

Chapter 12

Defences, mitigation and criminal responsibility

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Chapter 12

Defences, mitigation and criminal responsibility

Introduction

1. This chapter is divided into three parts:
 - a. Part 1 - Defences (paragraphs 4 - 28);
 - b. Part 2 - Mitigation (paragraphs 29 - 31); and
 - c. Part 3 - Criminal responsibility (paragraphs 32 - 44).
2. This chapter provides guidance on these matters to those involved in the administration of Service discipline at unit level. Related chapters are [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention), [Chapter 6](#) (Investigation, charging and mode of trial), and [Chapter 11](#) (Summary hearing - dealing with evidence).
3. This is not a detailed analysis of the law on the most common defences likely to be put forward by an accused, but when read in conjunction with the chapters mentioned above, should provide enough information for straightforward cases to be dealt with and ensure that staffs can identify when a case should be referred for Court Martial (CM) trial. It is not intended to replace the need to seek legal advice in specific cases or where individuals are uncertain as to interpretation of the guidance or the correct course of action.

Part 1 – Defences

4. Part 1 of this chapter covers those defences which are of general application. When a defence is raised¹ by the accused or is apparent from the facts put forward by them or on their behalf² a charge can only be found proved if it is shown to the required standard³ that the defence has not been established. There are specific defences which are sometimes available to certain offences; these are detailed within [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

5. The officer hearing a charge should be clear on the distinction between what is a defence and what constitutes mitigation (for more information pertaining to mitigation and defences see paragraph 29 - 31 below). To aid those administering Service discipline, listed below are those general defences which the officer hearing the charge could be expected to deal with at a summary hearing and those other defences for which they may wish to seek staff legal advice. This should assist the officer hearing the charge in identifying, in each case, whether it is a defence they could be expected to consider at summary hearing.

a. The general defences dealt with in this chapter are as follows:

- (1) Intoxication/drunkenness due to drugs/alcohol.
- (2) Self defence.
- (3) Mistake.
- (4) Duress.
- (5) Necessity.
- (6) Insanity.
- (7) Automatism.

b. Other defences detailed in this chapter are:

- (1) Alibi.
- (2) Provocation.
- (3) Diminished responsibility.
- (4) Consent.
- (5) Superior orders.

6. When deciding if a charge is to be heard summarily, those involved in the administration of discipline should consider whether a likely defence will raise issues which would be more

¹ Until the issue of a possible defence is raised by the accused, its relevance to the charge does not arise.

² The accused is not required to assert that they are raising a specific defence, such as self defence for example. If it is apparent from the evidence put forward to prove the charge (e.g. what the accused said when arrested) or by the accused when presenting his evidence, that a defence might apply the officer hearing the charge must be satisfied that the defence has not been established before they can find the charge proved.

³ An officer hearing a charge must, having considered all of the evidence, be sure (sometimes expressed as being satisfied beyond reasonable doubt) that the charge is proved.

appropriate to deal with at CM trial, for example insanity. See [Chapter 6](#) (Investigation, charging and mode of trial) for factors affecting mode of trial.

General defences

7. Intoxication/drunkenness due to drugs/alcohol.

a. **Voluntary.** The principle is that it is not a defence to say that the accused would not have acted in the way they did but for the fact that their inhibitions were reduced due to the effect of alcohol/drugs which they had voluntarily consumed. In other words, if the accused chose to consume the alcohol/take the drugs in the first place, it is no excuse to be intoxicated and cannot be relied on as a defence. Self-induced intoxication from alcohol or drugs or both, may however, be a defence to an offence requiring a 'specific intent'⁴. The most likely offence where this issue may arise at a summary hearing is theft. In such a case, intoxication may amount to a defence if the mind of the accused was so affected by alcohol/drugs that they were (or may have been) incapable of forming the necessary intent. Evidence of intoxication falling short of this and merely establishing that the mind of the accused was affected by drink/drugs, does not provide a defence. It might reasonably be inferred from evidence raised by the accused that they were incapable of forming the necessary intent through intoxication. In such a case, the onus is on the officer hearing the charge to satisfy himself beyond reasonable doubt that the accused was capable of forming the necessary intent at the time of the offence before they can find the charge proved.

