Beginning Criminal Law

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Chapter 1
Introduction to criminal law

LEARNING OBJECTIVES

By the end of this chapter you should be able to:

- Understand why the criminal law exists
- Demonstrate a basic understanding of the principles
- Understand how and where a criminal prosecution is begun
- Have some understanding of the court process

The most appropriate starting point in a book on criminal law is to consider what a crime is. Simply defined, a crime is a public wrong, one that adversely affects society as a whole. It is an act that so offends society's standards of acceptable behaviour that it is appropriate to punish the offender rather than to compensate the aggrieved party. This chapter provides the reader who has no previous understanding of the criminal law to understand basic principles relating to what amounts to a crime, the elements of a criminal offence, sentencing and a brief introduction to the court process. Subsequent chapters discuss more substantive offences as well as defences and the subject areas identified are those that most undergraduate and postgraduates courses teach. Students should always remember that many of the areas interconnect. For example, you may be required to consider the offence of murder and the defence of self defence in a single exam question. We begin by considering the more philosophical approach to the criminal law.

CAUSING HARM TO OTHERS

John Stuart Mill, the English philosopher *(On Liberty and other writings* (1859)*)* explained that actions of individuals should not be restricted by society except where it is necessary to prevent harm being inflicted on others.

> The only purpose for which power can rightfully be exercised over any member of a civilised society against his will, is to prevent harm to others.

Mill explains that society should not interfere with another person's free choice unless that person's behaviour harms society.

There is little doubt we agree that the State should intervene to protect us when harm is caused but what is harm? Is harm caused to the individual or to society as a whole? Arguably,

the two appear linked, if harm is caused to an individual, then society suffers as well. Harm has to be such that it threatens the mere fabric of society. Restricting harm caused to the individual protects not only the individual but invariably protects society – therefore an individual's restriction of behaviour can be justified where the greater good is concerned.

It is for society to determine what constitutes 'harm'. In a democratic society this should pose little difficulty. We all accept murder, rape, manslaughter, robbery, burglary and theft are all acts which are clearly wrong. Here, the victim should be protected from the 'wrong' and the wrongdoer should be punished. However, even here morals (which we look at shortly) play a role. For example, we all agree theft is wrong; harm is caused if I steal a wallet from the person sitting next to me on the train. Harm is caused to the individual and society needs to be protected from my actions! Compare my act to the single unemployed mum who steals a pint of milk and a loaf of bread to feed her family. Is harm caused here? Is her act equally as reprehensible as mine? We all know one should not steal but does society really need protection from her? Arguably not. Although the quality of the act is the same the motives are very different. Although motives play no role in criminal law, this simple example shows there are varying differing standards as to what amounts to an act that causes harm. Not only is this dependent on the morals of those who represent our 'society' but it is also largely dependent on society's expectations and the changing values of that society.

Example

Section 2(1) of the Suicide Act 1961 states that it is a criminal offence to aid, abet, counsel or procure another's suicide. Marian suffers from a terminal degenerative condition and wants her husband to be able to help her end her life at the time of her choosing, when she no longer feels her life is worth living. The law states that what she most desires – the chance to end her life with the help and support of her loving husband – is illegal. Her individual rights are curtailed in order to protect the vulnerable of society who may feel pressurised to end their life prematurely (see *R (Pretty) v DPP* (2001)). This may seem to be an acceptable approach, as harm could be caused to many if assisted suicide were permitted. One can also argue that harm is caused to Marian since her autonomous wish to end her life at the time of her choosing is denied. Hence, who is harmed is often not as straightforward as it might, at first glance, appear.

MORALITY

So far we have seen that 'harm' is a difficult concept to attempt to define. There is little doubt that morality plays a significant part in the development of the criminal law. Again,

morality is a tricky term to define and it is often guided by the standards of the particular culture one studies. For example, female genital circumcision is an accepted practice in parts of Africa, most commonly in Northern Eastern parts, but here in the UK it is morally unacceptable and now, since the Female Genital Mutilation Act 2003, unlawful.

The law in England and Wales permits us to consent to a certain level of self-harm (see Chapter 7), for example, we can consent to tattooing and all forms of exotic body piercing even though we may not all find it attractive, or even acceptable.

