace it with two new partial defences of killing in response to a fear of serious violence and killing in response to words or conduct which caused the defendant to have a justifiable sense of being seriously wronged (Clauses 41-43)
- modernise the partial defence of diminished responsibility based on the concept of a 'recognised medical condition'. (Clause 39 (England and Wales))

The Bill was debated at Second Reading on 26 January 2009. The House of Commons voted for it to be sent to a Public Bill Committee that will scrutinise the Bill clause by clause. The committee consideration of the Bill will be finished on or before 5 March 2009.

The consultation paper was considered in the November 2008 (diminished responsibility) and December 2008 (provocation) newsletters on the VLE. Please note that this Bill had not become law by the 15th February 2009.

- *Hill* [2008] EWCA Crim 76

The defendant was convicted of murder in 1994. On his second appeal to the Court of Appeal, two reasons were advanced on his behalf in support of his contention that the conviction was unsafe.

Firstly, there was fresh evidence that D had suffered childhood sexual abuse at the hands of his foster father and it was argued that this experience was relevant to the defence of provocation.

The Court of Appeal acknowledged that childhood experience of sexual abuse would, following *Attorney General for Jersey v Holley* [2005] UKPC 23, be relevant to the question in provocation whether the reasonable man would have done as the defendant did. The jury would be entitled to take into account the evidence as it might affect the gravity of the provocation to the defendant, making him more likely to be affected by an indecent assault than an ordinary person.

Secondly, he sought to rely on new evidence that he suffered from organic brain damage as a result of a road accident in 1971 which, it

was claimed, diminished his responsibility for the killing. However, the evidence was that the brain damage was not something which on its own would have impaired the appellant's responsibility for the killing, but only in interaction with either the alcohol he had consumed or waking from deep sleep.

As there was no evidence of confusion on waking, nor of a substantial impairment of responsibility in the absence of voluntary intoxication, the defence was rejected. It is settled law that voluntary intoxication cannot be considered as contributing to diminished responsibility. It would have been different had the brain damage, independently of the alcohol, substantially impaired his responsibility. In that case the intoxication would have been discounted and the defence of diminished responsibility would have rested on the abnormality caused by the damage (*Dietschmann* [2003] UKHL 10).

This case is considered in the April 2008 newsletter on the VLE.

- *R v Wood* [2008] EWCA Crim 130

In addressing a plea of diminished responsibility in the context of alcohol dependency syndrome, the jury must consider whether it had been established that the defendant's syndrome was of such an extent and nature that it constituted an abnormality of mind induced by disease or illness. If that were established, they must also consider whether the defendant's mental responsibility for his actions at the time of the killing was substantially impaired as a result of the syndrome.

The Court of Appeal (Criminal Division) so held in allowing an appeal by the defendant, Clive Wood, against his conviction for murder on 11 October 2006 in the Crown Court at Wolverhampton before Mitting J and a jury.

Sir Igor Judge P, giving the judgment of the court, said that *R v Tandy* [1989] 1 WLR 350 had to be reassessed in the light of *R v Dietschmann* [2003] 1 AC 1209. In the context of alcohol dependency syndrome, the sharp effect of the distinction drawn in *R v Tandy*, between cases where brain damage had occurred as a result of alcohol dependency syndrome and those where it had not, was no longer appropriate.

## Chapter 12 Defences 1 – failure of proof and justificatory defences

On the 15 January 2009 the Law Commission presented to Parliament its proposals for reforming the law on intoxication. The proposals, which contain a draft Bill can be downloaded from <http://www.lawcom.gov.uk/docs/lc314.pdf>

According to Professor Jeremy Horder, the Commissioner leading this project:

‘The present rules governing the extent to which the offender's intoxicated state may be relied on to avoid liability are inadequate. Our recommendations would remove the unsatisfactory distinction between basic intent and specific intent and provide a definitive list of states of mind to which self-induced intoxication is relevant.’

Clause 1(1)(a) and (b) provides that for the provisions in Part 1 to apply a defendant must have been charged with an offence, liability for

which require proof of a fault element which depends upon his state of mind. Clause 1(2) further provides that ‘fault element’ includes any fault element which the prosecution must prove ‘regardless of how the offence is defined’.

Professor Horder went on to say:

‘We also clearly identify situations in which the offender’s intoxication would be regarded as involuntary rather than self-induced and establish a rule setting out the relevance of the offender’s intoxicated state under these circumstances. Our recommendations would make the law much more efficient and easier to apply.’

These recommendations are contained in Clause 6 of the Bill.

The Bill deals with, amongst other things, voluntary intoxication as evidence of lack of *mens rea* on the part of both perpetrators (Clause 3) and accomplices (Clause 4), intoxicated mistakes (Clause 5) and issues of proof (Clause 7).

Please note that the recommendations of the Law Commission do not represent current law. However, although they are therefore unlikely to be relevant in the context of a problem examination question, some knowledge of the recommendations would be useful if you were called upon to answer an essay question on this topic.