b. For other offences which may be committed intentionally, recklessly or negligently⁵, self-induced intoxication is not a defence. Such offences which may be heard summarily include:

- (1) Assault occasioning actual bodily harm.
- (2) Common assault/battery.
- (3) Criminal damage.
- (4) Taking a conveyance without authority.

c. **Involuntary.** If, however, the primary cause of the intoxication is involuntary, e.g. where a person has their drink laced unbeknown to them, they will not necessarily, whilst under the influence of such drink, be accountable for all their actions. In these circumstances the advice of the staff legal adviser should be sought.

d. In the case of a non-criminal conduct offence, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) where there is doubt as to whether an accused's intoxication may or may not afford a defence, staff legal advice should be sought.

8. **Self defence.** Where violence is threatened or used against a person, it is lawful for the person threatened or attacked, to use such force as is necessary in order to resist or defend themselves and/or another against the attack, but only if the force used by them is reasonable. In such circumstances the law recognises that the person acts in self defence. In assessing whether the accused's actions in defending himself were reasonable, the officer hearing the charge should consider what the accused himself thought at the time. Where this defence is

⁴ That is an offence that can only be committed intentionally (or deliberately) as opposed to an offence that can be committed recklessly.

⁵ These offences are known legally as offences of 'basic intent'.

raised, the officer hearing the charge must find it proved beyond reasonable doubt that the actions of the accused did *not* amount to self-defence if the charge is to be found to be proved.

9. A person does not have to wait until they are struck before striking in self defence. In each case everything will depend upon the particular facts and circumstances. It may be, in some cases, only sensible and clearly possible for the person attacked to take some simple avoiding action. If there is some relatively minor attack, it is not permissible for the person attacked to respond with an act of retaliation which is out of proportion to the force or threat of force levelled against them. For example, a person who is punched in the face by another person cannot legally draw a gun and shoot that person dead. Lethal force can only be used by an individual when they reasonably believe they or another is about to be killed or seriously injured and the use of lethal force is the only means available with which to defend himself or another.

10. There is no legal requirement that a person must retreat as far as they can when threatened, but their ability to do so will be relevant to the reasonableness of the force used in their defence. If an attack is sufficiently serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the attack is over and no sort of peril remains, then the use of force may be by way of revenge, punishment, or pure aggression, and there would no longer be grounds to claim self-defence. In all cases it should be remembered that the person defending himself cannot precisely assess the exact measure of their defensive action.

11. **Use of force in prevention of crime.** A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large⁶. This will apply to the great majority of cases of self-defence and defence of others and many cases of defence of property because in these cases the person who uses lawful force will be doing so for the purpose of preventing crime.

12. **Mistake.** A mistake as to the criminal law or ignorance of it is no defence to a criminal charge. However, a mistaken belief that an act is not criminal may afford mitigation. Staff legal advice should be sought if this defence is raised in circumstances where a belief in the existence of certain facts appears to be honestly held. This is because the genuinely held (but mistaken) belief of the accused could make their conduct innocent and may afford a defence.

13. This issue could arise, for example, in relation to a charge contrary to section 28 (resistance to arrest) of the Act. An accused may claim that at the time of their arrest by the Service Police they honestly (but mistakenly) believed that the persons seeking to make the arrest were not Service policemen but were impersonating Service policeman. In deciding whether they find the charge proved or not, the officer hearing the charge will have to assess whether a mistaken view of the facts by the accused was genuinely held. In helping them to decide whether the accused genuinely held that belief they will need to consider the reasonableness or unreasonableness of the accused's belief, taking into account all of the surrounding circumstances - see section 28 of [Chapter 7](#) (Non-criminal conduct (disciplinary offences)).