However, there are areas of harm where the law has intervened and the case below illustrates how the law can impose its moral stamp of authority.

KEY CASE: *Brown* [1993] 2 All ER 75

Facts:

- The appellants enthusiastically engaged in acts of sado-masochism.
- Many of the acts involved personal and intimate violence.
- They are conducted in private, all parties consented and no harm was caused as a result.

Held:

The appellants were charged and convicted of actual bodily harm. They appealed but their convictions were upheld. Lord Templeman observed 'Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.'

The court's decision clearly sends out the message that personal freedoms considered morally unacceptable can be curtailed by the courts, even where the activity is conducted in private and no harm is caused.

Contrast *Brown* with *Wilson* below.

KEY CASE: *Wilson* [1996] 3 WLR 125

Facts:

- The appellant had brandished his initials on his wife's buttocks with her consent.
- She required medical attention following an infection.
- Her husband was charged with assault occasioning actual bodily harm contrary to s 47 of the Offences against the Person Act 1861.

Held:

The husband's conviction was overturned.

The court opined that this was an act of love between husband and wife, and consensual activity between two loving partners should not be a matter for the courts.

What is the real difference between the cases? In *Wilson* injury was caused (albeit minor) and Mrs Wilson required medical attention. No such injury was caused in *Brown*. *Brown* involved activities which involve sexual gratification; in contrast, Mr Wilson did not receive any sexual gratification. In reality, *Brown* is a judgment where morals were examined and statements made as to how people should behave. The activities of a minority group of people with a tendency to alternative sexual acts were not the kind of activities that the court concluded could be either accepted as 'normal' or acceptable and hence they were criminalised.

The judgment's principle is reflected by Sir Patrick Devlin in *The Enforcement of Morals* as he explains:

> The criminal law is not a statement of how people ought to behave; it is a statement of what can happen to them if they do not behave; good citizens are not expected to come within reach of it or to set their sights by it, and every enactment should be framed accordingly.

WHAT IS PUNISHMENT AND WHY DO WE HAVE IT?

One of the interesting aspects of a study of the criminal law, in contrast with other areas of law, is that the criminal law seems almost tangible. Turn on the television and there will invariably be a drama, news item or media portrayal of some offence being committed. The same applies to punishment. Sometimes we might even consider that punishment of criminal offences is glamorised by the media.

In contrast to the civil law, where compensation between the parties is sufficient, a victim of a criminal offence might, quite rightly, be offended if the State suggested that compensation was an adequate remedy between the parties.

The State punishes the wrongdoer in order to enforce boundaries of acceptable behaviour. It is also a form of '*retributive justice*' where the offender must face the consequences of his undesirable activities. Retribution was one of the main principles behind the Conservative Government's reform of sentencing: *Crime, Justice and Protecting the Public* (1990).

Punishment is a form of *deterrent* which allows others to appreciate the consequences of their potential actions through the punishment of others. A custodial sentence is the ultimate deterrent, reserved for offences where a period of imprisonment and deprivation of liberty satisfies the State that justice is seen to be done.

Punishment also seeks to *rehabilitate,* reform and re-educate the offender in the hope they will not re-offend. In the situation of a relatively minor drug offence, for example, sentencing the defendant to community service together with attendance at a drug rehabilitation unit (if he shows a desire to rid the habit) could be an effective tool. The aim is to rehabilitate the offender, together with some form of punishment for the offence committed. However, rehabilitation is often difficult to achieve with re-offending rates particularly high. Where an offender is released from a short custodial sentence of under 12 months, the rate of re-offending can, according to the Ministry of Justice, *Compendium of Reoffending Statistics and Analysis May 2011*, be as high as 70 per cent. The rate is lower for sentences of between two and four years, where the offender has been given a greater opportunity to rehabilitate. Those who re-offend cite a lack of a place to live and unemployment as the main reasons for re-offending.

The State must also consider *protecting the public* where sentencing is concerned. Whilst originally this may have been achieved by the death penalty, modern-day protection is achieved by imposing lengthy prison sentences. If the offender is not in custody, electronic tagging can restrict an offender's movements whilst, at the same time, protecting the public by prohibiting the offender from visiting a particular area between certain times. Sometimes the offender is forbidden to visit particular areas, especially if the area is connected with the original offence. The benefit of electronic tagging is that it is less costly than caring for an offender in custody, but at the same time it acts as a deterrent because if the defendant breaches the conditions of his tagging he can be imprisoned for the breach.