### **Criminal Justice and Immigration Act 2008**

When a person wishes to rely on either the common law defence of self-defence or that of using reasonable force in the prevention of crime under s.3(1) of the Criminal Law Act 1967, s.76 of the Criminal Justice and Immigration Act 2008 (which came into effect on the 14 July 2008) now applies for the purposes of determining whether the force used was reasonable in the circumstances. The rules are very similar to the pre-existing common law rules. For example, a mistaken belief in the need to use defensive force does not have to be reasonable (although its ‘reasonableness’ will be evidence that it was honestly held).

There are echoes of the common law in that when determining whether force was reasonable, by virtue of s.76(7)(a) it must be remembered that the defendant ‘may not [have been] able to weigh to a nicety the exact measure of any necessary action’ and s.76(7)(b) ‘evidence of a person’s having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose’.

Please note that this now represents the current law

## **Chapter 13 Defences 2 – Excusatory and mental disorder defences**

- *R v Ali* [2008] EWCA Crim 716

This case concerned the issue of whether duress can amount to a defence where a defendant has voluntarily associated with others where, in the words of the trial judge, ‘he ought to foresee that he might be subjected to compulsion by threats of violence’.

The Court of Appeal considered the decision by the House of Lords in *R v Z* [2005] UKHL 22, [2005] 2 AC 467 and pointed out that the current

Judicial Studies Board specimen direction reflects this decision. The specimen directions are as follows.

‘Did D voluntarily put himself in a position in which he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence? The prosecution say that he did, by [joining a criminal group the members of which might make such threats] [getting involved with crime and thus with other criminals who might make such threats if he let them down or came to owe them money]. But it is for you to decide. If you are sure that D did voluntarily put himself in such a position, the defence of duress does not apply [and D is guilty]. However, if you are not sure that he did so, the defence of duress does apply and you must find D not guilty.’

The trial judge had said:

‘The defence of duress does not apply if the defendant chooses voluntarily to associate with others where he ought to foresee that he might be subjected to compulsion by threats of violence.’

The Court of Appeal did not consider this to be a misdirection; in substance it was the same as the first sentence of the specimen direction and, moreover, with a substitution of ‘might be’ or ‘likely’ the direction was not materially different from that given by the trial judge in *R v Z*.

Please now go to the VLE and listen to the audio presentation on duress which further considers this case.

## Chapter 15 Parties to crime

- *R v Rahman and others* [2008] UKHL 45

The appellants were among a party of youths who had taken part in a revenge attack upon another group of youths in April 2004. The deceased, Clarke, had been kicked and struck and was fatally stabbed. There was no evidence that the appellants had inflicted the fatal injuries. They each gave evidence that they neither knew nor foresaw that anyone else involved in the attack intended to kill. The judge directed the jury that they could convict of murder if they were sure that he realised that

‘one or more of the attackers might produce and use a knife in the attack and that such attacker might kill with the intention of killing Clarke or causing him serious injury’.

The appellants were convicted of murder and appealed to the Court of Appeal. Their ground of appeal was that the judge should have directed the jury that if a secondary party, D2, intended or foresaw that one of their number might act with an intent to cause grievous bodily harm but not that he might intentionally kill, the jury were entitled to conclude that the act of one, D1, who did intentionally kill was fundamentally different in nature to that intended or foreseen and therefore D2 was not secondarily liable for the murder. The Court of Appeal dismissed their appeals. The decision of the Court of Appeal was considered in the March 2007 newsletter and you will find it on the VLE.

They further appealed to the House of Lords who also dismissed their appeal and ruled that their contention was not consistent with the authorities. Lord Bingham stated that:

‘To rule that an undisclosed and unforeseen intention to kill on the part of the primary offender may take a killing outside the scope of a common purpose to cause really serious injury, calling for a distinction irrelevant in the case of the primary offender, is in my view to subvert the rationale which underlies our law of murder.’

For a discussion of the House of Lords’ decision in this case please read the June 2008 newsletter on the VLE.

- *Smith (Dean Martin)* 2008 EWCA Crim 1342

Eleven men attempted to enter a nightclub by a fire exit and were ejected by the doormen. That same night the group had already tried to force entry into a number of nightclubs. A single shot was fired by one of eleven near the fire exit. Ninety seconds later, 13 shots were discharged outside the club, killing one doorman and injuring others. The shots were fired from two guns. At the time of the fatal shooting, the group had divided into two, one group standing near the shooters, covering their faces and shouting encouragement, while one at least in the other group called for the first group to ‘come on’. It could not be said who of the six appellants had taken what part.

There was ample evidence, namely the movements and behaviour of the group, to establish that the group was, to the knowledge of each person who had joined it, an armed gang ready and willing to shoot to kill during any confrontation that might have arisen. Once it was proved that any appellant had voluntarily joined the group then the necessary *mens rea* could be established by proving that the particular appellant joined the group in the knowledge that members of it were armed with loaded handguns that would be used in a confrontation with an intent to kill. Consequently, it did not avail any of the appellants to demonstrate the absence of evidence that he shouted encouragement, covered up or gathered around the gunman. Criminal liability was established by showing voluntary participation in what the jury was entitled to conclude was armed gang activity. Proof of guilt could be established by identifying any particular appellant as being present, voluntarily, in that gang activity. Moreover the jury was entitled to conclude on the evidence, that the appellants were members of the group involved in the incident.

