**R v Gnango [2010] EWCA Crim 1691, [2011] 1 All ER 153, Court of Appeal**  
**Issues:** Transferred malice; Joint Enterprise  

**Facts**  
One evening, Armel Gnango and a man known only as ‘Bandana Man’ (because he was never caught) engaged in a gun battle in New Cross in south-east London. A young woman, Magda Pniewska, 26, was caught in the cross-fire and killed – shot once in the head by Bandana Man. Gnango was subsequently convicted of the attempted murder of Bandana Man and the murder of Magda, on the basis of joint enterprise. He appealed against his murder conviction.

**Held:** Appeal allowed. Gnango and Bandana Man were not engaged in a joint enterprise. Several cases such as *Chan Wing-sui* [1985] AC 168 and *Hui Chi-ming* [1992] 1 AC 34 had established that where two or more defendants participate in a criminal enterprise, and a more serious crime was committed by one of them, the other(s) may be liable for that more serious offence if they participated in the venture with foresight of the possibility of that more serious offence being committed. However, those principles presupposed that the defendants were participating in a joint criminal enterprise in the first place. This was not the case here. Although Gnango and Bandana Man were both committing affray, this did not mean that they had a shared or common purpose. In the present case, their purposes might be similar or even coincident, but they were not shared. Hence, even if Gnango had foreseen the possibility of Bandana Man committing murder, this did not make Gnango liable for the death of Magda Pniewska, as her death did not occur in the context of a joint enterprise.

**Also note:** The Court of Appeal stated that there was no doubt whatsoever that Bandana Man was guilty of Magda Pniewska’s murder, applying ‘the ordinary law of transferred malice’ (Thomas LJ).

**R v Inglis [2010] EWCA Crim 2637, Court of Appeal**  
**Issues:** Meaning of ‘human being’ in the context of murder; whether ‘mercy killing’ amounts to murder  

**Facts**  
Frances Inglis was charged with the murder of her son, Thomas Inglis, 22, by injecting him with a fatal overdose of heroin. At the time, Thomas was in a ‘desperate state of disability’. Some 18 months’ earlier, Thomas had suffered serious head injuries after falling from an ambulance. He was taken to hospital in a ‘deep’ coma, and put on a life-support machine. Two ‘decompression’ operations were carried out, which involved removing part of the front of his skull to relieve pressure on the brain; these left Thomas with a ‘severe disfigurement’.

Frances found all of this extremely depressing and distressing. She regarded the operations as ‘evil’ and wished that Thomas had been allowed to die a natural death; she was convinced that he was suffering and in pain and that it was her duty as his mother to release him from that. She became further obsessed with the notion that she had to kill Thomas, quickly and peacefully, to prevent what she regarded as a ‘prolonged and lingering’ death. At her murder trial, she relied on provocation but was convicted after the trial judge ruled that there was no
evidence of a loss of self-control to support that defence. She appealed, arguing that her case was not murder but a ‘mercy killing’; alternatively, Thomas was so severely disabled as to no longer be a ‘human being’.

**Held:** Appeal (against conviction) dismissed, although her ‘tariff’ – the minimum period before she would become eligible for parole – was reduced. The Court of Appeal ruled that the law of murder did not distinguish between murder committed for ‘malevolent reasons’ and murder motivated by ‘familial love’. Mercy killing was murder. The Court also held that Thomas was still a ‘human being’. No matter how little time a person might have had left, and no matter how severe his or her disability, they were still a ‘person in being’. The Court also discussed the legal situation relating to euthanasia. The Court concluded that, until Parliament decided otherwise, there was a distinction to be drawn between the withdrawal of life-supporting treatment, which (subject to stringent conditions set out by the House of Lords in *Airedale NHS Trust v Bland* [1993] AC 789), may be lawful, and the active termination of life, i.e. euthanasia, which is unlawful.

**Comment:** This case raises several important issues.

- First, it confirms the long-standing principle of criminal law that motive must be distinguished from *mens rea*. Frances Inglis’ motive was love for her son, a need on her part to release her son from what she regarded as his suffering. However, her intention was to kill him, using a fatal drugs overdose. Although her motive was irrelevant to the question whether or not she was guilty of murder, it could be (and was) taken into account in determining her sentence.

- Second, Inglis confirms that there is no rule of law which provides that a severely disabled person and/or someone with a very limited lifespan is no longer a ‘human being’. This has to be correct. As the Court of Appeal decided in *Malcharek, Steel* [1981] 2 All ER 422, ‘There is only one true test of death and that is the irreversible death of the brain stem’. Until brain death has occurred, the person concerned is still a human being. If nothing else, that test is certain; in other words, it leaves very little, if any, room for argument as to when a person ceases to be a ‘human being’. Introducing an alternative test – based on the victim’s ‘quality’ of life and/or how much time they had left to live – would introduce an unacceptable degree of uncertainty into the law.