The Human Rights Act 1998 – the Act incorporates the provisions of the European Convention of Human Rights into domestic law with effect from October 2000. By virtue of s 6, the onus is on public authorities (for example, the courts, prisons and the police) to ensure that all legislation is compatible, as far as possible, with the Convention rights. Save for the case of *Lambert* [2002] QB 112, which concerned the reverse burden of proof and the use of

Article 6, it would be reasonable to say that terrorism offences (more so than other offences we deal with in this book) have most frequently engaged use of the Convention rights.

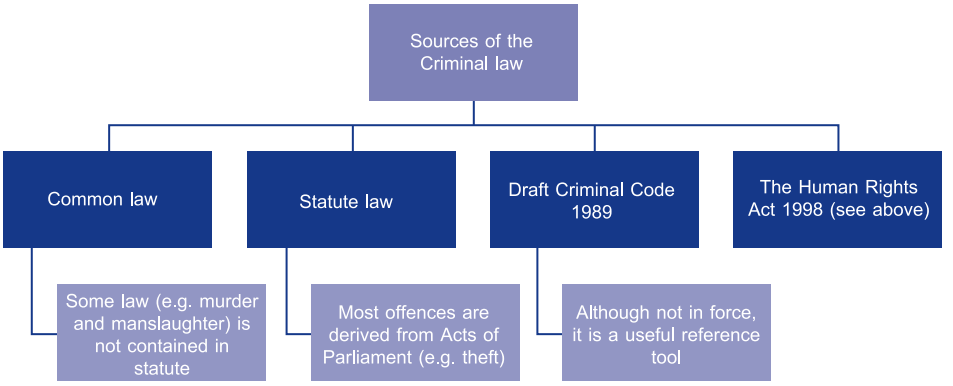

Figure 1.1 Sources of the criminal law

ELEMENTS OF CRIMINAL LIABILITY

Criminal liability is traditionally expressed in the following Latin maxim '*actus non facit reum nisi mens sit rea*' which can be translated as 'an act does not make a man guilty of a crime unless his mind is also guilty'.

We examine these terms in detail in Chapters 2 and 3, and here we simply need to outline the basic elements. Most criminal offences require both a guilty act (*actus reus*) and a guilty mind (*mens rea*) and in order for the defendant to be convicted of a criminal offence, the prosecution must prove these two elements. We will see that some offences (known as strict liability offences) only require proof of the *actus reus*, but this is an exception to the rule.

It is important to be able to identify the *actus reus* and the *mens rea* in an offence. The majority of offences are contained within statute. There are a few offences which are common law offences so the *actus reus* and *mens rea* can be found in accepted definitions of the offence, for example, the offence of murder.