14. In respect of a charge for any offence⁷ a mistaken but honest and reasonable belief in circumstances which if true would render the act of the accused an innocent act will afford a defence. The reasonableness of the belief will probably go only to the issue of whether the

⁶ Section 3, Criminal Law Act 1967.

⁷ Apart from offences of strict or absolute liability where no defence will be available. These are offences for which there is no requirement to prove a particular state of mind, for example an offence contrary to section 36 (inaccurate certification) of the Act.

belief was genuinely held. Where the issue is raised the officer hearing the charge must be sure that no such belief was held before they can find the charge proved.

15. **Duress.** Duress may form a defence to all offences which may be heard summarily. However, the exact scope of this defence is not clearly defined in law and staff legal advice should be sought if it is raised. This defence covers the situation where a person is threatened by another with death or grievous bodily harm⁸ if they do not undertake a criminal act. For example, where an accused claims that another person threatened to seriously harm them unless they stole a digital camera for them.

16. The fact that the accused believes that a threat of death or grievous bodily harm will be carried out if they do not commit the offence is not of itself sufficient if a person 'of reasonable firmness'⁹ sharing the characteristics of the accused would not have given way to the threats. Whether this defence is available will depend entirely upon the individual circumstances of the case including, in particular, whether the person belongs to a group of persons less able to resist pressure (e.g. youth, physical disability, mental impairment, including post traumatic stress).

17. The threat (as in the example above) does not in all cases need to be against the individual who undertakes the criminal act; it may be against someone for whom they feel responsible (e.g. the accused's spouse or child).

18. **Necessity.** Closely related to the defence of duress and sometimes legally called duress of circumstances, is the defence of necessity. This defence may arise in a situation where the accused justifiably chose to commit the offence only because of the consequences had they not committed the offence. For example, a rock climber falls and is dangling at the end of the rope held by a person who has the choice of dying with their companion (as they are unable to pull the accused to safety) or cutting the rope and saving himself, but accelerating the death of their companion.¹⁰

19. An accused may have a defence of necessity to an act which would otherwise be criminal if they can show that:

- a. Committing the crime was necessary, or the accused reasonably believed it to be necessary, in order to avoid or prevent serious injury or death to himself or another;
- b. They did no more than was necessary for that purpose; or
- c. The commission of the crime, viewed objectively, was reasonable and proportionate having regard to the injury they were seeking to avoid or prevent.

20. **Insanity.** Every person is presumed by law to be sane and to be accountable for their actions, unless the contrary is proved. Staff legal advice should be sought where this defence may be an issue.

21. **Automatism.** Closely related to the defence of insanity, is another defence, legally known as automatism. The distinction between them is that automatism is a defence to actions committed by the accused based on the failure of the accused's mind and not due to disease of the mind (as is the case for insanity). This defence is a concept involving the involuntary movement of the accused's body or limbs and is often raised in driving cases. It most commonly arises in relation to persons prone to sleepwalking or hypoglycaemia (a trance-

⁸ It is possible that a fear of false imprisonment might suffice.

⁹ i.e. a person who is not put in fear by the slightest threat.

¹⁰ Archbold 2009 17-128.

like state caused by lack of insulin most commonly suffered by diabetics) or where for example a driver is stung by a hornet and loses control of their vehicle.

22. This defence may be rendered invalid where the accused is responsible for falling into such a condition, as for example by driving whilst suffering from exhaustion or by abusing alcohol or drugs. If the accused has some, albeit impaired, control over their actions this defence may not be available,

23. Whether there is sufficient evidence to establish a defence of automatism is a question of law. If there is such evidence, the officer hearing the charge must find the charge not proved unless they are satisfied beyond reasonable doubt that the accused's conduct was not involuntary. In such a case staff legal advice should be sought.

