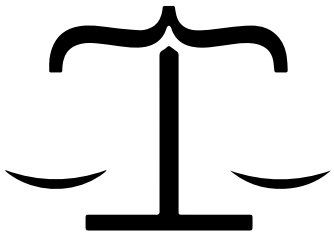

PGDL ANSWERED

SAMPLE NOTES FROM OUR PGDL *CORE GUIDE*:

Company Law: Minority Shareholder Remedies Chapter

Contract Law: Consideration, Variation of Terms and Promissory Estoppel

and Criminal Law: Murder and Voluntary Manslaughter

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MINORITY SHAREHOLDER REMEDIES

The general principle governing decisions of the members is majority rule. This can be difficult for minority shareholders, particularly those with less than 25% of voting rights, who will be effectively unable to veto any resolution. This can be particularly problematic for minority shareholders if the majority shareholders are also the directors of the company, as the majority shareholders can also ratify their decisions as directors.

THE RULE IN FOSS V HARBOTTLE

Remember that companies have separate legal personality. This means that, if a company suffers loss, it is the **company** which is the proper claimant – not the shareholders. This is known as the **rule in *Foss v Harbottle***, and it causes difficulties for minority shareholders in pursuing a remedy where a company suffers loss as a result of the actions of the majority because the minority shareholders may not be able to take action other than in exceptional cases.

Foss v Harbottle	Two shareholders in a company began legal proceedings on behalf of themselves and the other shareholders, alleging that a director had damaged the company through his wrongdoing by misapplying and wasting the company's assets. The individual shareholders had no standing to bring a claim, either separately or all together. The company could not be equated with the aggregate of its members. As a separate legal person, it was the company that had suffered the loss and only the company had standing to bring a claim.

However, minority shareholders do have some rights and some remedies available to them, as discussed in the next section.

NOTE: these rights are also relevant to all shareholders, but it would be impractical in most cases for majority shareholders to use them as they already have effective control over resolutions (and if they are also directors they have day-to-day control).

SHAREHOLDER RIGHTS AND REMEDIES

GENERAL RULE:

Under the rule in ***Foss v Harbottle***, when a wrong has been done to a company, the **company** is the proper claimant – **not the shareholders**.

For example, if a director has caused the company a loss through his illegal acts (such as fraud), it is the company that should first sue him rather than the shareholders.

There are however a number of **exceptions** to the rule, where **shareholders can take action**:

EXCEPTION 1: **Derivative claims**

Shareholders can sue **on behalf of the company** under **s. 260** for an act or omission involving a director **where the company has failed to take action itself** – as long as the cause of action is vested in the company.

Derivative claims can only be brought **against a director or other person** in limited circumstances (**s. 260(3)**), where the cause of action arises from **actual or proposed**:

- **negligence** on the part of the **director**;
- **default** on the part of the **director** (i.e. failure to perform a legal obligation, e.g. appearing in court when required);
- **breach of duty** by the **director** (*see chapter on Directors' Duties*); or
- **breach of trust** by the **director**

A common form of derivative claim – and well recognised exception to the rule in ***Foss v Harbottle*** – is where fraud is alleged by the directors of the company.

Note that it is immaterial whether the cause of action arose before or after the person bringing it became a member of the company (**s. 260(4)**).

Derivative claims can only be brought with the **leave** (permission) of the court. Application procedure for derivative claims:

1)	**PERMISSION STAGE I**	• The shareholder applies to court. • The court will dismiss the claim if there is no *prima facie* evidence – substantive evidence is needed.
2)	**PERMISSION STAGE II**	At an initial hearing, under **ss. 261(4)** and **263(3)**, the court will consider: • Is another action more suitable? • Is the shareholder's action in good faith? • How important is the claim? The court must refuse leave if (**s. 263(2)**): • The actions have been ratified; • A director would not continue the claim despite their duty under **s. 172**; or • The claim would have an unnecessary and negative impact on the company.
3)	If the claim passes permission stage II, it goes to full trial.	

Examples:

- ***Cook v Deeks*** – In breach of their fiduciary duties, three directors of a company signed a lucrative contract with a third party on their own behalf rather than, as they had previously done with other contracts, on behalf of the company As they were also majority shareholders, they then passed a resolution to declare that the company had no interest in the contract. The court held that the directors had misused their voting powers. The contract should have belonged to the company and the directors could not "*make a present to themselves*." Although there is majority rule, this is not the same as allowing "*a majority to oppress the minority*."
- ***Airey v Cordell*** – The court considered the application of the test for bringing a derivative claim in respect of breaches of fiduciary duty by several directors. In considering whether the company itself should have taken legal action, the court held that it could not act as if it were the board and determine whether it would have been proper for the board to bring proceedings (in the name of the company) in respect of the alleged breaches. Instead, the court set a relatively low bar: a reasonable independent board could have considered it appropriate to bring proceedings. **Only if no reasonable independent board would have brought proceedings should the court refuse the derivative claim**.

EXCEPTION 2: Shareholders can sue under **s. 33(1) CA 2006 to enforce their membership rights**.

This means that the shareholders can sue where the rights granted to them **by virtue of their shares** are being denied. Shareholders can sue to enforce their rights to:

- receive a **dividend** once it is declared;
- receive **capital** on a winding-up of the company;
- receive **notice** of a GM; and
- **vote** at a GM.

This could also include where a **special majority** is required to pass a particular vote. If the company ignores such a provision of the Articles, a member can sue to enforce it.

Essentially, **shareholders can sue to enforce the constitution**. A member could also sue to enforce any **objects clause** in the company constitution by challenging any action which would be ***ultra vires*** (i.e. outside the company's powers). However, objects clauses are less relevant since the **CA 2006** has come into force; this is also difficult to enforce, because the application to court must be made **before** the action complained of creates a valid contract which cannot be unwound (*see Constitution chapter*).

NOTE: the shareholders can **only sue in respect of rights attaching to the shares** – they cannot sue to enforce other rights, even where those rights are written into the Articles (***Eley v Positive Government Security Life Assurance Co***).

Examples:

- ***Pender v Lushington*** – The company's constitution allowed each member to vote in proportion to their shareholding but only up to a cap, after which they had no further votes regardless of the size of their shareholding. To get around this, a member transferred some of his shares to a friend who would vote the same way as him. The chairman refused to count

those votes, but the court held the chairman was wrong. The friend was the legal shareholder and registered on the company's register of members. The purpose behind the transfer was irrelevant and the company had no power to question the beneficial ownership of the shares. The director and friend could enforce their voting rights in court.