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**R v Keane [2010] EWCA Crim 2514, Court of Appeal**

**Issues:** Whether self-defence can be relied upon by someone who provokes a fight

**Facts**

Daniel Keane was charged with inflicting grievous bodily harm (GBH). He had punched V once in the face, knocking him onto the ground where V hit his head, suffering serious injury. At trial, Keane relied on self-defence but was convicted after the trial judge directed the jury that self-defence was unavailable where D was ‘the aggressor’ or had ‘successfully and deliberately provoked a fight’. Keane appealed.

**Held:** Appeal dismissed. The Court of Appeal ruled that, where D deliberately provokes V into punching him, that does not provide D with a guaranteed plea of self-defence were he to punch V in return. To hold otherwise ‘would be to legalise the common coin of the bully who confronts his victim with taunts which are deliberately designed to provide an excuse to hit him. The reason why it is not the law is that underlying the law of self-defence is the commonsense morality that what is not unlawful is force which is reasonably necessary. The force used by the bully in the situation postulated is not reasonably necessary. On the contrary, it has been engineered entirely unreasonably’ (per Hughes LJ). However, there may
be situations where self-induced self-defence might be available: ‘self-defence may arise in
the case of an original aggressor but only where the violence offered by the victim was so out
of proportion to what the original aggressor did that in effect the roles were reversed.’

**Comment:** This appears to be a new proposition of English law, although the Court of
Appeal relied upon *Burns v HM Lord Advocate* 1995 SLT 1090, a decision of the Scottish
High Court of Justiciary. Until *Keane*, the law in England had been clear: that D had to satisfy
two criteria in order to rely on self-defence:

1. the use of some force had to be necessary (*Beckford* [1988] AC 130);
2. the amount of force used had to be reasonable (*Palmer* [1971] AC 814).

The former issue was tested subjectively, the latter objectively (albeit that the jury had to
place themselves in the position that D honestly believed to exist (*Owino* [1996] 2 Cr. App. R.
128). However, *Keane* decides that self-defence is only available where the use of some force
was ‘reasonably necessary’. This appears to introduce an objective element into the first
criterion and changes the law quite significantly. An appeal to the Supreme Court to clarify
this point would be welcome.

*R v McGrath* [2010] EWCA Crim 2514, Court of Appeal

**Issue:** Directions on mistaken belief in self-defence to be avoided where D was actually
being attacked; the significance of s.76 of the Criminal Justice & Immigration Act 2008

**Facts**

Katherine McGrath was charged with the murder of her boyfriend in the kitchen of her flat in
the early hours of the morning. She claimed that he had attacked her physically, and had spat
on her and bitten her, and that she had grabbed a steak knife from a kitchen drawer and
stabbed him with it. The stab wound penetrated his heart and he died. She relied on self-
defence. The jury acquitted of murder but convicted of manslaughter. McGrath appealed,
arguing that the trial judge had misdirected the jury by referring to mistaken belief on self-
defence, and to s.76 of the Criminal Justice & Immigration Act 2008, whereas D’s claim was
that she was actually being attacked.

**Held:** Appeal dismissed. The Court of Appeal held that directions on mistaken belief in self-
defence should be avoided where D was claiming to have actually been attacked. In this case,
therefore, the introduction of the possibility of mistaken belief was an ‘unnecessary
complication which should not have been present.’ However, it was not sufficient to render
her conviction unsafe. Hughes LJ went on to explain the role of s.76: ‘For the avoidance of
doubt, it is perhaps helpful to say of s.76 three things: (a) it does not alter the law as it has
been for many years; (b) it does not exhaustively state the law of self-defence but it does state
the basic principles; (c) it does not require any summing-up to rehearse the whole of its
contents just because they are now contained in statute. The fundamental rule of summing-up
remains the same. The jury must be told the law which applies to the facts which it might
find; it is not to be troubled by a disquisition on the parts of the law which do not affect the
case.’