## Chapter 14 Inchoate offences

### Part 2 Serious Crime Act 2007 – Encouraging or assisting an offence

The common law offence of incitement has been abolished by s.59 of the Serious Crime Act - which came into effect on the 1 October 2008, and replaced by the statutory offence of encouraging or assisting an offence. Sections 44–46 of the Act create the following offences.

Section 44: intentionally encouraging or assisting an offence.

Section 45: encouraging or assisting an offence believing it will be committed. (Offences contrary to sections 44 or 45 are, by virtue of s.55(1), triable in the same way as the anticipated offence.)

Section 46: encouraging or assisting offences believing one or more will be committed. (An offence contrary to s.46 is, by virtue of s.55(2), triable on indictment.)

Section 50 provides a defence of acting reasonably and s.51 provides that a victim is protected from liability.

**Please note:** Although this development took place before the deadline of the 15 February and therefore represents the current law, exceptionally, **you will not be examined** on **either** these new offences **or** the pre-existing common law offence of incitement in the 2009 **Criminal law** examination.

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## Recent developments 2008

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Please note that newsletters on some of these developments have been published during the year on the VLE which you can access at:

<http://vle.londonexternal.ac.uk/laws/gateway.nsf>

You will be informed in the development summary when this is the case. You are strongly advised to read these newsletters, especially if you have not already done so.

You are also strongly advised, again if you have not already done so, to complete the computer marked assessments which can be accessed through the VLE.

#### ***Doli Incapax***

- *Crown Prosecution Service v P* [2007] EWHC 946.

Under the common law there was a rebuttable presumption that children between the ages of 10 and 14 were *doli incapax* – incapable of forming a criminal intent. To rebut the presumption, the prosecution was required to prove not only the ingredients of the offence charged, but also that the child knew that what he or she did was ‘seriously wrong’.

In *C (a minor) v DPP* [1995] 2 Cr App R 166, the House of Lords acknowledged the difficulties facing the prosecution when rebutting the presumption, but held that as the rule was well established; it was not for the courts to abolish it. In response to disquiet about the rule, the law was amended by s.34 of the Crime and Disorder Act 1998 which provided that ‘the rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished’.

In the instant cases, the Queen’s Bench Divisional Court held that the effect of s.34 of the Crime and Disorder Act 1998 was to abolish the presumption that a child was *doli incapax*, but not the defence itself.

For a discussion of this case, please see the VLE newsletter March 2007:

<http://vle.londonexternal.ac.uk/laws/gateway.nsf>

### Chapter 7 Unlawful homicide: murder and manslaughter

- *Kennedy* [2007] UKHL 38.

The defendant prepared and gave the deceased a syringe containing heroin. The deceased injected himself. The heroin affected his breathing and he died as a result.

The Court of Appeal dismissed Kennedy's appeal against conviction for manslaughter on the basis that, as he had actively assisted and encouraged the deceased, he was liable as a secondary party to V's unlawful self-injection.

The ruling attracted widespread criticism on the basis that there can be no secondary liability without a principal offender. Although possession of heroin is an offence, it was the self-injection and not possession which caused the deceased's death and self-injection of heroin is not an offence.

The question for consideration by the House of Lords was:

'When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?'

Prior to Kennedy, there had been a number of decisions relating to cases where similar issues were involved. The House of Lords reviewed these decisions, which are considered in the November 2007 newsletter. Kennedy's appeal was allowed.

The House of Lords ruled firstly, that *Finlay* was wrongly decided. There is a well established principle of English law that the free and voluntary act of a person with full capacity is not regarded as having been caused by another and thus:

'D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another'.

Thus where V self-injects, it is not appropriate to regard the supplier of the drug as having caused the drug to be administered.

The prosecution were therefore restricted to arguing that the drug was administered by Kennedy. Again the logical conclusion of the fact that the deceased's decision to self-inject was free and voluntary was that the heroin was not administered by the defendant. D may have encouraged or assisted the deceased to inject himself but he did not administer the drug. *Rogers* was also wrongly decided.

Finally the House rejected the analysis of the Court of Appeal in Kennedy's second appeal. This was not a case of a 'combined operation' for which Kennedy and the deceased were jointly responsible.

'The deceased... had a choice, knowing the facts, whether to inject himself or not. The heroin was, as the certified question correctly recognises, self-administered, not jointly administered.'

The House remarked that the failure to clearly specify the unlawful act upon which liability for manslaughter was based had contributed to

the uncertainty in the law under consideration and urged prosecutors to formulate counts precisely in future.

Please see the complete VLE newsletter November 2007:

<http://vle.londonexternal.ac.uk/laws/gateway.nsf>

### **Corporate Manslaughter and Corporate Homicide Act 2007**

This Act received Royal Assent on the 26th July 2007 and will be brought into force by secondary legislation on the 6th April 2008. Rather than, as now, requiring a grossly negligent act or omission on the part of a controlling mind of an organisation, liability will be imposed when its activities are managed or organised by its senior management so as to be a substantial element in the gross breach of a relevant duty of care. The Act effectively lifts the corporate veil and permits the jury to review the corporate culture inside an organisation and review its internal practices. On conviction, an organisation will face an unlimited fine and may be given a remedial order requiring it to remedy the relevant breaches within a given time scale. In addition, a publicity order may be imposed upon a convicted organisation. This will require it to publicise its conviction, particulars of the offence, the amount of the fine and the terms of any remedial order imposed.

