

Think box 9.1

Which of the following threats do you think amounts to serious injury?

- a) a broken arm/leg;
a dislocated finger;
one slap around the head;
a hundred slaps around the head;
an electric shock?
- b) Economic ruin, damage to reputation, the destruction of a home or object with monetary or sentimental value?

Answer guidance

(a) The Graham/Howe/Hasan test requires death or serious violence. But what might be trivial to one could be serious to another. Therefore is no fixed sliding scale of harm.

(b) None would qualify even though D's ability to resist threats might have been overwhelmed.

Think box 9.2

Which of the following characteristics would be admissible in relation to the standard of reasonable firmness to be expected of a reasonable person after Bowen:

- Being 18;
- Schizophrenia;
- Mild depression/anxiety;
- Weakness and timidity;
- Weakness/timidity of grandmothers aged 57 or 75;
- Low IQ;
- Battered Woman Syndrome;
- Blindness;
- Suicidal tendencies?

Answer guidance

- Possibly
- Yes
- No
- No
- No (yes but only on age ground)

- No
- Yes
- Yes
- No

Think box 9.3

1. Do you think that ordinary people are heroes?
2. What moral principle is reflected in Howe's stance on duress?
3. Is there a 'social good' or utilitarian principle to the judgment?
4. If you were threatened that your two children would be shot unless you shot a stranger, what would you do? Would duress provide a defence?

Answer guidance

Consider: The sanctity of life; and that the defence should not become a charter for terrorists, gangsters and kidnapers.

Think box 9.4

- Do you think that any of the following murders are morally justifiable?
- A mother kills X when her child, who is being held hostage, is threatened with death.
 - A young child is threatened with death by his psychotic father if he does not assist in killing his mother.
 - A pregnant woman kills X rather than submit to being killed, in order to save the life of her unborn child.
 - A woman subject to domestic violence from her husband assists in killing his adversary.
- Should duress be a defence to these murders?

Answer guidance

This is a matter of opinion but in each example there are moral arguments to say that the killing would be reasonable on the grounds that D's will would be overcome by fear for the life of another or overcome by fear of personal

violence/death. In none of these cases, however, would duress be a defence to murder.

Think box 9.5

Consider whether duress of circumstances applies to the following:

- D was approached in his car by a plain-clothed police officer. He thought he was going to be attacked and drove away at high speed. He was charged with reckless driving.
- D, who had been assaulted by her husband and threatened with death, drove 72 miles to her home town whilst intoxicated in order to escape. Would it make any difference if she had only driven to the nearest place of safety?
- D was forced to drive whilst drunk in order to escape from a threatened arson attack on her home.

Answer guidance

Denton [1987] 85 Cr App R 246: duress of circumstances applicable.
DPP v Lorraine Tomkinson (2001) EWHC Admin 182 – 72 miles is more than necessary, defence fails. It should succeed in second part of the question. Defence will succeed provided she drives no further than necessary to escape. See too: DPP v Mullally [2006] EWHC 3448 (Admin) where driving half a mile whilst drunk and in night clothes to escape a threatening scene after the police had arrived was unreasonable.

Think box 9.6

Answer the following. In each case, think of whether the harm outweighs the offence and the best interests criterion.

1. A 15-year-old anorexic girl is refusing to eat. Can a hospital force-feed her against her wishes? [Re F and Re W (a minor) (refusal of medical treatment) CA July 10 1992.]
2. A 20-year-old woman refuses a blood transfusion under the influence of her mother who is a Jehovah's witness. Can the hospital force it upon her? [Re T, CA, Times, October 14, 1992.]
3. A 12-year-old pregnant girl wishes to have an abortion but her mother will not give consent because she does not agree with it. Can the hospital perform the operation? [Re B (a minor) Family Division, May 20, 1991.]

Answer guidance

1. This would undoubtedly be justified as being in her best interests: necessity would provide a defence.
2. Doctors can override patient in her best interests where her capacity to decide has been overborne by others.
3. Abortion was in the best interests of the girl, who was made a ward of court in view of the risk to her physical and mental health. Her interests, though not necessarily wishes, were paramount.

Think box 9.7

Following *Re A*, would necessity provide a defence in the following murder cases?

1. A mountaineer (D) whose companion (V) falls over a precipice is in danger of being pulled over the edge. D cuts the connecting rope and V falls to a certain death.
2. D climbs a ladder whilst leading a group to safety in an upturned and sinking ship. He pulls from the ladder a man who has frozen with fear so that the others may escape. The man is swept away to certain death.
3. State security forces shoot down an airliner full of passengers which has been taken over by terrorists and is about to crash into a crowded skyscraper. It is the only way to save more lives.