*R v Rowbotham* [2011] EWCA Crim 433, Court of Appeal

**Issues:** Intoxication as a defence to murder, aggravated arson and burglary

**Facts**

William Rowbotham, 18, had been out one night in Nottingham and was extremely drunk. He
was seen by witnesses at around 1.30am, already very drunk and drinking neat vodka. At
around 2.30am he entered a house belonging to Gareth Needham and demanded money and a computer. Gareth threw him out. Shortly afterwards, Rowbotham pushed three wheelie bins up against the porch of a nearby house and set them on fire. The fire spread into the house and one of the occupants, a Mrs Southern, was trapped inside. Her husband was able to escape by jumping from a bedroom window but his wife was unable to escape and was killed. At 2.53am Rowbotham called the fire brigade on his mobile. He did not leave the area and was seen by witnesses stumbling around, obviously very drunk. He was still in the area some 2½ hours after the fire was started. He was subsequently convicted of the murder of Mrs Southern, burglary of Mr Needham’s house, and arson with intent to endanger life. This was despite evidence presented at the trial that Rowbotham had an IQ that put him in the bottom 1% of the population, in addition to his extreme drunkenness. He appealed.

**Held:** Appeal allowed. The uncontradicted expert evidence adduced at the trial was such that no reasonable jury could have convicted Rowbotham of the offences charged. His murder conviction was therefore quashed (with one of manslaughter substituted); his burglary conviction was quashed; his arson with intent to endanger life conviction was quashed (with ‘reckless arson’ substituted).

**Comment:** As is well-known, voluntary intoxication provides a defence to specific intent offences (those for which intention is an essential element) but is no defence to a basic intent offence (those which may be committed recklessly). The Rowbotham case provides some interesting examples of the intoxication defence in operation.

First, the proposition that voluntary intoxication provides a defence to murder is uncontroversial, dating back to DPP v Beard [1920] AC 479, where the House of Lords acknowledged that intoxication may be sufficient to prevent proof of malice aforethought. However, successful pleas are rare – more often than not, the jury decides that D’s intoxication was insufficient to prevent proof of malice aforethought. As the Court of Appeal said in Sheehan [1975] 1 WLR 739: a drunken intent is still an intent.

The further proposition that intoxication only operates as a partial defence to murder, reducing it to manslaughter, is also uncontroversial – see Lipman [1970] 1 QB 152. The proposition that intoxication provides a defence to burglary is also uncontroversial – on the basis that burglary (at least, where D is charged with entering a building as a trespasser with intent to steal) is a specific intent offence. However, it appears to be one without an actual precedent (until now, that is).

The final proposition that can be taken from Rowbotham, that arson with intent to endanger life is a specific intent offence, is again uncontroversial. However, it is regrettable that the Court of Appeal did not take more care to clarify the offence with which D could be convicted instead. The Court says that D is guilty of ‘reckless arson’, but that is ambiguous. It is submitted that, on the facts of the Rowbotham case, D should have been found guilty of arson being reckless whether life would be endangered.


**Issue:** Whether prohibited drugs are ‘property’ for the purposes of theft

**Facts**

Michael Smith, James Haines and Andrew Plummer were charged with robbery. The allegation was that they had stolen ‘drugs to the value of £50’ from Chesterfield Jordan, a heroin dealer, and had used force in order to do so. They were convicted but appealed, arguing that prohibited drugs could not be ‘property’ for the purposes of the Theft Act 1968.
**Held:** Appeals dismissed. Section 4 of the Theft Act did not exclude from the scope of ‘property’ things that were in someone’s unlawful possession. The definition of ‘property’ therefore included prohibited drugs. Lord Judge CJ said that s.4 of the Theft Act identifies ‘a number of items which might otherwise appear to be property which cannot be stolen. Thus, unless a number of other conditions are fulfilled, land cannot be stolen; nor for that matter can wild mushrooms, nor wild creatures. The exclusions do not extend to property of which someone is in prohibited or unlawful possession. Save where expressly excluded, therefore, the definition of “property” covers all property. That is what drugs are.’

*R v Wenton* [2010] EWCA Crim 2361, Court of Appeal

**Issue:** Mens rea of aggravated criminal damage

**Facts**

Luke Wenton used a brick to smash a window of a house in Liverpool, occupied by a couple and their three children. He then inserted a canister of petrol through the broken window along with a piece of paper which had been lit. The petrol spilt on the floor but did not ignite and one of the edges of the paper was burnt. He was convicted of aggravated criminal damage. He appealed.

**Held:** Appeal allowed. The Court of Appeal held that there were two distinct and separate acts, namely (i) breaking the window and (ii) inserting the canister into the house. To be liable, Wenton would have had to intend, or foresee, that breaking the window would endanger life.

**Comment:** This decision is consistent with cases such as *Steer* [1988] AC 111 and *Webster & Others* [1995] 2 All ER 168, in which the courts have held that the mens rea of aggravated criminal damage requires D to have intended, or at least foreseen the risk, that life would be endangered by the damage. In this case, D clearly damaged the window, but there was no intention or recklessness on his part that that damage would endanger life.