### **Chapter 9 Simple non-fatal offences against the person;**

### **Chapter 10 Aggravated non-fatal offences against the person;**

### **Chapter 18 Criminal damage**

#### **Racially aggravated offences**

- *R v Rogers* [2007] UKHL 8.

Sections 29–32 of the Crime and Disorder Act 1998 create racially or religiously aggravated versions of a number of offences, including those referred to above. If these offences are deemed to have been racially aggravated, the maximum penalties are higher.

In relevant circumstances, the court must first be satisfied that the basic offence has been committed and then whether it is racially or religiously aggravated.

The question certified by the Court of Appeal in this case was: ‘Do those who are not of British origin constitute a racial group within section 28(4) of the Crime and Disorder Act 1998?’

The issue was whether using the words ‘bloody foreigners’ and ‘get back to your own country’, directed at three Spanish women walking along the road, amounted to racial aggravation. The actual offence which had been committed by the defendant in this case was one contrary to the Public Order Act 1986, which is not on the University of London criminal law syllabus. Nonetheless, this case is relevant to us as the decision by the House of Lords will also apply to those offences which are on the syllabus. S.28(4) of the Crime and Disorder Act provides that:

‘...racial group means a group of persons defined by reference to race, colour, nationality (including citizenship), or by ethnic or national origins.’

It was argued for the appellant that hostility must be shown towards a particular group, rather than to foreigners as a whole: the Act required that the group be defined by what it was rather than what it was not. Therefore, Spaniards were covered – and it was accepted by the defence that had he called them ‘bloody Spaniards’ he would have been in breach of the Act – but ‘foreigners’, that is non-British, were not.

It was argued for the respondent that there were other indications that the statute intended a broad non-technical approach, rather than a construction which invited nice distinctions. The view of the House was that the flexible, non-technical approach propounded on behalf of the respondent made sense as both a matter of language and policy. Baroness Hale of Richmond said:

‘The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as ‘other’. This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.’

The certified question was answered in the affirmative.

To read the case in its entirety, please go to:

<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070228/rogers.htm>

## Chapter 11 Sexual offences

- *R v Heard* [2007] EWCA Crim 125 – Voluntary intoxication and s.3 of the Sexual Offences Act 2003 (sexual assault)

The court held that ‘touching’ in s.3 did not require a specific or purposive intent but only a basic intent and therefore, in applying *DPP v Majewski* (1976), voluntary intoxication could not be relied upon to negate that intention.

- *R v Bree* [2007] EWCA Crim 804 – Rape: consent to sexual intercourse

(Note that s.74 of the Sexual Offences Act 2003 provides that a person consents if he agrees by choice, and has the freedom and capacity to make that choice.)

The defendant and the complainant had been drinking together, each having voluntarily consumed a large amount of alcohol. Sexual activity had taken place and the defendant was charged with rape. Although the prosecution case was originally on the basis that the complainant had effectively been unconscious throughout most of the sexual activity, it was, ultimately – due to evidence brought by the complainant – not that she had lacked the capacity to consent, but rather that she had not in fact consented. Her capacity to consent had remained but her ability to resist had been hampered by the effects of alcohol. The defendant’s case was that she had been consenting and

was conscious throughout; and that he had reasonably believed that she was consenting. The defendant was convicted of rape. He appealed against his conviction.

The Court of Appeal, allowing the defendant's appeal, held that on the proper construction of s.74 in the context of voluntary intoxication by the complainant, if, through drink or for any other reason, the complainant had temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she was not consenting and, subject to questions about the defendant's state of mind, if intercourse took place, that would be rape. However, where the complainant had voluntarily consumed substantial quantities of alcohol, but had nevertheless remained capable of choosing whether or not to have intercourse (and in drink had agreed to do so) this would not constitute rape. The Court was of the view that the jury had not been given any sufficient directions on the issues of consent and voluntary intoxication to allow their verdict to be regarded as safe.

## Chapters 12 and 13 Defences

### Mistake and defence of property

- *R v Faraj* [2007] EWCA Crim 1033.

The Court of Appeal held in this case that a householder could use reasonable force to defend his property provided he honestly believed that there was a need to do so. Whether using a weapon was reasonable in the circumstances was a question for the jury to decide. For a fuller consideration of this case, please see the January 2008 newsletter on the VLE at:  
<http://vle.londonexternal.ac.uk/laws/gateway.nsf>

## Chapter 14: Inchoate offences

### 14.3.3 Attempting the impossible

- *R v Jones* [2007] EWCA Crim 1118.

The police set up an undercover operation using an officer known as 'Amy' following reports of sexually explicit graffiti being written in public lavatories of trains and stations seeking girls between the ages of 8 and 13 for sex in return for payment. There was a series of text messages between 'Amy' (who told the defendant she was 12 years old and a virgin) and the defendant whose messages set out explicit sexual acts he expected he would be able to perform on Amy.

The defendant was arrested and charged (*inter alia*) with attempting, contrary to s.1(1) of the Criminal Attempts Act 1981, to intentionally cause or incite a child under the age of 13 to engage in sexual activity involving penetrative sex, contrary to s.8 of the 2003 Act. He was convicted and appealed to the Court of Appeal.