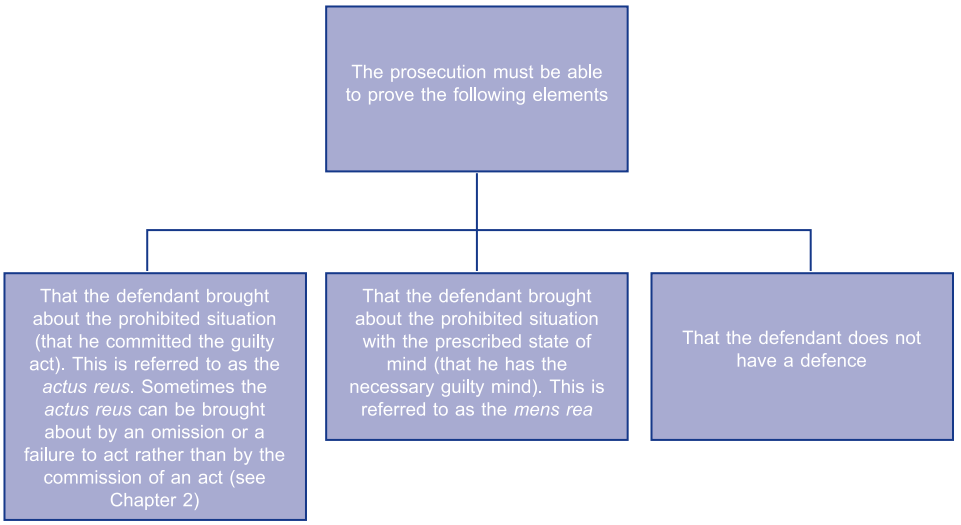

Figure 1.2 The elements of a criminal offence

The burden of proof

The burden of proof is on the prosecution to prove the *mens rea* and the *actus reus* of the offence beyond reasonable doubt. This means the jury must be satisfied so they are sure that the defendant committed the offence he is being tried for. If they are not sure, or there is any element of doubt, the defendant must be acquitted.

The prosecution must also prove that the defendant cannot rely on a defence. Thus, the defendant does not have to prove anything at all. He can simply wait and watch whilst the State (who prosecute) accuses the defendant and then sets out to prove its case. The well-worn phrase that the 'defendant is innocent until proven guilty' is entirely accurate. It is for the prosecution to prove its case, not for the defendant to disprove the case or assert his innocence.

The authority for the principle that the prosecution must prove the *mens rea* and *actus reus* beyond reasonable doubt is illustrated in the case below.

KEY CASE: *Woolmington v DPP* [1935] All ER 1

Facts:

- Mr and Mrs W separated.
- Mr W wished to persuade Mrs W to return by threatening to kill himself with a shotgun.
- Accidentally, the shotgun went off and he killed his wife.

Held:

At first instance, the trial judge misdirected the jury stating that once the *actus reus* had been proved, the *mens rea* of murder could be presumed unless the defendant proved to the contrary. Mr W was convicted of her murder.

The House of Lords overturned his conviction on the basis that the onus was on the prosecution to prove the killing was not accidental. Lord Sankey LC held as follows:

> Throughout the web of English criminal law one golden thread is always to be seen – that is the duty of the prosecution to prove the prisoner's guilt . . .
>
> No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

The standard of proof

The standard of proof rests with the prosecution to prove the defendant's guilt beyond reasonable doubt, referred to as the 'golden thread' by Lord Sankey LC above. This contrasts with civil law where the standard of proof is satisfied on a balance of probabilities, that is, 51 per cent. In criminal law, however, the standard of proof is set considerably higher. The justification for this can be found in the differing penalties that can be imposed on a civil defendant found liable and the criminal defendant convicted of a criminal offence. Since the penalty in civil law tends to be damages (compensation) between the parties, this form of 'punishment' tends to pale into insignificance when compared to the possible penalties in criminal law. The defendant could be fined (drawing a parallel with civil law), but this will also result in a recordable criminal conviction. More significantly, the defendant may also risk losing his liberty, and therefore his livelihood. It is

entirely appropriate that the more the defendant risks losing, the higher the standard of proof should be.

The reverse burden of proof

As is often the case with law, there are exceptions to the rule and there are limited circumstances where the standard of proof will be on the defendant to prove their defence. The most commonly used example the student of criminal law will encounter is the defence of diminished responsibility (see Chapter 6) where s 2(2) of the Homicide Act 1957 as amended by s 54(5) of the Coroners and Justice Act 2009, places the burden of proof on the defendant.

Thus, the standard of proof under normal circumstances is on the prosecution to prove the defendant's guilt beyond reasonable doubt, but if the defendant is required to prove a defence, the standard of proof is lowered to 'a balance of probability'.

THE PRACTICAL SIDE OF THE CRIMINAL LAW

From the outset, it is essential to use the correct terminology. Without a clear understanding, you will fall into poor habits that will remain with you throughout your studies.

The criminal law concerns the ability of the prosecution to prove the defendant's guilt. If the prosecution are unable to prove their case, the defendant's innocence is proved and he is acquitted.