- ***Edwards v Halliwell*** – A trade union's constitution required a two-thirds majority to pass any vote. Two members successfully challenged the actions of a union when it passed a resolution without a vote. The vote was on a matter of substance (on a resolution which would have required its members to pay more) and the members were entitled to sue in their own right.

EXCEPTION 3: Under **s. 994 CA 2006** any member can petition the court on the grounds that the actions of the company have caused or will cause "**unfair prejudice**" to the interests of members.

This is most relevant for **minority shareholders**. The actions must be:

1)	**unfair; and**	• "**Unfair**" conduct would involve at the very least "*a visible departure from the standards of fair dealing, and a violation of the conditions of fair play*" (***Elder v Elder & Watson Ltd*** • What is "unfair" prejudice is tested **objectively** (***Re Guidezone***). • Equitable considerations are relevant: an **inequitable** breach of the Articles and demonstrable **culpable conduct** could count as "**unfair**" prejudice (***O'Neill v Phillips***).
2)	**prejudicial;**	• "Prejudice" should not be narrowly or technically construed (***O'Neill v Phillips***). • There is no requirement for the "**prejudice**" to have been **financial** or purely monetary prejudice (***McKillen v Misland***).
3)	**to the interests of members.**	• The unfair prejudice must be **to (a class of) members generally** or to the **specific** minority members **bringing** the action. • The **capacity** in which the member brings the claim is important – the member has to have suffered unfair prejudice in his capacity **as a member** and not as an employee (***Elder v Elder & Watson Ltd***). • There is no requirement for the member(s) to have "clean hands" before bringing a claim (***Re London School of Electronics***). • The "**interests**" of members includes their rights as members but is **broader** than strictly being only about their membership rights – in deciding whether something is unfair to certain members' interests the objective reasonable bystander test applies, even where it might at first seem that the prejudice applies to all members (***Re Sam Weller & Sons Ltd***). *Continued overleaf*

- Note that there is **no limitation period** – though a significant delay in bringing this claim will make convincing the court much harder.

Such things as **criminal conduct** and **breaches of directors' duties**, **statutory rights** and the **constitution** will constitute unfair prejudice. There can also be unfair prejudice in less clear-cut cases depending on the facts of each case:

- ***Re London School of Electronics*** – The majority shareholder of a training company also separately ran another training company, and **enticed customers away** from the first training company to their own wholly-owned company. This was an example of **unfair and prejudicial conduct** to the minority shareholder of the first company.
- ***O'Neill v Phillips*** – Mr O'Neill was a minority shareholder and managing director in Mr Phillips' company. They discussed owning the shares 50:50 and Mr O'Neill was given half the profits while he acted as managing director, but no formal transfer agreement was made, and Mr O'Neill later left the company after being marginalised and excluded from decision-making. The court held that prejudice should not be "*too narrowly or technically construed*", but in this case **no actual agreement or promises** had been made as to share ownership (and particularly not after he left his employment as managing director), so Mr Phillips had **not** acted unfairly nor prejudiced Mr O'Neill.
- ***Re Elgindata Ltd*** – **Serious mismanagement** can be prejudicial. This is a high standard which the court is reluctant to find – negligence and mismanagement does not count as unfair prejudice unless it is serious or repeated. **Misusing company assets** for the benefit of a director and his family would be prejudicial.
- ***Maidment v Attwood*** – **Excessive remuneration** of the directors can be prejudicial.
- ***Re Sam Weller & Sons Ltd*** – **Low payments** of dividends and spending the company's capital in unprofitable ways can be prejudicial, even if all shareholders receive low dividends.
- ***McKillen v Misland*** – Prejudice is **not limited to purely financial prejudice**. The court held that "*prejudice may be damage to the value of his shares but may also extend to other financial damage … bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice… Moreover, prejudice need not be financial in character. A disregard of the rights of the member as such, without any financial consequences, may amount to prejudice.*"

If unfair prejudice is found under **s. 994**, the court has a wide power to "*make such order as it thinks fit*" to remedy the matter (**s. 996(1)**). This could include an order to regulate the future conduct of the company, to prevent it from carrying out a particular act (or to require it to do a particular act), or to not allow changes to the Articles without the court's permission. However, the most likely outcome is that the court will **require the other shareholders to purchase that member's shares** (**s. 996(2)(e)**).

EXCEPTION 4: A member could petition the court to **wind up** the company under **s. 122(1)(g) Insolvency Act 1986**, on the basis that it would be "**just and equitable**" to do so.

This is a hostile application which overlaps substantially with the unfair prejudice exception above. The **only remedy** available under it is the winding up of the company. For this reason, it is a **last resort**.

Although this remedy is available under the **IA 1986** it does not relate to the insolvency of the company in that the company **does not need to be insolvent**. In order for it to succeed the petitioner must be able to show that there would be a substantial **surplus on the winding up**. A petitioner must own partly paid shares at the time of the application and must have held them for 6 months in the 18 months prior to presentation of the petition.

Examples:

- ***In re Yenidje Tobacco Co. Ltd*** – A company had two equal shareholders who were also directors. They fell out and so no resolution could pass without the other's consent. They refused to manage the company together and vetoed each other's resolutions. As the business was **stuck in deadlock**, it was just and equitable to wind it up.
- ***Loch v John Blackwood Ltd*** – It may be just and equitable to wind up a company where there is a **"*justifiable lack of confidence*" in the management of its affairs**, such as a continuing failure to hold general meetings and submit accounts.
- ***Ebrahimi v Westbourne Galleries*** – In this case the court considered it just and equitable to wind up "***quasi-partnership***". Unlike other companies, in this company the three directors and members were accustomed to running the business together, and so all the "*rights, expectations and obligations of the individuals behind it were not necessarily merged in its structure*." In other words, the directors ran their company in accordance with the constitution but also as partners with a view to their family. This meant that it was not just and equitable for two director-members to remove another without his consent. The deposed director was not able to dispose of his shares and, on the particular facts, the only fair solution was to wind up the company.