The Court upheld his conviction. The *actus reus* of the offence of attempt required an act which the defendant had done with the intention of committing an offence, notwithstanding the commission of the actual offence was on the true facts impossible. It would have been open to the jury to conclude that the defendant had had the objective and intention of inciting a particular child to engage in the prohibited

activity. Even though the police had substituted an adult for a child, the defendant could not argue that by reason of that substitution (provided the other elements were made out), there was a defence in law to the charge. *Shivpuri* (1986) was applied.

Further, the police had not behaved improperly by choosing the fictional child's age as under 13. Parliament had made incitement directed at a child below the age of 13 a much more serious offence and it was clear from the graffiti that age was not immaterial to the defendant. The defendant had asked 'Amy' for her age and, even though the defendant had believed from that time that he was inciting a child under the age of 13, he had proceeded to incite penetrative sexual activity in that belief.

### **Law Commission Consultation Paper: Conspiracy and Attempts (October 2007 CP183)**

In its Consultation Paper, the Law Commission has proposed significant changes to the criminal law of attempt. Although the Commission makes a number of recommendations in respect of the *mens rea* of the offence and also in respect of the role of the judge and jury, its main concerns lie with the *actus reus* – which it considers is 'too vague and uncertain' to consistently give effect to the policy underlying the law.

#### **S.1(1) Criminal Attempts Act 1981**

The offence of attempt is defined in s.1(1) of the Criminal Attempts Act 1981. It provides that:

'If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.'

The *actus reus* is the doing of 'acts more than merely preparatory to the commission of the offence'.

Given the range of conduct capable of amounting to criminal attempt, the expression is necessarily imprecise. The difficulty is to identify the point on the continuum of steps between preparation and commission at which criminal liability should be imposed and this requires careful consideration of the principles and policy objectives of the law.

Regrettably, in the Commission's view, in a number of 'troubling' cases – most notably *Campbell* (1990) and *Geddes* (1996) – the Court of Appeal has ignored the underlying rationale of the offence and, fixated on the meaning of attempt as 'trying', has taken an unjustifiably restrictive approach to the phrase.

For a discussion of this Consultation Paper please see the complete VLE Newsletter for December 2007:

<http://vle.londonexternal.ac.uk/laws/gateway.nsf>

## **Chapter 15 Parties to crime**

### **Joint enterprise and murder**

- *R v Rahman and others* [2007] EWCA Crim 342

The appellants were among a party of youths who had attacked another group of youths. The deceased had been fatally stabbed. Each of the appellants denied that he had had a knife, or had known or foreseen that any other member of the group had a knife. Their contention was that the principal was acting beyond the scope of the joint enterprise and therefore they did not share liability for the fatal attack. The appellants were convicted of murder and appealed.

The appeal was rejected. Lord Justice Hooper, delivering the judgment of the Court, referred to the principles underlying this area of law (please see his judgment and the March newsletter on the VLE). Lord Hooper observed that to relax the law in accordance with the defendants' arguments would lead to an increase in acquittals, thus undermining the policy which was behind this area of law.

The Court of Appeal concluded by giving guidance on how juries should be directed in cases of murder involving joint enterprise, where P unlawfully caused the death of V intending to kill him or cause him serious bodily harm and D played some part in the attack on V.

A 'route to the verdict' consisting of six points set out by the Court of Appeal can be found at the end of the March newsletter on the VLE March 2007:

<http://vle.londonexternal.ac.uk/laws/gateway.nsf>

See also:

- *R v Rafferty* [2007] EWCA Crim 1846

In this case the Court of Appeal held that a secondary party would not be guilty of murder where he intended or foresaw that the primary party would or might act with intent to cause grievous bodily harm, but the lethal act carried out by the primary party was fundamentally different from the acts foreseen or intended by the secondary party. The defendant, together with his co-defendants had waylaid the victim on a beach whereupon the co-defendants, who were the principal attackers, had beaten and kicked the victim. The defendant then took away the victim's credit card to try to use it to withdraw money. While he was away, the co-defendants had dragged the victim across the beach, stripped him naked, taken him out to sea and left him to drown. The jury had to ask themselves what acts the defendant had realised that the co-defendants might do to cause the deceased harm and ask themselves whether they were sure that those acts were not of a fundamentally different nature to the deliberate drowning. In this case no jury could have properly concluded that the drowning of the deceased by the two co-defendants was other than a new and intervening act in the chain of events.

## Chapter 16 Offences against property 1: Theft and fraud

### The Fraud Act 2006

The Sentencing Advisory Panel and the Sentencing Guidelines Council work together to ensure that sentencing guidelines are produced which:

- encourage consistency in sentencing throughout the courts of England and Wales

- support sentencers in their decision making.

