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Introduction to Criminal Liability and Procedure
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PRE-READING
The Court Hierarchy

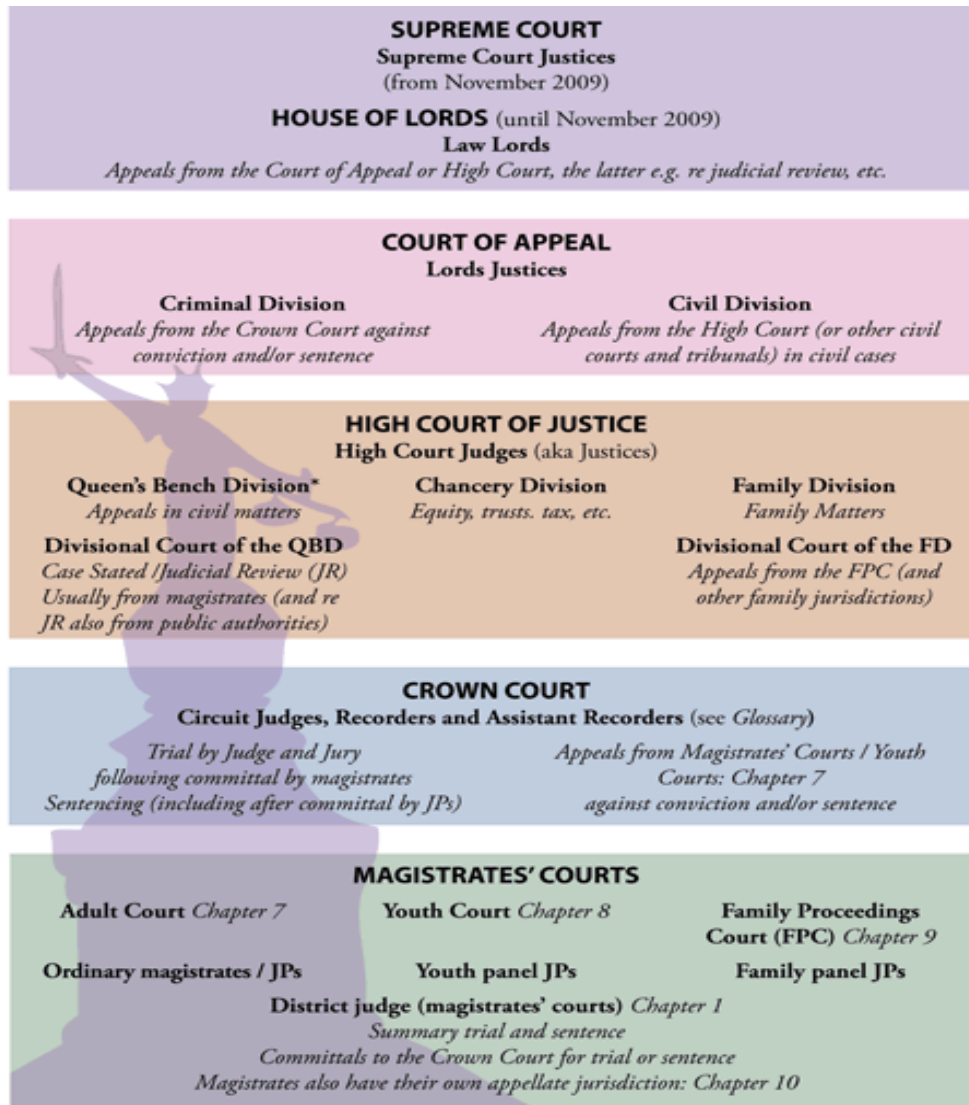


Figure 1: The courts hierarchy in outline

*The QBD also has its own 'first instance' jurisdiction (see Glossary) as well as a Commercial Court and Admiralty Court. There is also a local county court (including for civil and family cases). There is a freestanding right of appeal to the European Court of Human Rights: Chapter 5

Burden of proof

Human Rights Act 1998

Section 3: (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

European Convention on Human Rights 1950

Article 6 (2): Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

***R v Lambert* [2001]**

Facts: The accused was found in possession of a bag containing two kilogrammes of cocaine at 76% purity which was worth over £140,000. His defence was that he did not know what was in the bag.