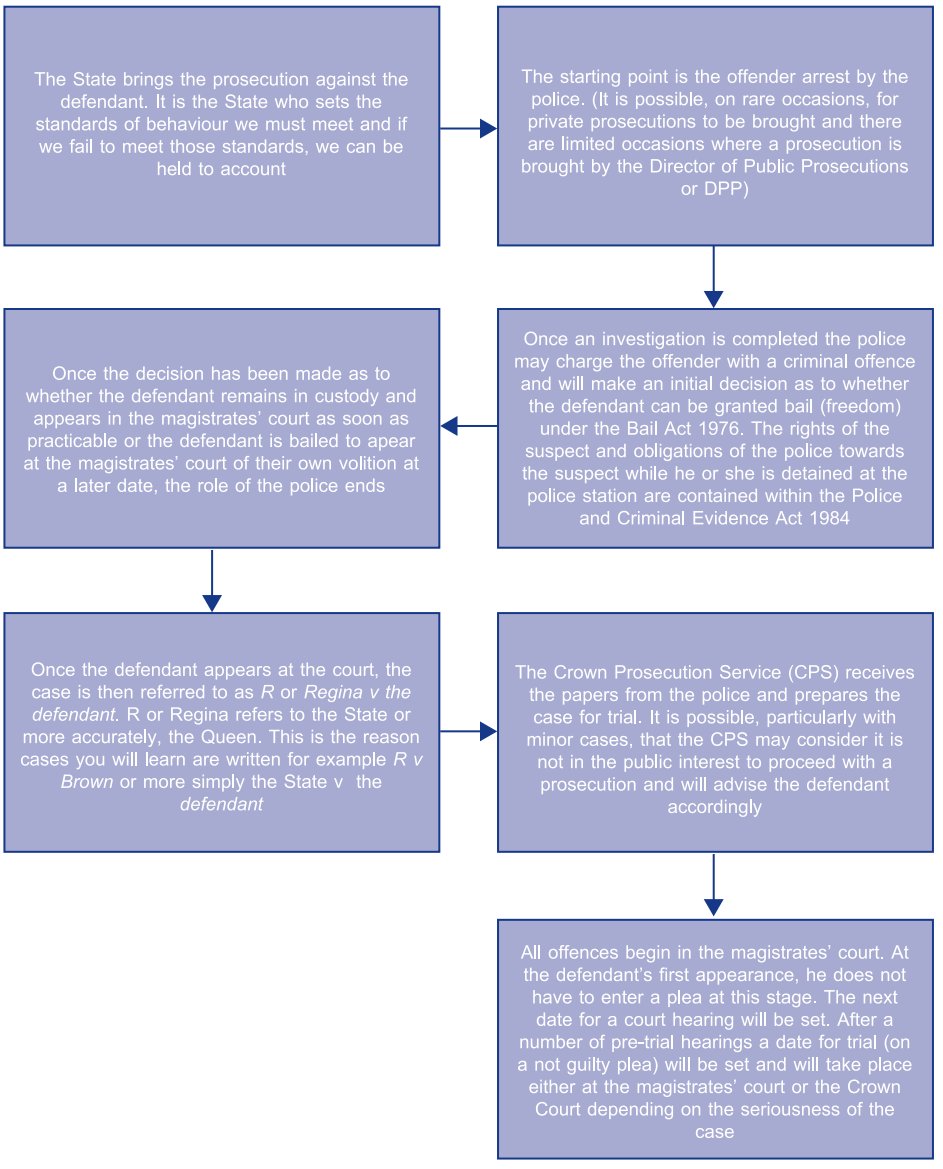

Figure 1.3 The process of a criminal offence from arrest to trial

THE CLASSIFICATION OF CRIMINAL OFFENCES

Criminal offences are classified by the level of seriousness of the offence with which the defendant is charged.

The most serious offences, such as murder, manslaughter, rape, robbery and wounding or causing grievous bodily harm with intent are referred to as '*indictable only*' offences and will be heard in the Crown Court where guilt or innocence will be determined by a jury. The judge in the Crown Court has the greatest powers of sentencing to reflect the seriousness of the offence.

There are a mid-range of offences which can be heard either in the magistrates' court (without a jury) or in the Crown Court (with a jury). These are referred to as *'either way offences'*. The type of offences which fall into this category include theft, burglary, wounding or inflicting grievous bodily harm (s 20 of the Offences Against the Person Act 1861). In order to decide where a case is to be heard, a *mode of trial* hearing takes place.