You will find a link to their website on the VLE or, you can go straight to their website which is at:

[www.sentencing-guidelines.gov.uk/about/index.html](http://www.sentencing-guidelines.gov.uk/about/index.html)

The Council's sentencing proposals for fraud offences include:

- Confidence tricks – a starting point of five years' imprisonment where there is deliberate targeting of vulnerable victims, abuse of position, professional planning and high value of property, ranging to a fine where it is a single confidence trick and value is low.
- E-fraud and possessing, making or supplying articles for use in fraud – a starting point of three years' imprisonment where the offence is making or adapting and the article was intended for use in an extensive professionally-planned fraud; ranging to a community order (medium) where the offence is possessing and it is intended for use in a less sophisticated fraud.
- Fraud against HM Revenue & Customs, benefit fraud, payment card and bank account fraud, insurance fraud and obtaining credit through fraud – a starting point of six years' imprisonment where behaviour is fraudulent from the outset and either involves multiple frauds or is carried out over a significant period of time and is worth £500,000 or more; ranging to a fine where it is a single fraud where either it is an exaggerated claim or not fraudulent from the start and is less than £5,000.

Note also that the controversial Fraud (Trials without a Jury) Bill 2006 which was introduced by John Reid MP is likely to receive Royal Assent this year. This Bill is intended to enable the government to implement s.43 of the Criminal Justice Act 2003 and allow cases, in certain instances, involving serious and complex fraud to be tried by a judge alone.

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# Recent developments 2007

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## The following developments should be noted

The current edition of the subject guide is the 2006 edition. The following changes should be noted.

All cases and materials in this update can be accessed through the University of London online library at:

<http://www.external.shl.lon.ac.uk/>

You will need your Athens user name and password to use this site.

## The Fraud Act 2006

The Fraud Act 2006, which received Royal Assent on 8 November 2006, came into effect on the 15 January 2007.

Thus, as this development occurred prior to the University of London cut-off date of 15 February, you are expected to be familiar with the provisions of the statute.

**Please note that all of the deception offences which are on the current criminal law syllabus and covered in the subject guide have been repealed and replaced by the Fraud Act 2006, and these offences as expressed in the Theft Acts 1968 and 1978 therefore no longer represent the law.**

Please also note that if your statute book does not incorporate the Fraud Act 2006 we cannot supply copies for your use during the examination and neither do the regulations permit you to bring a paper copy into the examination. Should the examination contain any questions which require knowledge of the statute, the Examiners will be made aware of the position.

You should download the following materials and read them carefully before turning to the section below on Chapter 16 of the subject guide:

- i. The Fraud Act 2006:  
[http://www.opsi.gov.uk/ACTS/acts2006/ukpga\\_20060035\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060035_en.pdf)
- ii. Explanatory notes to the statute:  
<http://www.opsi.gov.uk/ACTS/en2006/2006en35.htm>
- iii. Two articles on the Fraud Act which you will find on the VLE. Go to:  
<http://vle.londonexternal.ac.uk/laws/gateway.nsf>  
and then to the criminal law homepage/newsletters/archive (November and December).

For background information download the Law Commission Report on Fraud 2002 (Law Com No. 276) at  
<http://www.lawcom.gov.uk/docs/lc276.pdf>

## Chapter 16 Offences against property 1 – theft and deception

The Fraud Act 2006, which was enacted following calls for reform, repeals all of the deception offences that were contained in the Theft Acts 1968 and 1978 and replaces them with the offence of fraud (s.1) and the offence of obtaining services dishonestly (s.11).

Section 1 of the Fraud Act creates a new offence of fraud that can be committed in any one of three ways. These are:-

- a. fraud by false representation (see s.2)
- b. fraud by failing to disclose information (see s.3)
- c. fraud by abuse of position (see s.4)

This offence, together with that of obtaining services dishonestly contrary to s.11 which replaces the offence of obtaining services by deception contrary to s.1 of the Theft Act 1978, is therefore potentially examinable.

The Act also provides for preliminary offences of possessing, making or adapting articles for use in fraud and the new offences of fraudulent trading by sole traders. Note that these offences do **not** form part of the current syllabus and are therefore **not** potentially examinable.

Note that the common law offence of conspiracy to defraud has been retained.

You should now read the articles on the VLE referred to above for an explanation of the new offences of fraud. Consider these articles in conjunction with the statute before you read these Recent Developments any further.

### Some points to note on the Fraud Act

The offences contrary to ss.2–4 are complete where D has the intention to make a gain or cause a loss to the victim (loss or gain are defined in s.5 as being money or property). There is no need for the victim's interests actually to be imperilled. The focus is on D's behaviour and the gravity of the offence depends upon his dishonest intention.

Dishonesty must be proved in order to establish the offence of fraud contrary to section 1, i.e. the false representation (s.2), the failure to disclose (s.3) and/or the abuse of position (s.4) must be made dishonestly. See *Ghosh* [1982] (s.11 requires proof of a dishonest act). Dishonesty is one of the central elements of the offence. Note that it is no longer necessary for the prosecution to prove that the misrepresentation operated on the mind of the victim.

It has been argued that the offence of fraud is, in effect, a general dishonesty offence which is overly broad and with uncertain scope, thus possibly infringing Article 7 of the European Convention on Human Rights. The government response to this was:

We are not proposing a general dishonesty offence: dishonesty is an underlying requirement, but is only one of the requirements, and each limb of the new offence sets specific tests which must be met, in addition to dishonesty. We therefore believe it fully meets the requirements of Article 7.

The government made a statement of ECHR compatibility which was available at the start of the bill as it was introduced in each House.