Charge/key statutory provisions:

Misuse of Drugs Act 1971

Section 5: (1) Subject to any regulations under ... this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.

(2) Subject to section 28 of this Act ... it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.

Section 28: (1) This section applies to offences under any of the following provisions of this Act, that is to say ... [section 5\(2\)](#)...

(2) ... in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

Held: (per Lord Steyn)

...“ In *H.M. Advocate v McIntosh* [2001] UK PC D1 [FN5], PC, Lord Bingham of Cornhill recently referred to the judgment of Sachs J. of the South African Constitutional Court in *State v Coetzee* [1997] 2 LRC 593. It is worth setting out the eloquent explanation by Sachs J. of the significance of the presumption of innocence in full [paragraph 220 at 677]:

“There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more

important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book . . . Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases”.

The logic of this reasoning is inescapable. It is nevertheless right to say that in a constitutional democracy limited inroads on presumption of innocence may be justified. The approach to be adopted was stated by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 at 388 (paragraph 28) as follows:

“Presumptions of fact or of law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. This test depends upon the circumstances of the individual case.”

It follows that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed.

Does section 5(3) read with section 28(2) and (3) make an inroad on Article 6.2?

Counsel for the appellant submitted that the defence put forward by the appellant under section 28 is an ingredient of the offence under section 5(3). His argument was that knowledge of the existence and control of the contents of the container is the gravamen of the offence for which the legislature prescribed a maximum sentence of life imprisonment. The contrary argument advanced on behalf of the Director of Public Prosecutions relied on the observation of Lord Woolf C.J. in the Court of Appeal [2001] 2 WLR at 221F that “What the offence does is to make the defendant responsible for ensuring that he does not take into his possession containers which in fact contain drugs.” Taking into account that section 28 deals directly with the situation where the accused is denying moral blameworthiness and the fact that the maximum prescribed penalty is life imprisonment, I conclude that the appellant’s interpretation is to be preferred. It follows that section 28 derogates from the presumption of innocence. I would, however, also reach this conclusion on broader grounds. The distinction between

constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance...

Applying section 3 [HRA] I would therefore read section 28 (2) and (3) [MDA] as creating an evidential burden only. In particular this involves reading the words "prove" and "proves" as meaning *giving sufficient evidence* (emphasis added)"

English Criminal Law

Introduction to criminal liability

extract from Huxley-Binns 'Concentrate criminal law', 2nd ed, 2010, OUP

What is criminal liability?

A person is criminally liable if he is guilty of an offence.

The criminal law consists of complex and sometime contradictory rules which, when applied to a set of facts, should allow us to conclude whether or not a person is guilty or not guilty of a crime. From the chapters which follow, you will see that we can reach a conclusion as to liability only by deciding whether the defendant (D) is responsible for the conduct that forms the basis of the charge (we call this the *actus reus...*), and he either had the prohibited state of mind (the *mens rea...*) or none was needed (for an offence of strict liability...) and there is no defence (...). *What* has to be proved depends on the components (or elements) of the crime charged (...).

WHAT IS ACTUS REUS?

- The elements of an offence are found in the definition of the offence, and that is contained in a statute or in cases (common law)
- These elements are known as the definitional elements of the offence
- The definitional elements are broken down, to manage them more easily, into *actus reus* and *mens rea*
- The *actus reus* consists of prohibited conduct (acts or omissions), prohibited circumstances and/or prohibited consequences (results)
- A person can be criminally liable for failing to act (i.e. an omission), but imposing criminal liability for an omission can be controversial
- Causation is a key part of consequence/result crimes. The prosecution must prove that the result was caused by the defendant. In order to do this, the chain of causation must first be established, and then consideration must be given to any intervention which might break the chain.

The strict translation of *actus reus* to 'guilty act' can be misleading. *Actus reus* does not necessarily denote 'guilt' in terms of blameworthiness or moral (or legal) wrongness, but it simply refers to the prohibited conduct, circumstance, or result (or a combination of them). Secondly, the *actus reus* does not have to be an act; the conduct could be satisfied by an omission (see page xx below). Thirdly, *actus reus* includes far more than conduct. The term is used to cover any circumstances mentioned in the definition of the offence and any consequence (or result) too.

