***Para 16.9** In *Riddell* [2017] EWCA Crim 413 the Court of Appeal, confirming that self-defence was not limited to offences against the person, held that, although unlikely to arise, that self-defence was capable of being a defence to a charge of dangerous (or careless) driving. The Court recognised that for the defence of self-defence to succeed that the force used had to be in order to meet an actual or perceived force or threat of force and that, whilst a charge of dangerous (or careless driving) did not in itself convey the use of force, the alleged facts may be such that the force applied was in response to actual force or a threat of force. The Court stated therefore that whether the defence of self-defence would apply ultimately depended on the use of force involved in the driving by reference to the particular circumstances of the case.

In *R (DPP) v Stratford Magistrates' Court* [2017] EWHC 1794 (Admin) the Divisional Court stated, *obiter*, that the defence under s 3(1) applied where there was a direct application of force, although the force did not necessarily have to be applied directly against a person. By way of example, the Court recognised that the defence would apply to a defendant who attached himself to a lorry which was believed to be carrying chemical weapons, but not to those who laid down in the road in front of lorries driving to a place where crimes were believed to be taking place, or who blocked access by chaining themselves to gates.

In *Oraki v DPP* [2018] EWHC 115 (Admin) (also dealt with in para 6.69 of the updates to Chapter 6) the Divisional Court decided two points of interest: (1) self-defence or defence of another is a general defence known to the criminal law and (2) the defences are not restricted to cases involving the use of force. Singh LJ stated (at [28]): 'For example, if a person does not touch a police officer but gets in his way, perhaps by blocking a police car by driving his own car in front of it, which enables a third party to get away, I can see no reason in principle why the defence of protection of another person should not be available [to a charge of obstructing a constable in the execution of his duty]. Depending on the facts, the defence may or may not be a good one, and much will depend on the state of mind of the defendant, for example, if he believes that the police are in fact thugs who are chasing an innocent person.'

***Para 16.20** In *Taj* [2018] EWCA Crim 1743 (also dealt with in para 15.126 of the updates to Chapter 15) the Court of Appeal held that the phrase 'attributable to intoxication' in the Criminal Justice and Immigration Act 2008, s 76(5), is not confined to cases in which alcohol or drugs are still present in a defendant's system. It concluded (at [60]) that the phrase was:

> 'broad enough to encompass both (a) a mistaken state of mind as a result of being drunk or intoxicated at the time and (b) a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking, so that even though the person concerned is not drunk or intoxicated at the time, the short-term effects can be shown to have

> triggered subsequent episodes of *e.g.* paranoia. This is consistent with common law principles. We repeat that this conclusion does not extend to long term mental illness precipitated (perhaps over a considerable period) by alcohol or drug misuse.'

The Court of Appeal, dismissing the appeal against conviction, concluded that the trial judge was correct to remove self-defence from the jury's consideration as D's mistaken belief, as a result of his paranoid state of mind, that V was a terrorist was a direct and proximate result of his earlier drinking and drug taking in the previous days prior to the incident.

Para 16.24 The issue before the Court of Appeal in *Ray* [2017] EWCA Crim 1391 was whether the Criminal Justice and Immigration Act 2008, s 76(5A), which provides the defence of self-defence in 'householder cases', was correctly interpreted by the Divisional Court in *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin). The Court of Appeal, confirming that the interpretation in *Collins* was correct, held (at [24]-[29]) that:

> 'Once the jury have determined the circumstances as the defendant believed them to be, the issue, under s.76(3), for the jury is (as it always has been at common law) whether, in those circumstances, the degree of force used was reasonable.
>
> In determining the question of whether the degree of force used is reasonable, in a householder case, the effect of s. 76 (5A) is that the jury must first determine whether it was grossly disproportionate. If it was, the degree of force was not reasonable and the defence of self-defence is not made out.
>
> If the degree of force was not grossly disproportionate, then the effect of s.76(5A) is that the jury must consider whether that degree of force was reasonable taking into account all the circumstances of the case as the defendant believed them to be. The use of disproportionate force which is short of grossly disproportionate is not, on the wording of the section, of itself necessarily the use of reasonable force. The jury are in such a case, where the defendant is a householder, entitled to form the view, taking into account all the other circumstances (as the defendant believed them to be), that the degree of force used was either reasonable or not reasonable.
>
> The terms of the 2013 Act have therefore, in a householder case, slightly refined the common law in that a degree of force used that is disproportionate may nevertheless be reasonable.