EXCEPTION 5: A shareholder who is also a **creditor** could petition for the company to be wound up on grounds of its insolvency under (**s. 122(1)(f) Insolvency Act 1986** ("**IA**"), as long as the conditions in (**s.123(1)(a) IA** are complied with:

i) the company must owe at least £750;
ii) the creditor must formally demand it; and
iii) the creditor's demands must have been ignored for at least 3 weeks (though note that this has been temporarily suspended during the Covid-19 pandemic – *see Corporate Insolvency chapter*).

EXAM TIP

Focus on exceptions 1 to 3 in your exam and note the practical difficulties in applying them. Only turn to exceptions 4 and 5 as a last resort. After all, most shareholders would rather their companies continue to turn a profit rather than be wound up. Winding up is an option but not often the most desirable choice for a shareholder.

REMOVAL OF A DIRECTOR BY SHAREHOLDERS

Directors can be removed in accordance with the **Articles** or under the **CDDA** (*see chapter on Directors above for details*) – or by a resolution of the shareholders.

REMOVING A DIRECTOR BY ORDINARY RESOLUTION

The procedure to follow when removing a director by ordinary resolution will depend upon whether or not the rest of the board of directors are **willing to cooperate**:

COOPERATIVE BOARD	The directors must call a BM using their **MA 9** powers. At the BM they must call a GM using their **s. 302** powers. The shareholders must give "**special notice**" of a resolution to remove a director (**s. 168(2)**). Special notice of their intention must be given: • To the company at least **28 days** before the GM (**s. 312(1)**); and • To the members in the same manner and at the same time as it gives notice of the meeting (**s. 312(2)**), but where that is not practicable, it can be given **14 days** before the GM via an **advertisement in a newspaper** with appropriate circulation or in accordance with the Articles (**s. 312(3)**); and When calculating the notice period, the **clear day rule applies** (**s. 360)**, so both the day on which notice is given and the day of the meeting must be **excluded**. The director has the right to speak against their removal at the meeting and to make written representations to the shareholders in advance of the meeting (**s. 169**). **NOTE:** the company cannot use the written resolution procedure here (**s. 288(2)(a)**).
UNCOOPERATIVE BOARD	If the Board refuse to call a GM they can be **required** to do so if members representing **more than 5%** of the paid up share capital request it (**s. 303**). • The Board must call the GM within **21 days** of the request and the meeting must be held within **28 days** of the notice (**s. 304(1)**).

If the Board still refuse to call a GM, the members who made the request **may call the GM themselves** if more than half of them agree to do so (**s. 305(1)**).

- The GM must be held **within three months** of the request (**s. 305(3)**). The OR to remove the director can then be voted on as above.

Shareholders can reclaim from the company reasonable **expenses** they incur in calling the meeting as a result of the Board's failure (**s. 305(6)**).

NOTE: if special notice of an intention to remove the director is given, the notice will be valid even if a GM is subsequently called within the 28-day period (**s. 312(4)**). The directors cannot simply call a GM early in order to prevent the vote taking place.

A director cannot entrench their position so as to prevent the company removing them by OR (**s. 168(1)**). However, it is possible to include a clause in the articles granting the director weighted votes in any vote to remove them. For example, on such a vote a director may be entitled to exercise five votes for every one share they own, or to always have sufficient votes to defeat the resolution. This type of clause is known as a ***Bushell v Faith*** clause.

THE EFFECT OF *PEDLEY V INLAND WATERWAYS* – WILL THE BOARD COOPERATE?

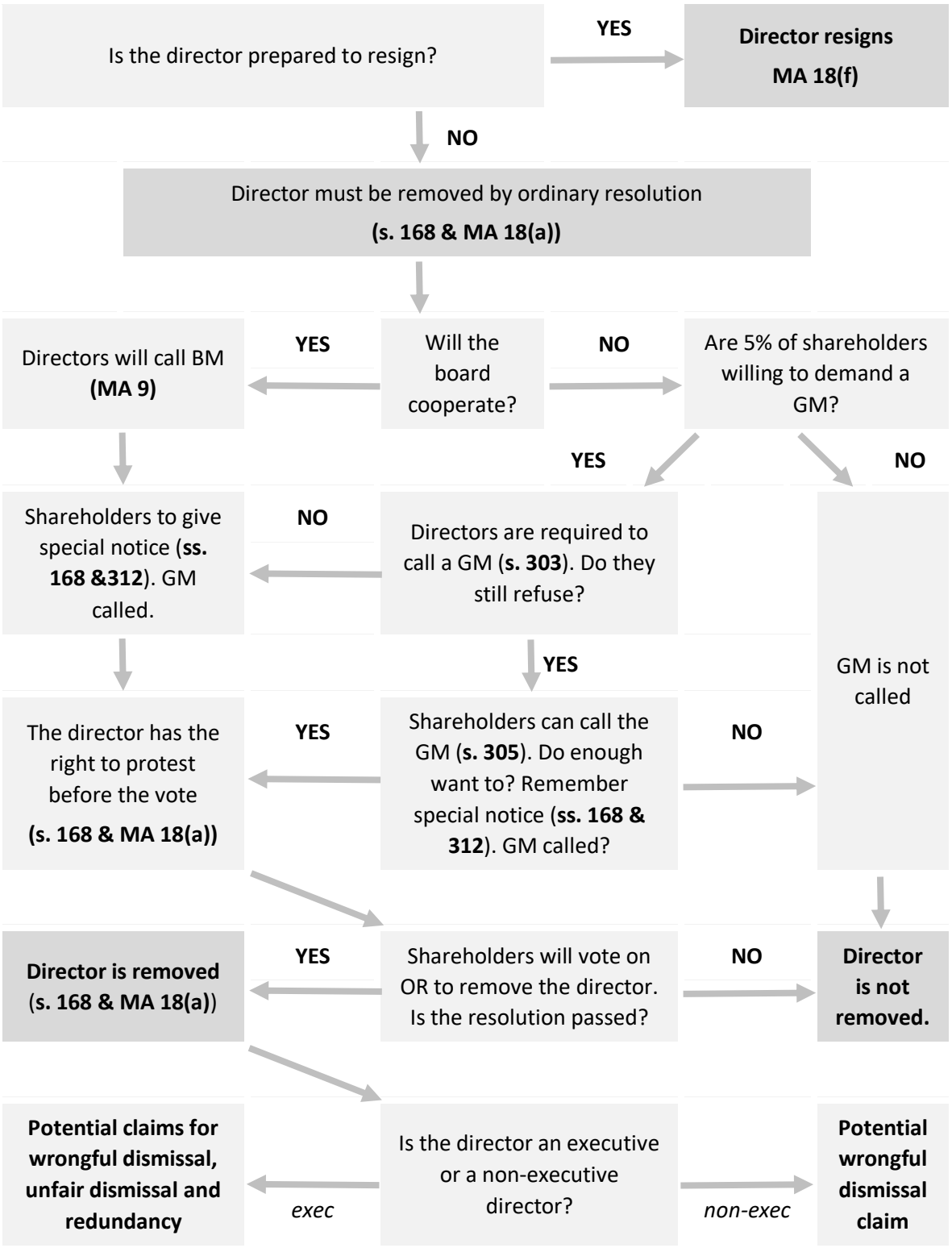
Pedley v Inland Waterways states that **directors are not bound to place a resolution to remove a director on the agenda for consideration at the GM** – essentially the board are permitted to not cooperate with the shareholders. This means that the shareholders will have to require the directors to call a GM to consider the issue under **s. 303**, and if the directors still refuse, they can call the GM and set the agenda themselves under **s. 305**.