**Issues::** Joint Enterprise; Constructive manslaughter

**Facts**

Tommy Willett (TW) was a passenger in a Ford Mondeo that was being driven by his brother Albert (AW). They were seeking to escape from a car park where they had been attempting to steal from a van belonging to Balbir Matharu (BM). BM had tried to prevent their escape by standing in front of the vehicle, but AW drove over BM, dragging him along the road and killing him. TW was charged with murder on the basis that, although he had not agreed to his brother killing or intentionally inflicting serious injury on BM, he had realised that his brother might do so with a murderous intention but nevertheless continued to participate in the venture. He was convicted and appealed.

**Held:** Appeal allowed. The Court of Appeal held that the imposition of murder liability on TW using joint enterprise principles was dependent on proof of his continued participation in the theft, with foresight or contemplation of an intentional killing by AW. However, the trial judge had not drawn this issue to the jury's attention. If anything, the trial judge appeared to have endorsed the Crown's proposition that TW could be guilty of murder merely on the basis that he was a passenger in the vehicle being driven by his brother. This proposition would make it too easy for a jury to convict of murder a passenger in a vehicle which was being used
to escape from the scene of a crime. If there had been evidence that TW had encouraged his brother to drive at BM in order to escape, then there would have been sufficient evidence upon which a jury could convict TW of murder (under secondary liability principles). The Court of Appeal added that the facts might support a conviction of constructive manslaughter instead, based on the unlawful and (in these particular circumstances) dangerous act of theft. That would have to be tested at a retrial.

*R v Williams* [2010] EWCA Crim 2552; [2011] 1 WLR 588, Court of Appeal

**Issues:** Causation in driving cases where death is caused; Strict Liability

**Facts**
Jason Williams was driving his car along a dual carriageway in Swansea. He did not have a driving licence or insurance. Suddenly, David Loosemore stepped out into the path of W’s car, was knocked into the air and suffered fatal head injuries. Witnesses testified that W was not speeding and there was nothing he could have done to avoid hitting V. Nevertheless, W was convicted of causing death by driving without a licence or insurance, contrary to s.3ZB of the Road Traffic Act 1988. He appealed.

**Held:** Appeal dismissed. (1) There was no requirement of fault for the offence under s.3ZB. In other words, the offence under s.3ZB was one of strict liability. (2) As far as causing death was concerned, the word ‘cause’ in the Road Traffic Act 1988 meant something ‘more than minute or negligible.’

*Ricketts v Basildon Magistrates* [2010] EWHC 2358 (Admin), [2011] 1 Cr App R 15, Queen’s Bench Divisional Court

**Issues:** Whether property belongs to another, or has been abandoned, for the purposes of theft

**Facts**
At 2.15am, Robert Ricketts was viewed on CCTV taking bags from outside a British Heart Foundation charity shop on Brentwood High Street and putting them into a vehicle. He was stopped by police and a number of bags and a suitcase containing clothing were discovered. He admitted that he had taken them to sell. He also admitted taking items that had been placed in a bin at the rear of an Oxfam charity shop. He was arrested and charged with theft.

At the committal hearing, Ricketts submitted that, on the evidence, the court could not properly conclude that the property belonged to either of the shops. The magistrates rejected the submission. He appealed.

**Held:** Appeal dismissed. The property left outside the British Heart Foundation charity shop had not yet come within the possession, custody, or control of the charity. However, the magistrates had been perfectly entitled to conclude that whoever had left the property outside the shop, with the intention of making a donation to the charity, had not abandoned that property. The donors had intended to gift the items. That gift would be complete when the shop took possession of the items. Until then, the donors had not relinquished possession. Therefore, there was sufficient evidence to determine that the property ‘belonged to another’ at the time of its appropriation by Ricketts. Meanwhile, the property left in the bin behind the Oxfam charity shop had either been left there by donors (in which case the situation was the same as the property left outside the British Heart Foundation), or had been placed there by Oxfam for collection by the local authority. In either situation, the property had not been
abandoned either by the unknown donors or by Oxfam and hence that property also ‘belonged to another.’

**Comment:** This case is consistent with the approach in earlier cases such as *Rostron* [2003] EWCA Crim 2206 (involving lost property), in that the courts will be reluctant to find that allegedly stolen property has been abandoned and therefore ownerless. Even items that have been left out for collection by the local authority are still in the possession and/or under the control of the original owners and have not been abandoned.