> As subsection (6) makes clear, in a non-householder case the position is different; in such a case the degree of force used is not to be regarded as reasonable if it was disproportionate
>
> Thus in our judgment the amendments to s.76 put the householder relying on self-defence in a position different from all others relying on the defence. This is clear on the language of the Act. But it is narrow and not of the wide-ranging effect for which the appellant contended. We accordingly reject the contention that provided the degree of force used by a householder is not grossly disproportionate then it is necessarily reasonable.'

Paras 16.32-16.36 In *Armani Da Silva v UK* [2016] ECHR 5878/08 an application was brought before the European Court of Human Rights (ECtHR) by V's sister who argued that the legal test used in England and Wales for self-defence and defence of another was incompatible with ECHR, Article 2, in particular the compatibility of the English definition with the requirement that an honest belief be perceived for good reasons. V was shot dead by D1 and D2. D1 and D2 were police officers employed to observe a suspected terrorist as part of a covert surveillance operation that was set up in the aftermath of the terrorist attack in London, and following a number of bombs being located in public places, including public transport, which the police suspected was another planned terrorist attack. D1 and D2 honestly believing, although mistakenly, that the victim was the suspected suicide bomber being observed by the police officers followed the victim into an underground tube station, and suspecting, although mistakenly, that he was reaching in his coat to detonate a bomb, shot the victim repeatedly, resulting in his death. D1 and D2, argued that they had honestly believed, although mistakenly, that they, and the general public, were in imminent danger from a suspected suicide bomber. In reaching a decision on compatibility the ECtHR assessed the current legal test applied in England and Wales, and the previous decisions of the ECtHR in *McCann v UK, Bubbins v UK and Bennett v UK* (discussed in para 16.33-16.35 of the text) where the Court had held that the legal test in England and Wales did not violate Article 2 of the Convention. However, the ECtHR recognised that there was a need to consider the compatibility issue raised in the instant case afresh as the earlier decisions were in relation to the requirement that the use of force be reasonably justified which the Court held was compatible with 'absolutely necessary'. In considering the requirement of a honest belief that force was necessary, the ECtHR held (at [252]) that 'it cannot be said that the test applied in England and Wales is significantly different from the standard applied by the Court in the *McCann* judgment and in its post-*McCann* case-law…', and therefore '…it can cannot be said that the definition of self-defence in England and Wales falls short of the standard required by Article 2…'.

***Para 16.44, n 130** In *MK* [2018] EWCA Crim 667 the Court of Appeal held that the Modern Slavery Act 2015, s 45 did not implicitly require the defence to bear the persuasive burden of proof of any of the elements of the defence. It was for the defendant to raise evidence of each of those elements and for the prosecution to disprove one or more of them.

Paras 16.44, n 130, 16.47 and 16.48 The Court of Appeal in *Joseph* [2017] EWCA Crim 36 considered the availability of the defence of duress by threats and duress by circumstances in cases where victims of human trafficking for the purpose of exploitation commit a crime in England and Wales where there is a nexus between the crime committed and the trafficking. The Modern Slavery Act 2015, s 45 and schedule 4 addresses the position for those offences occurring after commencement of the relevant provisions (mentioned in para 16.44, n 130 of the text). The Court of Appeal held that the 2015 Act was not drafted to give retrospective protection to victims of trafficking, concluding that the common law would continue to apply to those who claimed there was a nexus between human trafficking and the offence committed, if that offence was committed before the commencement of the relevant provisions contained in the 2015 Act. The Court of Appeal, refusing to develop the law on duress (both duress by threats and duress by circumstances) to encompass such cases, held that Parliament had considered the matter and enacted s 45 without providing retrospective protection to victims of trafficking.