- If the magistrates feel their powers of sentencing are insufficient and the case is too serious to be heard in the magistrates' court, they will send (remit) the case to the Crown Court for trial.
- Even if the magistrates accept the case for trial in the magistrates' court, they can still remit the case to the Crown Court for sentence at the conclusion of the trial, if they consider their sentencing powers to be inadequate.
- If the magistrates accept the case for trial, the defendant then has a choice. He can either accept the magistrates' decision or he can decide to have his case heard in the Crown Court.
- What factors are relevant to the defendant's decision? Briefly, the defendant may choose to have his case tried by his peers rather than the magistrates on the basis that jury members may be more sympathetic to his defence rather than the magistrates who can be more 'case-hardened' (i.e. they have heard it all before!). However, the defendant must balance the decision against the potential of a harsher sentence if convicted in the Crown Court.

Since we have established that all cases begin in the magistrates' court, it follows that the magistrates' court is the more inferior of the courts. More serious cases (*either way offences* or *indictable only offences*) are heard by the Crown Court. If the defendant is tried in the magistrates' court, he may appeal against conviction and/or sentence to the Crown Court. On the other hand, if the defendant is tried in the Crown Court, he can still appeal against conviction and/or sentence, but now to the Court of Appeal (Criminal Division). It is not just the defendant who can appeal; the prosecution can and does appeal against sentence. Either party can appeal to the Supreme Court (or the House of Lords pre-2009). A party must have leave from the Court of Appeal to proceed to the Supreme Court, and this will only be granted if there is a question of great public importance involved. If the Court of Appeal refuses leave to appeal, an application can be made directly to the Supreme Court.