COMMERCIAL CONSIDERATIONS WHEN REMOVING A DIRECTOR

When deciding to remove a director it is important to consider the **procedural requirements** as well as the **commercial implications** of doing so. Although the company is always entitled to remove a director by OR, doing so may still breach the terms of the director's **service contract**. The remedies available to the director will depend upon the **reasons** for removing them, **how long they have worked for the company**, and whether they are an **executive or a non-executive director**.

The procedure is summarised in a flowchart overleaf.

SUMMARY: FLOWCHART FOR REMOVING A DIRECTOR



OTHER SHAREHOLDER RIGHTS

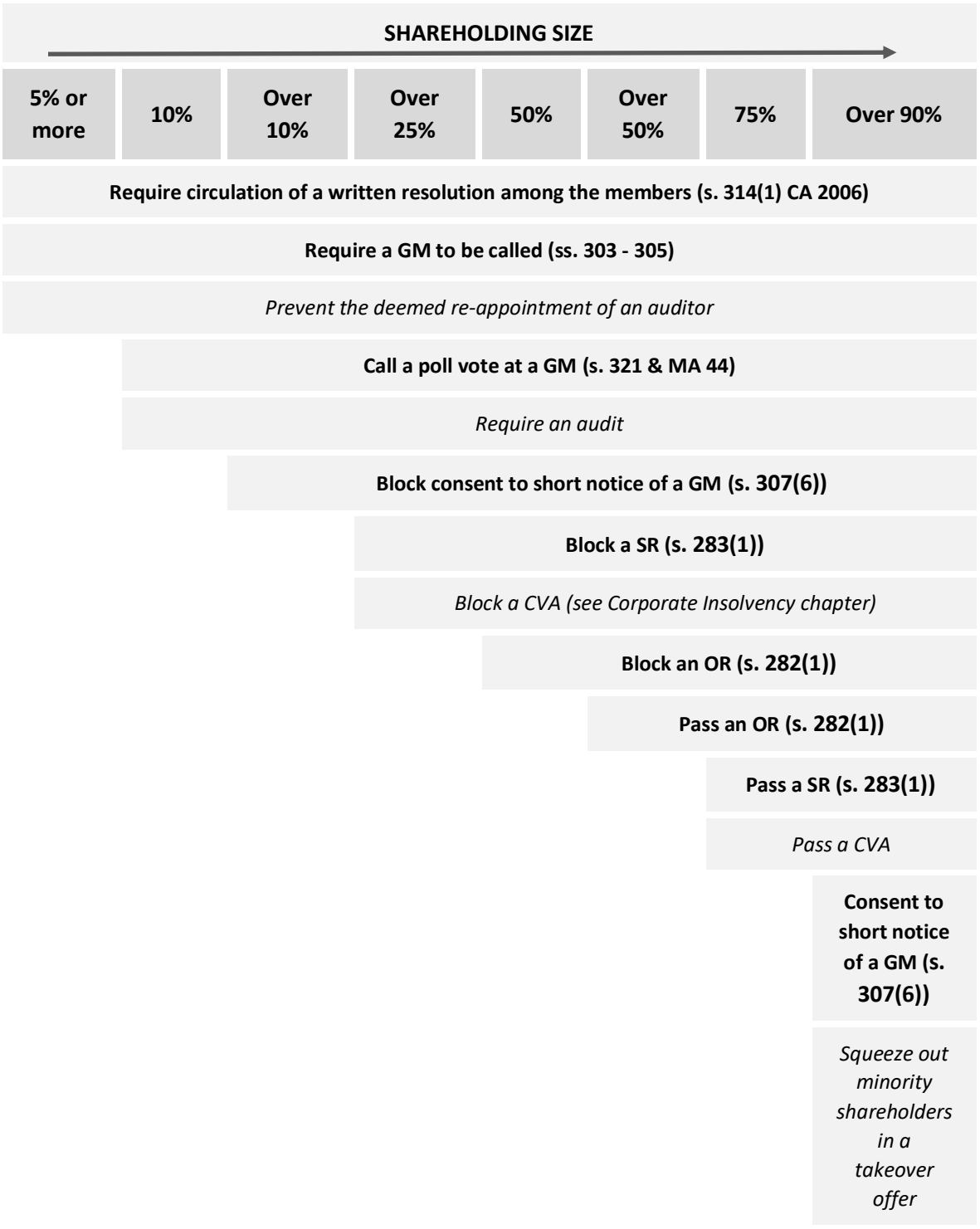
Aside from their membership rights to dividends once declared, capital on a winding up, notice of GMs and voting rights, shareholders may also:

1:	**Require the directors to call a GM** (**s. 303(1)**). If so required, the directors have a duty to call the meeting (**s. 304(1)**) – only if they fail to do so can the shareholders call a GM directly themselves, and only those shareholders who first requested the GM (or those with more than 50% of the voting rights) may call a GM (**s. 305(1)**). *See box above on GMs to remove a director for an example of this in practice.*
2:	**Require the circulation of statements** regarding any resolutions proposed to be heard at a GM (**s. 314(1)**), if at least 100 members, or members representing 5% of the voting rights, request it (**s. 314(2)**).
3:	**Force resolutions** onto the agenda of an annual general meeting ("**AGM**") – but only for **public** companies (**s. 338(1)**).
4:	**Demand a poll vote** (**s. 321** & **Model Article 44**) – if two or more members, or members holding at least 10% of the voting rights, demand it.