Other defences

24. **Provocation.** Provocation does not provide a defence for any charge which may be heard summarily¹¹ but can, nevertheless, be a strong mitigating factor. Although a commonly claimed 'defence' particularly in cases of assault, the claim by an accused that they were 'provoked' or 'wound up' by the victim/co-accused must only be taken into account by the officer hearing the charge (if they are satisfied this occurred) as the background to the offence. For example, an accused might claim that their victim 'provoked' them into hitting them because they called their girlfriend "a slag" in front of them and others, or had been making a succession of derogatory comments to them immediately before the accused punched the victim in the face. Neither of these excuses would provide the accused with a defence to a charge of battery, but the officer hearing the charge may well regard such an excuse as a mitigating factor.

25. **Alibi.** Rather than a defence put forward to justify or provide an excuse for why a person committed a certain act, alibi is a common defence which is relied upon to assert that a person did not in fact commit the offence at all, because they were not present when the offence was committed. However, an alibi is more than an assertion that they were not in a particular place at a particular time. In order to establish an alibi the accused has to prove that they were somewhere else at the relevant time. Once the accused, by evidence, shows that they were somewhere else at the given time, the officer hearing the charge must call evidence to disprove the alibi or determine that the offence was committed at some other time in order to find the charge proved. Where such a defence is put forward, it is often linked to a claim of mistaken identity. For guidance on the approach to be taken to the issue of identity see [Chapter 11](#) (Summary hearing – dealing with evidence).

26. **Diminished responsibility.** Diminished responsibility does not provide a defence for any charge which may be heard summarily¹². This should not be confused with examples of emotional stress such as bereavement, illness of a close relative etc which may, nevertheless, be strong mitigating factors in their own right, see paragraphs 29 to 31 below.

27. **Consent.** Consent is a defence to a charge of assault or battery; however, it is not a defence to a more serious assault, e.g. where actual or grievous bodily harm is caused. This defence commonly arises where an accused claims the injured party was hurt during 'horseplay' to which that person consented. Consent can provide a defence if there was no intention on the part of the accused to injure the person concerned. For intention generally, see paragraph 32 below.

¹¹ It is however a defence to murder, where it reduces the offence to one of manslaughter.

¹² The statutory defence of diminished responsibility [section 2 of the Homicide Act, 1957] is applicable only to the offence of murder. Diminished responsibility reduces a charge of murder to manslaughter.

28. **Superior orders.** A person who is bound to obey a superior is under a legal duty to refuse to carry out an order received from that superior, to do some act or make some omission, if the order is manifestly illegal. If the illegal order is carried out, an offence may be committed. Where the order is not manifestly illegal, an accused will not be excused if they carried out the order and in doing so commits an offence. However, the accused may have a defence on other grounds because, for example, the order may negate a particular intent on the accused's part (which may provide a complete defence) or it may reduce the offence to one of a less serious nature or it may excuse what otherwise appears to be negligence. Evidence of superior orders which fall short of providing the accused with a defence to the offence may still be a strong mitigating factor.

Part 2 - Mitigation

29. Mitigation is not a defence. For mitigation generally see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) and [Chapter 13](#) (Summary hearing sentencing and punishments).

30. What amounts to a defence and what amounts to mitigation can sometimes be confused; they are, however, quite distinct elements of the summary hearing process. A defence is relevant to the issue as to whether the charge can be proved, whereas mitigation is relevant to the question of punishment. For example, in a case of assault self defence may be a defence but provocation may only be mitigation. Where a charge is proved, mitigation is put forward by or on behalf of the accused to explain the circumstances surrounding the offence for the purpose of either reducing the sentence which might otherwise be awarded, or persuading the officer hearing the charge that they should sentence the offender in a particular way. It is an attempt to put the offence into context by showing a number of factors or circumstances that impacted on the accused at the time.