CAUSATION

Causation is only an issue for result crimes; that is, crimes which have a result or consequence specified in the offence definition. Examples of result crimes include:

- Murder (i.e. death)
- Causing grievous bodily harm with intent (i.e. grievous bodily harm)

For any result crime, the prosecution must prove the defendant caused the result. There are three stages in our reasoning. First we must establish a chain of causation in fact between D's acts and the result. Secondly, that factual chain must also exist in law, and thirdly, it must not be broken by an intervention.

It is unusual for causation to be in issue as a matter of fact, or of law, or both, but if it is necessary to establish that D did cause the result, the opening part of the chart below applies. Even if the chain of causation is established (i.e. D can be said to have made a sufficient contribution in fact and in law to the outcome) it does not automatically mean D is guilty because a new act might break the chain.

1. Establishing the Chain of Causation in Fact

If the result would have happened anyway, then causation has not occurred in fact. The question which must be asked is this; *But for* D's conduct, would the result have happened? If the answer is 'no', D has factually caused the result. If the answer is 'yes', D has not caused the result.

In *White* [1910] 2 KB 124, D had put cyanide in his mother's drink, but she died of unrelated heart failure and no cyanide was found in her body. D had not caused her death, so he could not be convicted of murder.

2. Establishing the Chain of Causation in Law

The next step, once factual causation is established, is to ensure D is also the cause in law. The law is clear that if D's conduct was a cause, and that does not mean the only or even the main cause, he can be found to have been the legal cause of the result.

In *Kimsey* [1996] Crim LR 35, D was charged with causing death by dangerous driving. He and the V had been racing each other in their cars at very high speed. Their cars collided and V's

car spun out of control and was hit by an oncoming car. The Court of Appeal upheld the judge's direction that the jury could find D had caused V's death even if they were not sure that D's driving "was the principal, or a substantial, cause of the death, as long as you are sure that it was a cause and that there was something more than a slight or a trifling link".

3. Breaking the Chain of Causation

Even where it can be found that D caused the result in fact AND made a 'more than trifling' contribution to the result, something might have occurred after D's act or omission, and before the result, which breaks the link (the so-called chain of causation) between D and the consequence. If that is that case, D is not liable for the offence. Indeed, even though D did make a 'more than trifling contribution', legal causation is ultimately not satisfied if the chain of causation is subsequently broken.

An intervention is called a *novus actus interveniens*, or new intervening act. Whether a *novus actus interveniens* does break the chain of causation depends on what type of intervention it is, and what legal test is adopted.

Natural events

If the natural event was not reasonably foreseeable, it breaks the chain of causation. There is no case law here, but most standard textbooks illustrate this by example (e.g. the incoming tide).

Victim's acts

If the victim's act was unreasonable or unforeseeable it breaks the chain of causation.

In *Williams* [1992] 2 All ER 183, V jumped from the moving car being driven by D. It is likely D threatened to rob V, but on appeal it was held that V's reaction was unforeseeable. On similar facts in *Roberts* (1971) 56 Cr App R 95, V jumped from a moving car because D, the driver, had made unwanted sexual advances. V's reaction was reasonably foreseeable and did not break the chain of causation.

In *Blaue* [1975] 1 WLR 1411, the victim of wounding declined, on religious grounds, a blood transfusion which would have saved her life. This did not break the causal connection between the act of wounding and death. D was not entitled to claim that the victim's refusal of medical treatment because of her religious beliefs was unreasonable.

However, if the victim's act was free and voluntary, it does break the chain of causation.

Kennedy [2008] 1 AC 269. At the victim's request, D prepared a syringe of heroin and gave it to V. V self-injected. V died. The House of Lords allowed D's appeal, holding that where a defendant has been involved in the supply of a class A drug, which is then freely and

voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death, D has not caused the death where V is a fully-informed and responsible adult.

Third party acts

The free, deliberate and informed act of a third party breaks the chain of causation.

In *Paggett* (1983) 76 Cr App R 279, there was a shoot-out between D and the police. D held V in front of him as a human shield. In returning fire, the police shot and killed V. The Court of Appeal said that occasionally the intervention of a third person might break the causal chain, but a reasonable act performed in self-defence does not.