NOTE: shareholders may also have other **contractual** rights between themselves under a **Shareholders' Agreement**, if any (*see Constitution chapter for an explanation of Shareholders' Agreements*).

SUMMARY: HOW MEMBER RIGHTS VARY WITH SHAREHOLDING SIZE

There are various thresholds at which shareholders holding a particular percentage of a company's shareholding gain particular rights. **This chart summarises the key rights described above in bold** (*and also mentions other rights for completeness in italics – though you may not need to know all of these in detail for your exams*):



ANSWERING A PROBLEM QUESTION ON MINORITY SHAREHOLDER RIGHTS

STEP 1:	Briefly set out the potential issue in the scenario. State that the issue involves whether the minority shareholder in the scenario has any enforceable rights or remedies in relation to the proposed course of action that the director(s) and/or majority shareholder(s) are proposing to take.
STEP 2:	Explain the rule in ***Foss v Harbottle*** and (in broad terms) why the principle of majority rule can be difficult for minority shareholders.
STEP 3:	Might there be a relevant exception to the rule? Consider: • Are the minority member's **rights** being ignored? If so, consider action under **s. 33**. • Are the **directors'** actions/omissions a problem? Consider a derivative claim under **s. 260**. • Is the minority shareholder suffering **unfair prejudice**? Consider **s. 994**. Use case law examples to consider whether it falls under this definition. In each case, describe the advantages and disadvantages (e.g. procedural difficulties and delays in applying for leave of the court).
STEP 4:	Also consider whether the minority shareholder has any **other options** to resolve the problem, e.g.: • Would demanding a **poll vote** make any difference to the result? • Does the minority member have at least **5%** of voting rights? Consider circulating a statement under **s. 314** requiring any resolutions proposed to be heard at a GM. • Is there a **Shareholders' Agreement**? What does it say?
STEP 5:	If the above are not relevant or might be problematic, or if the minority shareholder is happy winding up the company, then **as a last resort**: • Consider applying to the court for winding up if it is "**just and equitable**". • If the minority member is also a **creditor**, consider a winding up under those provisions.
STEP 6:	Conclude by identifying which potential remedies are available to the minority shareholder, and which would best address their concerns.

CONSIDERATION, VARIATION OF TERMS AND PROMISSORY ESTOPPEL

STEP 1:	**Is there a <u>new</u> contract being formed or is there an issue with a <u>variation</u> of an existing contract?**

<u>Briefly</u> establish the following to show that, but for any issue with consideration, there is a contract. Remember that a variation contract is itself a new contract and so any variation must also meet all of the usual requirements of a contract.

1) **Agreement:**

   Have both parties agreed to the same offer? Identify the offer and acceptance.

2) **Intention to Create Legal Relations ("ICLR"):**

   Did the parties intend that the contract would be legally binding?

3) **Consideration** (*see below*)

STEP 2:	**Define consideration. State what the consideration in the scenario is.**

Definition of consideration:

> *"An act or forbearance of one party, or the promise thereof, is <u>the price for which the promise of the other is bought</u>* (***Dunlop v Selfridge***). *"*

Both the promisor and promisee must provide consideration.

- Have both parties provided consideration? State what the potential consideration is. **State whether there is any issue with consideration**.
- If there is a variation, has each side given consideration for the variation? What is it?
- In respect of each example of consideration, establish who the promisor is, and who the promisee is. (**Remember** that the promisee **receives** the variation promise. The promisor **makes** that promise. Be clear about these terms.) For example: "*C wants to claim the £x bonus promised to him by D, but the issue is whether C provided consideration for this variation.*" (***Blue v Ashley***).

STEP 3:	**Decide what the issue is. There are a few potential issues – identify them and then select the correct steps below:**

The potential issues with consideration – which one is relevant for each issue?

The consideration is <u>not good consideration</u> because it does not meet one or more of the criteria in Step 4 (because of *past consideration* or an *existing contractual obligation*) (→ *see Step 4 below*); **or**

The variation is a promise to <u>pay more</u> (→ *see Step 5 below*); **or**

The variation is a promise to <u>accept less</u> (→ *see Step 5 below*).

STEP 4:	**Go through the rules of consideration – has each party provided good consideration?**

1) Consideration must not be past.

- Where one party has already acted, a **later** promise by another party to perform an act in return is not good consideration, as it is past consideration. In ***Eastwood v Kenyon***, Eastwood had supported his ward through childhood – later on, her husband, Kenyon, promised to repay him for having looked after his now-wife, but as Eastwood's consideration had been rendered in the past, Kenyon's promise was not enforceable.
- **EXCEPTION**: ***Pao On v Lau Yiu Long*** states that if the following conditions are met, then past consideration can still be good consideration:

1:	**Was it at the request of the promisor?** i.e. did the promise-maker (promisor) ask for the promiseee to take the action? (***Lampleigh v Braithwaite***).
2:	**Was payment understood to be due?** i.e. did both parties assume that payment would be made for the variation? This is more likely in a commercial context (***Re Casey's Patents***) than in a domestic one (***Re McArdle***).
3:	**Would the contract be enforceable apart from this issue?** i.e. there are no other consideration, acceptance or ICLR issues.

2) Consideration must move <u>from</u> the promisee to the promisor:

- In return for receiving the promise-maker's promise, the promisee must have given consideration. Essentially, **both parties must provide consideration**. A claimant can only claim on a contract if he has provided consideration (***Tweddle v Atkinson***).
- **EXCEPTION: s. 1 Contract (Rights of Third Parties) Act 1999** – 3rd parties (people who are neither promisor nor promisee to the contract) **can** now enforce a contract between others which benefits that 3rd party, even though the 3rd party has not provided any consideration.

3) **Consideration must be <u>sufficient</u>, but need not be <u>adequate</u>:**
   - Consideration must have **some** value in the eyes of the law (i.e. be sufficient), even if it is inadequate (i.e. far less than the promise is worth). **Examples of sufficiency**:
     - ***Chappell & Co v Nestle*** – Nestle was selling records at a discounted price to people who sent in three chocolate wrappers (which Nestle then threw away). The record's copyright holders contended that their percentage of royalties should be greater. The court held that the wrappers did constitute consideration for the records; they represented Nestle's increased sales of chocolate bars.
     - ***White v Bluett*** – giving up a legal right is sufficient but promising not to enforce a right that you do not have is insufficient. In this case, a son promising not to complain about his father's disposal of property was not sufficient consideration.
     - *Hamer v Sidway* – promising to abstain from drink and tobacco was giving up a legal right; a promise to do so did amount to sufficient consideration.
4) **Performance of an existing obligation, as between the same parties, is not good consideration** (an existing obligation already binds and cannot be good consideration).