31. Mitigation may also seek to demonstrate that a particular sentence would have a disproportionately serious effect on the offender or their family (a custodial sentence, for example). By contrast, a defence is an explanation for the accused's actions that legally excuse or justify their conduct. The accused often contests the accuracy of the allegations against them; however, defences do not depend on refuting such allegations, rather a defence raises an issue as to whether the accused has committed an offence at all. If the officer hearing a charge is not satisfied so that they are sure that a defence does not apply they must find the charge not proved.

Part 3 - Criminal responsibility

Intention

32. 'Intention' is a word that is usually used in relation to consequences. A person clearly intends a consequence if they want that consequence to follow from their action. This is so whether the consequence is very likely or very unlikely to result. Thus, an accused who shoots at another wanting to kill them, intends to kill whether the intended victim is two metres away and an easy target or whether they are 200 metres away and it would have taken an exceptionally good shot to hit them. In either case, even if the accused misses they will be culpable for an offence requiring an intention to kill, such as attempted murder.

33. The meaning of 'intention' is not restricted to consequences which are wanted or desired¹³, but includes consequences which an accused might not want to follow but which they know are virtually certain to occur. Where there is clear evidence that the accused desired the consequence to occur, the question of whether the accused intended that consequence and whether intent can be proved will depend on the strength of that evidence. Where the accused may not have desired the consequence but may have foreseen it as a by-product of their action, whether intent is proved will require consideration both of the probability, however high, of the consequence occurring as a result of the accused's action, (and in some cases this may be a very significant factor) together with all the other evidence, in order to determine whether the accused intended to bring about the consequence.

34. For the effect of intoxication on intention see paragraph 7 above.

Joint Enterprise and Secondary Participation

35. The issue of joint enterprise may arise where more than one individual is involved in the commission of an offence, either as the principal offender or by encouraging or assisting the commission of the offence. For example, if several people participate in an attack on a victim where one person holds the victim down, a second person punches the victim, a third person acts as a lookout, and a fourth person shouts verbal encouragement to the principal attacker, then all may be liable for the commission of the offence.

36. If more than one person participated in an offence, any accused (D) will be liable as joint principal offenders if they carry out the actus reus (guilty act) and do so with the requisite mens rea (guilty mind, i.e. intent or, if applicable, recklessness). If someone did not commit the actus reus but did assist or encourage the principal (P) to do so, they will be guilty as secondary participants if they intended to assist or encourage P to commit the crime (i.e. to carry out the actus reus with the necessary mens rea). Merely associating with P or being present at the scene of P's crime will not be enough unless that presence had the effect of assisting or encouraging P to commit the offence with the intent on D's part that it do so. Nor is it enough, to be liable as a secondary, to simply foresee that that P might commit the crime, D must have the intent that P will do so.

37. Joint Enterprise can be complex and the CO must take legal advice when he believes that two offenders have acted together in this way.

Recklessness

38. A person acts recklessly with respect to:

- a. A circumstance, when they are aware of a risk that exists or will exist; and

b. A result, when they are aware of a risk that it will occur;

and it is in the circumstances known to them, unreasonable to take that risk¹⁴.

39. Proof is required that the accused was aware of the risk and in circumstances known to them, it was unreasonable for them to take the risk. In other words, to prove a person has been reckless, they must have some foresight that by acting, or failing to act in a given manner there was a risk that the offence would be committed. They must then have gone on, unreasonably, to take that risk and commit the offence. Any reason why the accused did not in fact appreciate the risk is relevant, except for voluntary intoxication through drink or drugs. However, an accused's assertion that they did not think of a certain risk will not be accepted when all the circumstances and probabilities and evidence of what they did and said at the time, show that they did or must have done so.

Negligence

40. The concept of negligence requires the accused to behave in the circumstances as a reasonable man would be expected to. Therefore, an offence involving negligence can be committed unwittingly, but in circumstances where an accused either acted unreasonably or omitted to act reasonably. Few criminal conduct offences can be committed negligently - see

¹³ In other words - consequences which the accused 'directly intends' to follow.

¹⁴ Archbold 2009 para 17-51 (R v G [2004] 1 AC 1034).