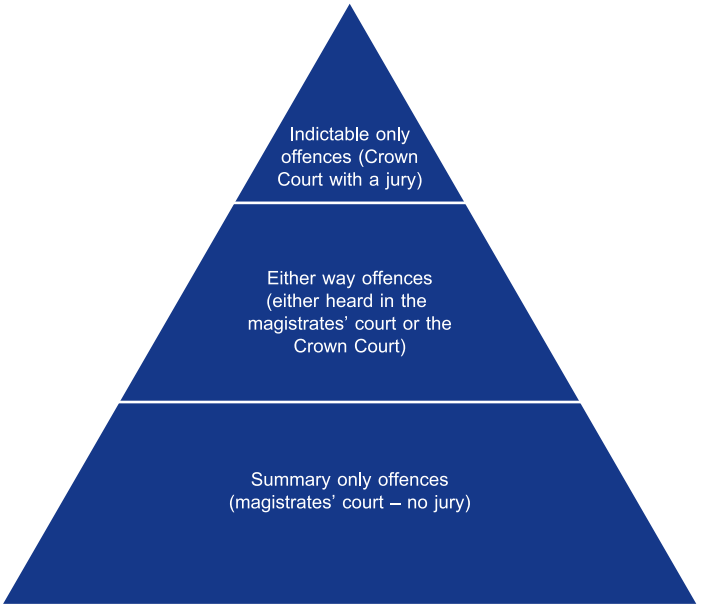

Figure 1.4 The classification of offences

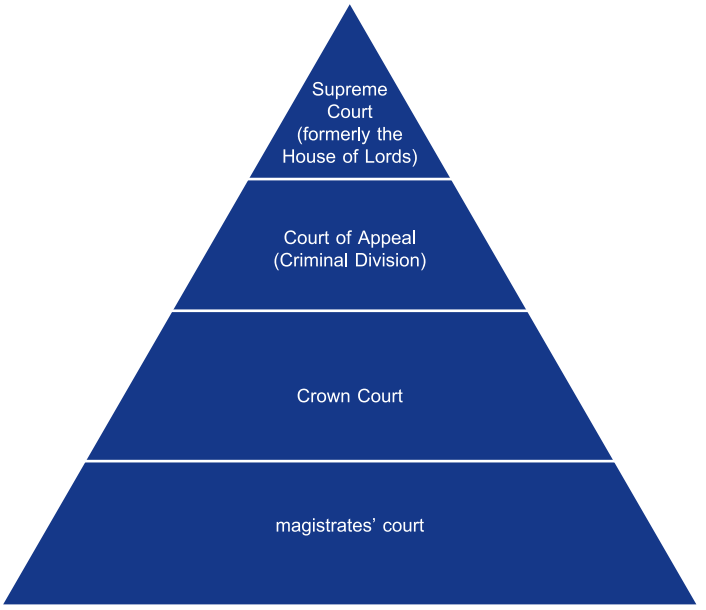

Figure 1.5 The hierarchy of criminal courts in England and Wales

THE CRIMINAL TRIAL

The UK has an adversarial system of trial which involves both parties presenting their case to the jury whose role it is to determine guilt or innocence. One disadvantage of this system is that the scales of justice do not appear equally balanced; this is because the State prosecutes and has resources and funding securely behind them. A defendant, in contrast, may be in receipt of legal funding (legal aid) if they cannot afford to fund their defence themselves or are receiving state benefits. There are, however, some minor cases where legal funding will be refused but the basic principle is where there is a risk of loss of livelihood, the defendant is likely to receive legal funding. It is the role of the judge to ensure that the trial is conducted fairly and properly. To this end, there are strict rules of evidence that must be adhered to and the prosecution must disclose all evidence they wish to rely on, together with all unused material, to the defence. The defence are not required to provide all the details about the defence, save for details of any alibi the defendant may wish to rely upon and the defence will also have disclosed any experts reports if relevant. As stated above, the defendant is cloaked in a presumption of innocence and it is at this time that the prosecution will seek to unravel it.

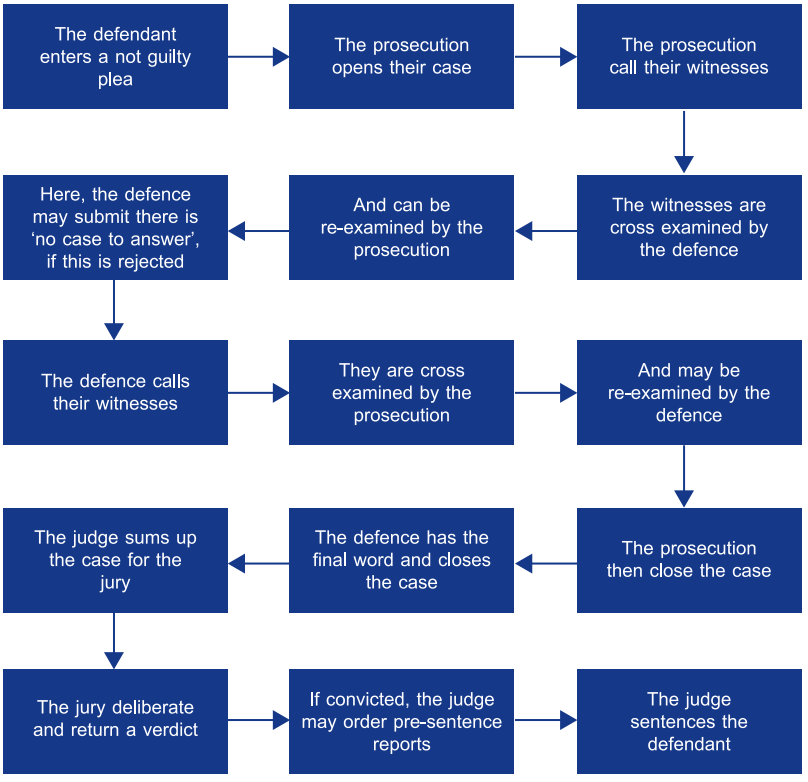

Figure 1.6 The trial process

FURTHER READING

It is important to appreciate the importance of reading the key cases. It is not sufficient to successfully study law by simply reading a summary of the case in any textbook. Any law student who wishes to achieve must read the cases in full.

Lord Bingham, 'A Criminal Code: Must we wait Forever?' [1999] Crim LR 694 – an insight into the crucial issue of whether the UK should have a criminal code.

In a law library or electronically, read the judgment of *R v Brown* and *R v Wilson*. Summarise the main principles of the judgment.

COMPANION WEBSITE

An online glossary compiled by the authors is available on the companion website: www.routledge.com/cw/beginningthelaw