   (→ *see STEP 5: Promises to Pay More for an existing obligation*).

5) **Part payment of a debt is not good consideration** (***Foakes v Beer; Re Selectmove***)

(→ *see STEP 5: Promises to Accept Less*).

STEP 5: **Is this a promise to <u>pay more</u>, or a promise to <u>accept less</u>?** Do not mix up these routes.

PROMISES TO PAY MORE

Performance of an existing obligation is not good consideration (an existing obligation is something that you are already obliged to do and cannot be good consideration) –in order **to be good consideration something extra must be offered above one's existing obligations**.

Public duties:

- ***Harris v Sheffield Utd*** – the policing bill for a football match had to be paid by the club that requested it as it went beyond ordinary policing duties.
- ***Collins v Godefroy*** – a witness who had been subpoenaed could not enforce a promise to be paid to appear in court as he was already legally obliged to attend.

Duties owed to third parties:

- ***Scotson v Pegg*** – promising to do something that you are already obliged to do under a contract with a third party **is** good consideration with the new party. The new party acquires a **direct right to sue** you if you fail to fulfil the promise.

Contractual duties:

- **GENERAL RULE:** performance of an existing contractual obligation is **not** good consideration.

- ***Stilk v Myrick*** – on a voyage some sailors deserted, the remainder were offered extra money to crew the ship home with fewer hands. When the payment was refused they could not enforce, because they had been employed to cover "all reasonable endeavours" – **always compare *Stilk v Myrick* with *Hartley v Ponsonby***:

- **EXCEPTION 1:** going **above and beyond your existing obligations** is good consideration.
  - ***Hartley v Ponsonby*** – additional payments offered to sailors following desertions were payable. So many had deserted that the work for those remaining became much more onerous. **Consider: have the claimant's actions gone above and beyond what they were contracted to do?** If so, that can be good consideration. Remember that all the criteria for good consideration must also must be met as well (→ *see Step 4)*.

EXCEPTION 2: if the claimant is not going above and beyond, consider the exception set out by Glidewell LJ in *Williams v Roffey Bros*.

Go through all of the following criteria:

1:	**Where A already has a contract with B** to supply goods or services; and
2:	**B has reason to doubt that A will complete** (A cannot approach B and say this though, as it would be duress – *see point 5 below*); and
3:	**B approaches A and promises to pay A extra to complete on time**; and
4:	**B obtains a "*practical benefit*"** or "*obviates a disbenefit*" [**NOTE:** this was not defined in ***Roffey Bros***. In this case it was avoidance of a penalty clause – is the example in your question similar? What exactly is the benefit afforded/disbenefit avoided?]; and
5:	**B's promise was not given as a result of duress or fraud** (*see below*); then
6:	**The benefit to B is capable of being consideration, so B's promise to pay more for the same will be binding**.

Conclude your analysis of the *Roffey Bros.* criteria: a promise to pay more will be good consideration if it goes above and beyond, or if it fits the ***Roffey Bros***. criteria.

When applying *Roffey Bros.*, you must be certain that the variation did not result from duress (*see point 5 above*), so go through the criteria for duress (*see next chapter*).

ALTERNATIVELY: PROMISES TO ACCEPT LESS

GENERAL RULE: part payment of a debt is not good consideration – it is merely fulfilling an existing obligation to pay money. Even where the other party promises to waive that obligation, they can still claim the debt back at any later point (***Foakes v Beer; Re Selectmove***).

There are three exceptions to this:

- **EXCEPTION 1: *Pinnel's Case***: a debt can be part paid with either: (1) a different thing ("a hawk, a horse or a robe"); (2) in a different place; or (3) earlier, any of which will count as good consideration.
- **EXCEPTION 2: *Welby v Drake***: part payment of a debt by a 3rd party is good consideration.
- **EXCEPTION 3: Promissory Estoppel**: this means that the claimant may be obliged to stand by what he said, even where he is not contractually bound to do so. The claimant cannot go back on his word when it would be unjust or inequitable for him to do so (**Denning**).

Promissory estoppel was established by **Denning** in ***Central London Property Trust v High Trees House***. In this case the claimant promised to reduce the agreed rent "*for the duration of the war*." The property became fully let in 1945, and when the claimant sued for the full back rent, it was held that the rent could be claimed in full for the period for which it was fully let, but that the landlord could not claim for the wartime period when it was partly vacant.

Promissory Estoppel has 5 elements – go through them in detail using the cases:

1:	**A clear and unequivocal promise** to suspend or waive existing contractual rights. This can be by words or conduct (***Hughes v Metropolitan Railway***) but must be sufficiently clear (***Woodhouse Cocoa v Nigerian Produce*** – in this case it was not clear how payment was affected by currency market changes).
2:	**A change of position by the promisee in reliance on the promise**. In ***Emmanuel Ajayi v Briscoe*** there was no change of position; the defendant had simply carried on his business when the lorries were laid up. "Reliance" was given a wide interpretation in ***Brikom Investments v Carr***. **Arden LJ** took this approach even further in ***Collier v P & MJ Wright (Holdings) Ltd.***, seemingly dispensing with the need for any meaningful idea of reliance.
3:	**The reliance need not be detrimental** (***The Post Chaser***).
4:	**It must be inequitable for the promisor to go back on the promise**. In ***D&C Builders v Rees*** Mrs Rees could not use the equitable remedy of promissory estoppel because she had not come to equity with "clean hands". She had known that the builders were in financial trouble and that they would have no choice but to accept her offer to pay them less for their work. **NOTE**: this is **not a chance to discuss duress** – use the equitable maxims instead.
5:	**Promissory estoppel is a shield, not a sword**. It can only be used as a defence, not a cause of action (***Combe v Combe***).