In *Jordan* (1956) 40 Cr App R 152, V was given a large volume of medicine to which he had previously shown intolerance. This was described as abnormal medical treatment and it broke the chain of causation between D (who had stabbed V) and V's death. The chain was not broken however in *Smith* [1959] 2 QB 35. Although V's death only occurred after he had suffered a series of unfortunate events (including being dropped and being given the wrong medical treatment), the stabbing by D was an "operating and substantial cause" of V's death. Similarly, in *Cheshire* [1991] 1 WLR 844, V did not die until two months after being shot by D. The Court of Appeal held that even though medical negligence was the immediate cause of V's death, it did not exclude D's responsibility. The negligence was not so independent of D's acts, and in itself so potent in causing death, that D's acts could be regarded as insignificant.

The legal principle from the case of *Malcherek* (1981) is that a doctor who switches off a life support machine is not the cause of the death where V was originally and criminally injured by D.

MENS REA

- *Mens rea* means guilty mind, but the term is better thought of as the fault element of the offence
- The role of *mens rea* is to attribute fault or blameworthiness (also called culpability) to the *actus reus*
- The main types of *mens rea* are intention, recklessness and negligence
- The judiciary has encountered difficulties in defining, in particular, intention and recklessness

Mens rea translates as 'guilty mind', but it is better to think of it as the mental element of the crime. It is the state of mind that is prohibited (expressly or impliedly) in the definition of the offence (i.e. if *mens rea* X is prohibited in the definition of the crime, and D was thinking X at the time of the *actus reus*, then D may be guilty).

The Law Commission prefers the term 'fault element' to *mens rea*, and there are certainly good reasons for changing our lexicon. First; it would prevent students suggesting that crimes with objective *mens reas* are crimes of strict liability, and secondly it would focus our mind on the role *mens rea* plays in criminal liability which is to describe the fault or blameworthiness of the crime. Performing the *actus reus* deliberately is seen as being worse than performing it foreseeing the risk of the prohibited consequence, and deciding to take the risk; which is in turn viewed as worse than acting without thinking about the risk at all. There are therefore degrees of mental wrongdoing, and there are different types of *mens rea*, some reflecting more blameworthiness or culpability than the others.

How is *mens rea* proved?

A study of *mens rea* is a study of what needs to be proved, and as we already pointed out in **(above)**, criminal liability is not about how it can be proved. That said; students can easily become distracted by the question of how the prosecution can prove what D was thinking. The jury can infer what D was thinking from the evidence

Section 8 of the Criminal Justice Act 1967:

- A court or jury, in determining whether a person has committed an offence,—
- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reasons only of its being a natural and probable consequence of those actions; but
 - (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Take a very straightforward example; at D's trial for murder, the prosecution adduces evidence of emails, text messages and letters that D sent to V, expressing D's hatred of V and threatening to kill V. V was later found, stabbed to death, D was standing over V's body, laughing and holding the knife which was later established to be the murder weapon. The prosecution can prove that at the time of the death D intended to kill V or cause GBH if the jury infers that D intended to kill or cause GBH to V.

TRANSFERRED MALICE

In a case of 'transferred malice' the situation is that D aims to kill or injure X but accidentally misses and kills or injures V instead. The law allows the *mens rea* to transfer to the *actus reus* against his unintended victim.

The best case illustration of the doctrine is *Latimer (1886) 17 QBD 359*. D went to hit X with her belt, but the belt accidentally rebounded and hit V, causing injury. D's malicious intent against X was transferred to V...

[However] the doctrine cannot join the *actus reus* of an offence against property, such as criminal damage (breaking a window) with the *mens rea* of an offence against the person (intention to injure V).

In *Pembliton (1874)* LR 2 CCR 119, D had been fighting with others. He threw a stone at them, which struck a window and did damage. His intention to injure was not sufficient *mens rea* for damage to the window.

Identifying the Definitional Elements of an Offence

We saw [above] that criminal liability is found when the prosecution can prove the defendant satisfies the elements of the crime, and has no defence. The elements of each offence (and of each defence) are found in its definition, and the definition is found either at common law (cases only) or under statute (an Act of Parliament, supplemented by case law which tells us what the statutory provision means).

Offences against the Person Act 1861

section 18: Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty ...

Theft Act 1968

section 1: A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Criminal Damage Act 1971

section 1(1): A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

Criminal Justice Act 2003

section 142 (1): Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.