Answer guidance

1. This example was given by G. Williams, *Criminal Law, The General Part*, as justifiable murder, contradicting *Howe*.
Offence: Murder. *Re A* states that necessity is a defence wherever one out of two or more victims is designated for death.
2. This event reportedly occurred during the sinking of the *Zeebrugge* ferry, *Herald of Free Enterprise* (Chapter 4). See JC Smith, *Justification & Excuse in the Criminal Law* (Hamlyn, 1989) at 77-78. Offence: Murder. Defence: Necessity on the 'best interests' of others argument.
3. JC Smith, *Criminal Law* commentary to Shayler below: Necessity should provide a defence. For more detailed arguments regarding this moral dilemma, see M. Bohlander, 'In Extremis – Hijacked Airplanes, "Collateral Damage" and the Limits of Criminal Law', [2006] *Crim LR* 579. He argues that English law currently has no answer to this problem. Does the state have a duty to protect a

greater number of innocent lives? Is Dudley & Stephens overruled by Re A?
Would the state be acting in prevention of crime?

Think box 9.8

Is necessity/necessity of circumstances available in the following?
[Remember: it involves a balancing of harms. The offence must be proportionate, the action must be taken to avoid a greater harm, the threat must be extraneous, possibly criminal, and must not involve self-help/direct action.]

- a. A prisoner escapes from a burning gaol in order to save his life.
- b. D smuggles through customs a parcel of cannabis for medicinal supply to others.
- c. D, whose wife is suicidal because of enduring pain from multiple sclerosis, drives her to hospital despite being disqualified from driving.
- d. D, who is suicidal because of enduring pain from multiple sclerosis, drives himself to hospital despite being disqualified from driving.

Answer guidance

The defence should succeed in (a) and (c), on the basis of Martin and Quayle (duress of circumstances or necessity of circumstances), but in none of the others.

Think box 9.9

1. Why do you think self-defence is based on 'reasonable' force in self-defence?
2. Is this an objective test (one which is measured against the standard of a reasonable person) or a subjective test (one which is measured against D's own standards)?
3. Do you think reasonable force has been used in the following?
 - D shoots a burglar in the arm with an air rifle as he is making off with D's television ;
 - D finds an intruder in her bedroom at 3.00am. Fearing she will be raped, she stabs him fatally in the neck with some scissors;
 - D stabs and injures a burglar whilst he is still outside D's house on the pavement;
 - D knocks unconscious a youth who is about to break a priceless vase;
 - D breaks the arm of a youth whom he sees mugging a man.

Answer guidance

The requirement of reasonable force means that whether D is actually under attack or mistakenly believes s/he is under attack, the force must ultimately be reasonable in the circumstances as D subjectively believes them to be. If it is clear that excessive force is used in revenge or retaliation, the defence will fail. This is an objective standard so as to prevent people from using unreasonable and disproportionate force for minor threats.

The assessment of reasonableness is based on all the circumstances of each case. Of particular relevance are the nature of the threat and the beliefs of the defender. Reasonableness is not always easy to quantify and allowances will be made for heat of the moment decisions, genuine fear and mistakes. There are no strict guidelines and the jury will decide on the facts of each case. The force used in all of the above would generally be considered excessive. It will be a question of fact as to whether it is reasonable to kill to prevent rape.

Think box 9.10

Look at the facts of the American case of *People v Goetz* 497 NE 2d 41 (NY 1986) where D was twice acquitted of murder at a trial and retrial: D, a racist, was approached by four black youths on the underground who asked him for money. D took out a gun and shot them dead. When charged with murder, D asserted that he honestly believed the youths were going to rob and assault him and that he acted in self-defence. Would his defence succeed in England?

Answer guidance

Murder: AR -Unlawful killing

MR – Intention to kill or cause GBH.

D has intentionally killed but the killing will not be unlawful if committed in self-defence. Hopefully, an acquittal would not occur in England. The requirement of reasonable force means that whether D is actually under attack or mistakenly believes s/he is under attack, the force must be reasonable in the circumstances as D believes them to be. If it is clear that excessive force is used in revenge or retaliation, the defence will fail. This should be a clear case of excessive force and the defence should fail. This is an objective standard so as to prevent people from using unreasonable and disproportionate force for minor threats.

Think box 9.11

D is sitting in a café. He is approached by a plain-clothed county court bailiff (V) who enquires about an unpaid judgment debt. D does not know who V is. A fracas ensues and D hits V in the face. D is charged with assault. Does he have a defence?