Effect of the estoppel:

- Generally **suspends** rights (***CLP Trust v High Trees***), which means that rights could be resumed later.
- Rights can be **resumed** later on:
  1) following reasonable notice (***Tool Metal v Tungsten Electric*** – the first law suit was reasonable notice); **or**
  2) when the circumstances giving rise to estoppel cease (in ***CLP v High Trees*** the properties were fully let before the war ended, unlike during the Blitz in 1940).

If the money is due in instalments (like rent), the claimant cannot recover the money that was waived – they can only receive **future** payments. Any past periodic payments are extinguished. **This implies** that **if the money is due as a lump sum** (one debt payment), then the **payment is merely suspended** for the period that the estoppel lasts – afterwards the claimant can resume his rights for the **whole sum**.

NOTE: The Supreme Court has recently overturned a Court of Appeal decision creating a possible fourth exception to the rule that part pament of a debt cannot be good consideration: in ***MWB Business Exchange v Rock Advertising*** the Supreme Court confirmed that the ***Roffey Bros*** exception only applies to promises to pay more. This decision creates certainty and removes the difficulty of distinguishing ***Selectmove*** which had arisen.

Draw a conclusion regarding any promise to accept less: if the claimant has promised to accept less, the defendant will be able to rely on this variation if he pays with a different thing, if a 3rd party pays, or if promissory estoppel applies.

NOTE: duress is **not** relevant to promises to accept less – do not discuss it.

STEP 6:	**Conclude. Is there valid consideration? Is there a valid contract? Who can recover what from who?**

MURDER AND VOLUNTARY MANSLAUGHTER

MURDER	Murder is defined under the common law as: "*the unlawful killing of a reasonable person in being under the Queen's peace with malice aforethought"* (***Coke***).

THE *ACTUS REUS*

The AR of murder is "*the unlawful killing of a reasonable person in being under the Queen's peace.*" Breaking this down into its individual components, this means:

"Unlawful"	Killing will generally be unlawful – only the killing of soldiers in battle, the death penalty and certain self-defences could be "lawful".
"Killing"	D's act(s) must result in V's death. This has a clear element of **causation**, so consider the section below on *"Establishing Causation"*.
"Under the Queen's peace"	An ordinary state of affairs in society, i.e. not during a time of war or rebellion. It would be rare for a court to find that D's actions were not committed under the Queen's peace (***R v Adebolajo***).
"Reasonable person in being"	Essentially, this means a "person". It does not matter whether or not the victim is "reasonable". Think of this as meaning "viable". A person is someone capable of independent life. The grey area here is around pre-natal cases. Following ***R v Poulton***, an unborn child cannot be murdered as it is not a "*reasonable person in being*" for the purposes of murder (note that there are separate offences relating to unborn children). However, murder would arise where injuries are inflicted on the unborn child, which is then born alive, but dies as a result of the injuries inflicted while it was in the womb.

ESTABLISHING CAUSATION

Consider the three questions below:

1:	**Can Factual Causation be established?**

Here one must apply the "<u>but for</u>" test: The prosecution must prove that, *but for* D's actions, the death of V would not have occurred.

R v White	D put arsenic in his mother's drink, intending to kill her. She died that night of an unconnected heart attack. There was insufficient poison in her body or in the drink to have killed her. The court held that her death would have occurred irrespective of D's actions. D was not liable for her murder.

2:	Can Legal Causation be established?

Did the defendant's culpable act cause the death?

R v Dalloway	D was driving a horse and cart along a road. A child ran out in front of the cart and was killed. D had not been holding the reins at the time of the accident. Even if D had been in control of the cart, the accident would still have occurred – the cart could not have stopped in time even if D had been able to pull the reins as the child ran out. The culpable act (failure to hold the reins) was not the cause of the child's death. The driver was not guilty of murder.

NOTE: where there are several causes of an incident, the defendant may still be guilty of murder if their actions were a "material and substantial cause" of the injury, unless there was a *novus actus interveniens* (***R v Benge***).

3:	Is there a *novus actus interveniens*?

A *novus actus interveniens* is a new act from the victim, a third party or an Act of God, which intervenes in a chain of events started by D to affect the outcome significantly. This event must **break the chain of causation** (*see the chapter on the Core Principles of Criminal Liability for more details*).

R v Pagett	D was convicted of murder. He used his girlfriend as a human shield in a shootout. A police officer shot, fired in self-defence, killed her. This was a natural and foreseeable response; the chain of causation was unbroken.
R v Blaue	An example of the "thin skull" rule, D was convicted. He had not known that V was a Jehovah's Witness. The direct cause of her death was refusal of blood transfusion following the injury D had inflicted. For the thin skull rule see also ***R v Holland*** and ***R v Hayward***.
R v Smith (the soldier)	**T**he original injury was held to still be an "operating and substantial" cause of death even though the subsequent medical treatment was negligent.
R v Mackie	This was a "fright and flight" act of the victim. V was a three-year-old child, he was scared of D, who had a history of violence and had in this instance smacked V, thrown a book at him and threatened him. V tried to run away but fell down a flight of stairs, sustaining fatal injuries. D was convicted of manslaughter.
R v Dear	D slashed V with a knife. V did not die, but died days later following a possibly deliberate suicidal action by V (it was alleged that V either deliberately reopened the wounds or failed to treat them). V's actions were held not to break the chain of causation, as the injuries inflicted by D were still an "operating and substantial cause" of V's death.

THE *MENS REA*

The MR of murder is "*with malice aforethought*". There is no alternative MR of recklessness here.

"with malice aforethought"	This means intention to kill or to cause GBH (grievous bodily harm). GBH is defined as serious or really serious harm (***R v Vickers; R v Saunders; DPP v Smith***).
"Intention"	Intention is given its ordinary linguistic meaning by the jury (***R v Moloney***) of direct aim or purpose (***Smith and Hogan's Criminal Law textbook***). **NOTE:** for murder only, it is possible for D to be found to have indirect or "oblique" intent. To find out whether D had oblique intent to commit murder, ask: was death or serious injury a virtual certainty of D's actions? And did D appreciate this to be the case? (***R v Woollin***) If so, the jury may find that D intended to kill or cause GBH (***R v Nedrick; R v Matthews & Alleyn***). Indirect intent only applies to murder – it cannot be used in offences where there is an alternative *mens rea* of recklessness.