### **Fraud by false representation: s.2**

A representation is defined as false if it is untrue or misleading and the person making it knows that it is, or may be, untrue or misleading.

In contrast to the pre-existing law, there is no need for the prosecution to demonstrate that the misrepresentation operated on the mind of the victim. This does away with the problem of the victim who is indifferent as to whether the representation is false or not – for example the sales assistant in a shop who knows that if he complies with the credit company's requirements the shop will receive payment, but is indifferent as to whether or not the customer's implied representation that he or she is entitled to use the card is true or false.

It follows that, as the misrepresentation does not need to act on the mind of the victim, this offence can be committed *vis-à-vis* a machine. See in particular s.2(5) and the November article on the VLE.

### **Fraud by failing to disclose information: s.3**

Note that the duty must be a legal duty. The concept of 'legal duty' is explained in the Law Commission's Report on Fraud. See the November article on the VLE. Note also the possible overlap with s.2 as a failure to disclose information which D is under a legal duty to disclose will also be a false representation.

### **Fraud by abuse of position: s.4**

Section 4 makes it an offence to commit a fraud by dishonestly abusing one's position. It applies in situations where the defendant has been put in a privileged position, and by virtue of this position is expected to safeguard another's financial interests or not act against those interests. See the November article on the VLE.

### **Obtaining services dishonestly: s.11**

This new offence combats problems with the 'deception' of automated service provision. It is not restricted to the deception of machines but deals generally with the obtaining of services dishonestly. See the December article on the VLE.

Note that the service must be a non-gratuitous service and that it is sufficient that D knows that this 'might' be the case – s.11(2)(c)(ii) – and it must be proved that D intended that payment would not be made or would not be made in full. The offence is not inchoate: it requires the actual obtaining of the service.

### **Definitions**

The definitions of 'gain', 'loss' and 'property' are aligned with those used in the law of Theft. Gain and loss are defined in s.5 of the Fraud Act 2006 and property is as defined in s.4(1) (read with s.32(1)) of the Theft Act 1968.

## **Chapter 7 Unlawful homicide: murder and manslaughter**

- *R v Coutts* [2006] UKHL 39.

D killed V during consensual sexual activity which involved the use of a ligature made from a pair of tights which he had tied around her neck. He claimed that he had not intended to kill or cause V grievous bodily harm. Although he was a neck fetishist, he was not violent and had never before harmed anyone when using such ligatures during sexual activity.

D was charged with murder and convicted.

The trial judge, with the support of the prosecution and the consent of the defence, did not leave an alternative count of manslaughter to the jury. He directed the jury that they should convict of murder if satisfied that the appellant had committed that offence and, if not so satisfied, acquit. The Court of Appeal dismissed his appeal, where he contended that a manslaughter verdict should have been left to the jury for their consideration irrespective of the parties' wishes.

The narrow question raised by the appeal is whether, on the facts of this case, the trial judge should have left an alternative verdict of manslaughter to the jury. The broader question, of more general public importance, concerns the duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence which a rational jury could accept to support such a verdict but neither prosecution nor defence seek it. (Lord Bingham)

The House of Lords allowed D's appeal, ruling that on a charge of murder the alternative verdict of manslaughter should normally be left to the jury – unless, for example, it would result in an unfair trial – if there was material to support it, irrespective of the wishes of the parties.

It did not serve the interests of justice where a defendant who had committed a lesser offence was either convicted of the greater offence or acquitted. His punishment would either be too harsh or he would not receive the measure of punishment his crime deserved.

The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. (Lord Bingham)

Lord Hutton's view was that in this case, the lesser offence would have been manslaughter by unlawful and dangerous act. V's consent to the use of the ligature would not have been legally valid: *Brown* [1994] HL; *Emmett* [1999] CA.

- *R v Dhaliwal* [2006] 2 Cr App R 24.

In this case the Court of Appeal, following the case of *Chan-Fook* [1994], held that the ambit of 'bodily harm' was restricted to recognised psychiatric illness although it was stated *per curiam* that unlawful violence on an individual with a fragile and vulnerable personality which is proved to be a material cause of death, even if the result (death) is suicide, is arguably capable of amounting to manslaughter.

## Chapter 8: Voluntary manslaughter: the defenses of provocation and diminished responsibility

### Diminished responsibility

- *R v Hendy* [2006] EWCA Crim 819.

D killed V while suffering from an abnormality of mind and while intoxicated. The trial judge directed the jury as follows:

1. Have the defence satisfied you that it is more likely than not if the defendant had not taken drink he would have killed as he in fact did? If the answer is 'no', the verdict is 'guilty of murder'. If the answer is 'yes', proceed to... 2.
2. Have the defence satisfied you that it is more likely than not that if the defendant had not taken drink he would have been under diminished responsibility when he killed? If the answer is 'no', the verdict is 'guilty of murder'. If the answer is 'yes', the verdict is 'not guilty of murder, but guilty of manslaughter by reason of diminished responsibility'.

D was convicted of murder and appealed. The prosecution conceded that the trial judge had not directed the jury in accordance with *Dietschmann* [2003] (see page 114 of the subject guide), but that the direction was in accordance with the law as it was at the trial, which took place before the decision in *Dietschmann*.