Answer guidance

Assault: AR – causing another to apprehend unlawful, personal violence;
MR – intention or recklessness.

The assault was intended but the AR may not be proved where the assault is lawful in self-defence. To determine this point, the force must be reasonable (objective) on the facts as he believed them to be (subjective) (Beckford, Williams). D may have made a mistake that he was under attack because he did not know who the identity of the bailiff. If his mistake was genuine and he felt unjustly threatened, D is entitled to the defence. The test for mistaken self-defence is subjective. The mistake does not need to be reasonable provided the force was objectively reasonable on the facts as D believed them to be.

Think box 9.12

D stabbed her husband (V) fatally with a kitchen knife whilst he grabbed her throat in a struggle. She believed her life was in danger. D suffered from Battered Woman Syndrome and was extremely sensitive to danger. The facts did not disclose a life-threatening struggle. Does D have a defence to murder?

Answer guidance

Murder: AR: Unlawful killing. MR: intention to kill or cause gbh.

Self-defence is not a plea that the killing was unintentional. It is a plea that there was no intention to kill by using unlawful force. To succeed, the force needs to be both necessary and reasonable on the facts as D honestly believed them to be, even if mistaken, (Beckford/Williams) and all other requirements of the defence, such as imminence above, are required. Martin suggests and Shaw confirms, although only of persuasive weight, that a direction to the jury is also required on D's perception of danger. Heightened sensitivity to danger from a violent partner may, in the circumstances of an actual attack, be evidence that the force was reasonable on the facts as the highly sensitive D believed them to be. If D succeeds, she will have a complete defence.

D's characteristic of BWS would be inadmissible in relation to either the necessity or degree of force (Martin).

Alternatively, either of the partial defences to murder may be available where BWS would be rightly admitted:

- Diminished responsibility: where D's condition forms an abnormality of mental functioning under s2 Homicide Act 1957.
- Loss of Control: where D has been provoked into losing self-control by a qualifying trigger and can satisfy the court that a person of ordinary tolerance and self-restraint would have responded to the violence as she did. Her sensitivity to danger and BWS may still be relevant characteristics after Holley [2005] for the Privy Council stated its wish not to deprive battered women of the defence.

Think box 9.13

D armed himself with a rice-flail: two pieces of wood joined by a chain sometimes used in martial arts. He and others went to confront someone known to be violent. He carried the weapon because of fear of imminent attack. Has D committed an offence and what is his defence?

Answer guidance

Statute: D will be charged with possession of an offensive weapon under s1 Prevention of Crime Act 1953. A defence of 'lawful authority' or 'reasonable excuse' is possible (*Evans v Hughes*) but is unlikely to apply where D voluntarily assumes the risk of violent attack by seeking out the attacker (*Malnick v DPP* [1953] Crim LR 1989).

Common law: *Devlin v Armstrong* confirms that there must be an imminent attack. AG's Reference (No 2 of 1983) states that although self-defence is a lawful object, preparing for it by arming oneself may still be unlawful.

Think box 9.14

D wished to protect the habitat of Great Crested Newts occupying a site for which planning permission had been granted. V was legitimately using a mechanical digger on the site. D struck the digger with a stake. V chased D who struck V on the arm with the stake. D was charged with assault. Can D plead prevention of crime or defence of property?

Answer guidance

The facts are borrowed from DPP v Armstrong-Braun [1999] Crim LR 416, Divisional Court, which strictly concerned excessive force in self-defence rather than prevention of crime/defence of property. But newts or land may be regarded as property. If the facts were to re-appear before the courts, Jones & Milling & Bayer would undoubtedly deprive D of a defence. The defence must be in respect of unlawful activity. V's actions are lawful.

Think box 9.15

V entered a public house, the worse for drink, and demanded to be served. D, the publican, told him to leave. V refused. D bundled V out of the bar by pinning his arms to his side from behind and pushing him violently towards the door. V fell backwards down a flight of five steps, struck his head and received injuries from which he later died. D was charged with manslaughter and raised self-defence. Which of the following statements correctly represent the law:

- a) The use of force in self defence is subjectively assessed.
- b) D can make an unreasonable but honest mistake that he is under attack.
- c) D can use an unreasonable amount of force on the facts as he honestly believes them to be.
- d) The use of force is assessed in an objective sense as to whether or not force is reasonably necessary in the circumstances as D honestly believed them to be.

B and D are correct. The overall requirement is one of reasonableness on the basis of D's honest belief. There is no separate test regarding proportionality/degree of force. This was confirmed by the Court of Appeal in Owino. The facts here are loosely based on Scarlett [1993] which wrongly allowed an entirely subjective test on the degree of force.