DEFENCES TO MURDER – AND VOUNTARY MANSLAUGHTER

The following defences may be available to D on a charge of murder:

INFANCY	**INTOXICATION**	
SELF-DEFENCE	**INSANITY**	**AUTOMATISM**

NOTE: there are other defences, which are usually open to D for other offences, but which are never available for murder, such as **consent**, **duress** and **necessity**.

See the "Defences" chapter of this guide for the details of the above defences.
There are also **two special defences that only apply to murder**:

LOSS OF CONTROL	**DIMINISHED RESPONSIBILITY**

NOTE: these are not full defences but are **partial** defences. If they are raised successfully, the defendant is liable for **voluntary manslaughter** instead of murder.

LOSS OF CONTROL:

A new defence under **ss. 54-56 Coroners and Justice Act 2009** that replaces the old defence of 'provocation'. The burden of proof is on the prosecution to show that the defence does not apply, unless the judge directs otherwise.

There are three requirements, all of which must be shown for a successful defence. If the prosecution can prove that just one element is missing the defence will fail (***R v Clinton, Parker & Evans***).

Consider the following three requirements:

1) **Did the defendant kill someone as a result of losing control** (**s. 54(1)(a)**)**?**

   - Loss of control need not be complete (compare ***R v Cocker,*** where the defence failed because the defendant checked (before killing his wife in response to her requests) that she still wanted to die, with the later case of ***R v Richens*** where the defence succeeded).

     R v Ahluwalia: loss of control need not be sudden, though the greater the delay the less likely the defence is to succeed.

2) **Did the loss of control have a qualifying trigger** (**s. 54(1)(b)**)**?** Two possible triggers:

   - Subjective 'fear of serious violence' aimed at defendant or another. E.g. ***R v Martin (Anthony)*** defence failed because burglar was shot as he ran away.
   - Things said or done that "*constitute circumstances of an extremely grave character*" (**s. 55(4)(a)**) which "*caused D to have a justifiable sense of being seriously wronged*" (**s. 55(4)(b)**). Ill-defined but probably an objective test. E.g. ***R v Ahluwalia***; ***R v Thornton***; ***R v Humphreys***.

   NOTE: If either of the qualifying triggers (fear or being wronged) was caused by something that D incited to be done as an excuse to use violence; or resulted from sexual infidelity without additional reasons for the loss of control; or was a "*considered desire for revenge*" (**s54(4**)); then it is indefensible.

3) **Might a 'reasonable person' have acted in a similar way** (**s. 54(1)(c)**)**?**

   - ***DPP v Camplin***; ***A-G Jersey v Holley***; ***R v Morhall***: "*A person of D's age and sex, in the circumstances of D, but with a normal degree of tolerance and self-restraint*."
   - ***R v Morhall***: the defence will not apply if D was drunk or high (intoxicated) at the time. The defendant in ***Morhall*** was a glue-sniffer.

   For recent applications of this defence see ***R v Clinton*** and ***R v Dawes, Hatter & Bower***.

   NOTE: Under **s54(5-7)** on a murder charge, if the trial judge concludes that sufficient evidence is adduced to raise an issue under **s54(1)**, the burden of proof moves to the prosecution to prove beyond reasonable doubt that the defence is not satisfied. If the tests are satisfied the defendant becomes liable for conviction for manslaughter rather than murder.

DIMINISHED RESPONSIBILITY:

The burden of proof is on the defence, on the balance of probabilities (*see* **s. 2(2) Homicide Act 1957** ("**HA 1957**") and ***R v Sutcliffe***). The **four** requirements are set out in **s. 2(1) HA 1957**:

1) D was suffering from an 'abnormality of mental functioning'…

- ***R v Byrne***: Established the classic definition of abnormality of the mind. "A state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal". It is not the same as insanity.

2) which arose from a recognised medical condition…

- This could be a physiological or psychological condition, e.g. schizophrenia in ***R v Joyce and Kay***.

3) … which substantially impaired the defendant's ability to do certain things…

- These things are: (a) to understand the nature of his conduct, (b) to form a rational judgment or (c) to exercise self-control (**s. 2(1A) HA 1957**). *See* ***R v Fenton***; ***R v Simcox***.
- The jury may assess all relevant circumstances preceding and following the killing (including circumstances that took place a long time before the killing). This may involve appraising the impact of the abnormality of mental functioning both on D's decision-making generally and also on the particular decision to kill V (***R v Conroy***).
- 'Substantially' should be given its ordinary English meaning (***R v Golds***). The impairment must be more than merely trivial, but it is not the case that any impairment beyond the trivial will suffice.

4) … and which provides an explanation for D's acts and/or omissions in killing V.

- An abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct (**s. 2(1B) HA 1957**).
- Planning may be relevant in assessing D's level of self-control, but an ability to plan may well still be consistent with disordered thinking (***R v Golds***).
- The jury decides this as a matter of fact. The role of medical experts is generally key.
- *See* ***R v Byrne*** *contrasting* ***R v Sutcliffe***.

Note on intoxication: being drunk is not a separate defence to murder, but it does **not** necessarily negate the defence of diminished responsibility **if** the drunkard also had an abnormality of mind caused by a recognised medical condition which had some effect on the killing. Alcoholism could indicate that being drunk was not voluntary. E.g. ***R v Tandy***; ***R v Wood***.

- ***R v Stewart***: Jury to consider the seriousness of D's dependency; the extent to which D's ability to control his drinking was reduced; whether D was capable of abstinence (if so, for how long); and whether D was choosing to drink more than usual for a particular reason.
- D must still demonstrate that D was suffering from a recognised medical condition, e.g. alcohol dependency syndrome. Heavy binge drinking alone is insufficient (***R v Dowds***).

- A recognised medical condition such as schizophrenia coupled with drink / drugs dependency syndrome can be sufficient to meet the **s. 2(1)** criteria, where together they substantially impaired D's responsibility (***R v Joyce and Kay***). However, if the abnormality of mental functioning was caused by voluntary intoxication and not the recognised medical condition, D cannot rely on diminished responsibility.

NOTE: **s.76 Serious Crime Act 2015** created a new offence of coercive control in family relationships. It is possible that this will be a defence to murder where a defendant can demonstrate a history of coercive control against them. It has already enabled the quashing of the murder conviction of Sally Challen who killed her husband after enduring many years of psychological abuse. On appeal her plea of guilty to manslaughter on grounds of diminished responsibility was accepted. It is yet to be seen whether the courts will allow coercive control to be a full defence on a murder charge.