The issue for the Court of Appeal was, therefore, whether the House of Lords in *Dietschmann* made new law or whether the decision represented the law as it always was.

The Court held that the trial judge had misstated the law as it was at the time of the trial and stated *per curiam* that the House in *Dietschmann* had not been propounding any new principle of law but merely explaining what the law had been since the enactment of the Homicide Act 1957 and since *R v Gittens* [1984].

**On 29 November 2006 the Law Commission published its recommendations for the law of murder and other homicides. This is the first review of its kind for half a century. The Law Commission Report on Homicide 'Murder, Manslaughter and Infanticide' (Law Com. No.304, TSO, 2006).**

Go to <http://www.lawcom.gov.uk/docs/lc304.pdf> and see the editorial by Ian Dennis in the *Criminal Law Review*, Crim LR 2007, Feb, 107–108. You can access this article in full on Westlaw, which is available through the University of London online library at <http://www.external.shl.lon.ac.uk/>

Note that these are recommendations and do not represent current law.

## Chapter 10 Aggravated non-fatal offences against the person

- *DPP v Smith* [2006] EWHC 94 (Admin).

The issue for the court was whether cutting a person's hair without their consent could amount to an offence contrary to s.47 of the Offences Against the Person Act 1861.

The Divisional Court of the Queen's Bench held that evidence of external bodily injury or a break in or bruise to the surface of the skin was not required for the purposes of actual bodily harm within s.47 of the Offences Against the Person Act 1861. Hair was part of the human body which was intrinsic to each individual and the cutting off of a substantial part of a person's hair, without that person's consent, in the course of an assault was capable of amounting to the offence contrary to s.47 even where it did not leave any mark or break the skin. *Chan Fook* [1994] and *Ireland* [1998] HL followed.

## Chapter 12 Defences 1: Failure of proof and justificatory defences

- *R v Altham* [2006] EWCA Crim 7.

### Necessity

The defendant was charged with an offence contrary to s.5(2) of the Misuse of Drugs Act 1971 – he had been smoking cannabis (a controlled drug) for 15 years to alleviate the constant pain he suffered as the result of injuries he had suffered in a road traffic accident. The Court of Appeal held that the trial judge had been entitled to hold that the defence of necessity should not be left to the jury. The role of the defence according to Scott Baker LJ 'cannot be to legitimise conduct contrary to the clear legislative policy and scheme...'. Further, the state was not in breach of its obligation under Article 3 of the European Convention on Human Rights by not permitting him to take any steps that were necessary to alleviate his medical condition notwithstanding that those steps breached the criminal law: it had done nothing to subject the appellant to either inhuman or degrading treatment and thereby engage the absolute prohibition within Article 3.

## Chapter 13 Defences 2 – Excusatory and mental disorder defences

- *DPP v Mullally* [2006] ALL ER (D) 49 (Nov).

### Duress

The defendant drove a car having consumed excess alcohol after the police were in attendance, having responded to her call to them. The Divisional Court of the Queen's Bench held that the Justices had fallen into error when they decided that her response to the threat was objectively reasonable. According to the Queen's Bench Division, once a reasonable person knew that the police were in attendance, they would have concluded that they would have been given protection by the police. The Justices were wrong to have acquitted the defendant and the matter would be remitted to them with a direction to convict.

## Chapter 14: Inchoate offences

### Incitement

- *R v Abu Hamza* [2006] EWCA Crim 2918.

The Court of Appeal held that it was an offence contrary to s.4 of the Offences Against the Person Act 1861 for a person to incite a foreign national in England or Wales to commit murder abroad. The offence was not restricted to situations where those committing the murders were to be British subjects. Section 4 enacted the ingredients of

substantive offences. It did not lay down rules of jurisdiction and there was nothing in the wording of the section to suggest that the conspirators, or the person incited, should be British subjects.

## Conspiracy

- *R v Saik* [2006] UKHL 18.

The case for the prosecution was that D, who operated a currency exchange office, had in the course of that business converted sterling which was or represented the proceeds of drug trafficking or other criminal activity into foreign currency.

D's qualified plea of guilty to a charge of conspiracy to launder money contrary to s.1 of the Criminal Law Act 1977 was accepted by the court. He claimed that although he suspected that the money was the proceeds of crime, he did not in fact know that it was.

A defendant will be guilty of the substantive offence of money laundering where he knows or has '**reasonable grounds to suspect** that such property... represent[s] another person's proceeds of... criminal conduct' but, in the case of conspiracy, s.1(2) of the Criminal Law Act 1977 provides that: 'where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement **intend or know** that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.'

D's appeal against conviction to the Court of Appeal failed but he succeeded in his subsequent appeal to the House of Lords.

Conspiracy to commit an offence is a different harm from the actual commission of the substantive offence in that conspiracy imposes criminal liability on the basis of a person's intention. For the purposes of conspiracy, knowledge required proof of a true belief, even where a lesser form of *mens rea* (or no *mens rea*) was required for the substantive offence.

In July 2006 The Law Commission published its recommendations on assisting and encouraging crime. Inchoate Liability for Assisting and Encouraging Crime: Law Comm 300. You can access this report at <http://www.lawcom.gov.uk/docs/lc300.pdf>

Note that these are recommendations and do not represent current law.