[Chapter 8](#) (Criminal conduct offences), although a significant number of non-criminal conduct offences can be - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). This is because non-criminal conduct offences relate wholly to a Service person's professional responsibilities, where certain basic (or reasonable) standards of performance can be expected. Where a Service person fails to meet these standards, their failure to do so may be negligent and the charge against them may therefore be proved.

41. For non-criminal offences, in the case of an offence where negligence suffices to find the charge proved, liability will be avoided if the accused behaves as a reasonable person, with the same training, knowledge and experience would have done in the circumstances. A person is negligent therefore, only if they fail to exercise such care, skill or foresight as such a reasonable person would exercise in the same situation. This is an objective test, albeit taking into account the accused's training, knowledge and experience, for the officer hearing the charge to apply.

42. For a criminal conduct offence where negligence alone would be sufficient to find the charge proved, careless and inconsiderate driving is a good example. Judged against an objective test, failure by an accused to exercise the degree of care and attention that a *reasonable*, competent and prudent driver would exercise in the circumstances is sufficient for the offence to be proved. An accused may have driven carelessly, either due to a particular driving manoeuvre or method of driving they used or failed to use. If the accused either fails to provide an explanation for their apparently careless driving, or the explanation is objectively inadequate, then the conclusion will be that they were careless (or negligent) and the charge will be proved. Failure to exercise due care and attention may be a deliberate act (overtaking on a bend for example).

Lawful excuse or reasonable excuse - the burden of proof

43. **Evidential burden**¹⁵. A charge is not proved against an accused unless the officer hearing the charge is sure (sometimes expressed as being satisfied beyond reasonable doubt) that the person committed the offence. This will require the officer to be satisfied that each and every element of the offence has been proved to the requisite standard - see [Chapter 11](#) (Summary hearing – dealing with evidence). It follows that the accused is generally not required to prove anything.

44. Where, however, the words 'lawful excuse' or 'reasonable excuse' appear in the charge, it is only if the accused raises some evidence to suggest that they may have such an excuse that the officer hearing the charge will have to be satisfied beyond reasonable doubt that they did not have a lawful or reasonable excuse.

45. **Lawful excuse**. A person will have a lawful excuse if they act because of some lawful reason. For example, if a Service policeman breaks down the door of a barrack room to arrest a suspect, they will not commit an offence under section 24 (damaging Service property) of the Act because of the statutory powers they are given under section 90 (entry for purpose of arrest etc) of the Act. Similarly, a person will have a lawful excuse if they acted as they did because they were lawfully obliged to do so. For example, if a person intentionally disposes of Service property because they are given a lawful order to do so or because of some other legal requirement (for example, the destruction of records containing personal data because of obligations under the Data Protection Act) they will not have committed an offence.

¹⁵ Section 325 of the Act.

46. **Reasonable excuse.** A person will have a defence if they have a reasonable excuse for acting in the manner alleged. Thus, a person charged with fighting¹⁶ will have a reasonable excuse for their actions if they acted in self defence. Similarly, a person who fails to attend for a duty¹⁷ will have a reasonable excuse if they do not attend because they were involved in an accident and were incapable of attending. Reasonable excuse is a wider concept than 'lawful excuse'. It is unnecessary for the reasonable excuse to be connected to a legal obligation or authorisation. However, in many cases, if a person acts because of a legal obligation or authorisation, they will also have a reasonable excuse.

47. In cases where the accused is charged with criminal conduct offences¹⁸ - see [Chapter 8](#) (Criminal conduct offences) if the words lawful authority, lawful excuse or reasonable excuse appear in the charge, consideration should be given to obtaining advice from a staff legal adviser. This is because what is a lawful authority or a lawful or reasonable excuse will depend on the law (other than the Act) underlying that conduct.

¹⁶ Section 21 of the Act.

¹⁷ Section 15 of the Act.

¹⁸ Section 42 of the Act.