Paras 16.47 and 16.48 In *Brandford* [2016] EWCA Crim 1794 the Court of Appeal had to consider whether the trial judge was correct to withdraw the defence of duress by threats from the jury. The Court of Appeal, dismissing the appeal, held that the trial judge, following *Bianco* [2001] EWCA Crim 2516, was entitled to withdraw the defence, where upon proper scrutiny the trial judge concluded that no reasonable jury, properly directed, could have found that D acted under duress by threats. The issues in this case was that the threat had not been made directly to D, but indirectly through a third party, her boyfriend, namely that his life was at risk if he did not manage to sell Class A drugs in Portsmouth. D claims that as a result of this threat she assisted him in transporting the drugs to Portsmouth. However, it is questionable as to whether this indirect threat of death or serious injury to a third party impelled her to act, or whether it was the fact she was deeply in love with her boyfriend and would have done anything to help him, with or without the threat, making the threat a secondary factor. The Court of Appeal, having reviewed the relevant authorities which was silent on indirect threats made by third parties, concluded, *obiter*, that a threat could be conveyed indirectly, although recognising that a more directly conveyed threat was more likely to succeed as it was easier to satisfy the immediacy requirement within the defence of duress by threats. However, the Court of Appeal concluded that on a proper scrutiny of the case that the trial judge was correct to remove the defence of duress by threats from the jury due

to the vagueness of the threat in question and the lack of immediacy which lead to the possibility of evasive action being taken.

Para 16.63 In *Dunne v Director of Public Prosecutions* [2016] IESC 24, the Supreme Court of Ireland were asked to reconsider the current common law position and establish that the defence of duress could be a defence to murder. Following the authority and discussions on the issue that have arisen in English law, the Supreme Court of Ireland at [162] held that to change the common law position, so as to make the defence of duress available to a charge of murder, would be an alteration that is so fundamental that it could only occur if legislated by Parliament. This is the viewpoint which has similarly been iterated in English law – see the reference to *Gotts* in para 16.63.

***Para 16.79** In *Petgrave* [2018] EWCA Crim 1397 the Court of Appeal considered duress of circumstances, and held that the prosecution only had to disprove the defence once raised in evidence by D. The Court of Appeal speculated that there may be rare occasions when the evidence adduced by P could form the evidential basis for the defence to be raised, but concluded that this was not one of those occasions. The Court of Appeal stated (at [27] and [28]):

> '... The prosecution evidence showed, at its highest, that the appellant had in the past been threatened by armed men and that on the night in question his car was chased along the pavement by armed men. But the prosecution evidence was silent as to when, how or why that chase began. It did not, and could not, tell the jury anything about whether the appellant was driving on the pavement *because* he was being chased, or for some other reason. For all that the prosecution evidence showed, the appellant might deliberately have acted in a way which provoked the men to chase him; or he might have been driving on the pavement in order to remove himself from the scene of a crime of which his pursuers were the victims. Nor could the evidence at that stage tell the jury anything about whether the appellant was in fear. Even if he was in fear, there was at that stage of the trial no evidence that he was in such fear that he was compelled to drive along the pavement, without even sounding his horn as his car bore down on the pedestrians in front of him. Because he had declined to answer questions in interview, it could not be suggested on his behalf that the interview record raised any evidence which could and did sufficiently raise the defence of duress of circumstances.
>
> Once the appellant gave evidence, of course, the position was different. The defence was raised in his evidence and it was for the prosecution to disprove it. But a defendant who wishes to rely on the defence of duress of circumstances cannot put it in issue through his advocate. It must be put in issue by evidence. In this case the prosecution evidence

> did not raise the issue. It did no more than provide a foundation on which the appellant could build to raise the issue himself, if he chose to give evidence, that he acted in fear and out of necessity. Thus, in our judgment, the learned judge's decision to reject the submission of no case to answer was correct.'

Para 16.85 The Court of Appeal in *Riddell* [2017] EWCA Crim 413 considered the relationship between self-defence and duress of circumstances, and stated (at [29]):

> '…It might be said that self-defence is itself akin to a defence of duress (of circumstances): in the sense that a person (D) who honestly believes himself to be under attack, or threatened attack, can by reason of the pressure of those circumstances justify himself by using reasonable force in response. Nevertheless, on any view there are clear and settled differences…between the two defences. For one thing, a defence of duress of circumstances ordinarily would require…a threat of death or serious injury. That is not required to be so for self-defence. Another important difference (among others) is that, in cases of duress, the yardstick is essentially objective: thus the belief as to the threatened force must be reasonable, as well as the actual response to the threat being reasonable: see, for example, *Martin* (1989) 88 Cr. App. R 343. But that is not so in self-defence. Whilst, in self-defence, the response of D must be reasonable and proportionate, that is so by reference to the circumstances in which, subjectively, D genuinely - even if mistakenly and even if unreasonably - believed himself to be...'