Criminal Law
Concentrate

4th edition

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OXFORD
UNIVERSITY PRESS

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UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First edition 2009
Second edition 2011
Third edition 2013

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014933492

ISBN 978–0–19–870375–4

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

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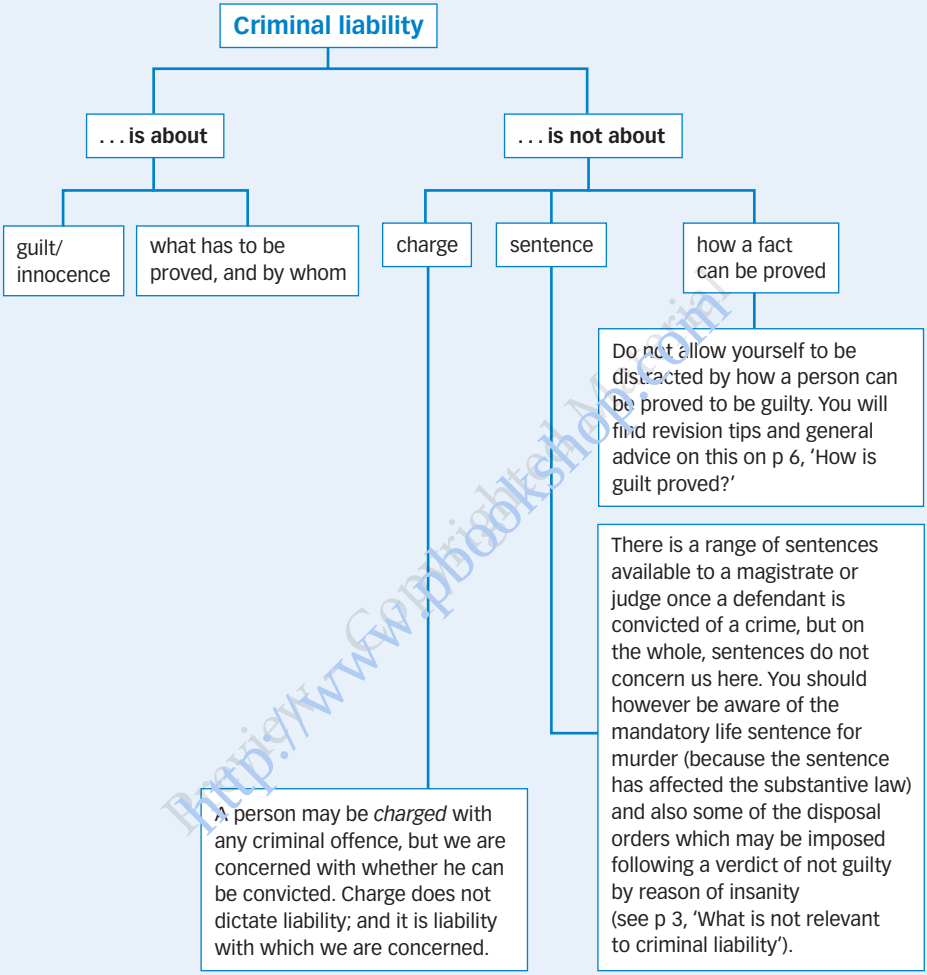
The basis of criminal liability

Key facts

- The study of the **criminal law** is the study of liability.
- It is not about whether a person can be **charged** with a crime, or what **sentence** he may face if convicted, but rather it deals with whether a person is innocent or guilty of an offence (ie whether or not he can be convicted).
- Think about the criminal law in terms of *what* has to be proved in order to convict a person of a crime, not about *how* it can be proved.
- Your depth of understanding of the criminal law will also be enhanced if you are able to identify how the law is reformed, by Parliament, the courts, and as a result of any European influence.

Chapter overview



Criminal liability

What is criminal liability?

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

The criminal law consists of complex and sometimes contradictory rules which, when applied to a set of facts, 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*, see chapter 2), and he either had the prohibited state of mind (the *mens rea*, see chapter 3) or none was needed (for an offence of strict liability, see chapter 4) and there is no defence (see chapters 14 and 15). *What* has to be proved depends on the components (or elements) of the crime charged (chapters 5–13).

Revision tip

For each criminal offence on your syllabus (and that does not necessarily mean every offence covered in this book) you must know *each element*. You also need to know the source of the law (is it statutory or common law) and at least one (usually more) authority (case). Once you know these, you can build on that knowledge the more sophisticated arguments about whether the law is satisfactory, or how it should be reformed.

What is not relevant to criminal liability?

We are commonly not concerned with *why* D committed the crime. What we mean here is that D's motive is generally irrelevant to liability. If, for example, D stole goods from a shop to get the money to buy drugs to which he had an addiction, we consider only whether, on the facts, D committed theft. D's addiction should not distract us from that question. However, the criminal law is not always blind to why a person commits a crime. For example, if D commits an assault because he is in danger from an aggressor, then the reason that D lashed out is certainly important as it may provide him with a defence (self-defence). Similarly, D may have killed his girlfriend because whilst experiencing an uncontrollable epileptic fit he hit her so hard she died. You may find it surprising, but such a defendant is probably insane (see further chapter 14).

Insanity is a curious defence, and the law has developed in such a way as to produce seemingly bizarre results; including labelling epilepsy as a form of insanity. The mention of insanity raises another point which must be made by way of introduction. Insanity is one of the only topics in the criminal law where the sentence may be relevant in your answer. For almost all other topics, you should not deal with sentencing at all. You may recall the very first sentence of this chapter—the criminal law is about liability. It is, therefore, not about punishment. (Sentencing and forms of punishment are usually taught as part of English Legal System and/or Criminology modules.) Insanity is different in this respect because an

insane offender is not guilty by reason of that insanity, but he will be subject to a 'disposal' by the court. You should have a basic understanding of these disposal orders (see chapter 14) so you can show the examiner that you know the consequences of a successful plea of insanity. The only other sentence of which you must have some awareness is the mandatory sentence of imprisonment for murder; see chapter 7.

Most prosecutions are brought by the Crown Prosecution Service in the name of the Crown. It is very important that you understand that for the purposes of the criminal law, the question is not whether a person can be *charged* with an offence, but whether or not he can be convicted. As a matter of terminology, then, do not say, 'Alan can therefore be charged with theft', but after careful reasoning, using statutory provisions and cases in support, you may conclude, 'Alan is therefore guilty of the offence of theft'.

Burden of proof

What does burden of proof mean?

The **burden of proof** means the requirement on a party to adduce sufficient evidence to persuade the fact-finder (the magistrates or the jury), to a standard set by law, that a particular fact is true. For example, if a defendant is charged with murder, the burden of proving he is guilty lies on the prosecution who must do so beyond reasonable doubt.

Which party bears the burden of proof in criminal cases?

You are, no doubt, aware of the presumption of innocence, commonly phrased that a defendant is presumed to be innocent until proven guilty. This is a fundamental principle of the common law and is also one of the rights specifically mentioned to guarantee a fair trial according to **Article 6(2) European Convention on Human Rights**.

Woolmington [1935] AC 462

The House of Lords held that there is a 'golden thread' running throughout the criminal law, that it is the duty of the prosecution to prove the defendant is guilty, not for the defendant to prove he is innocent. Viscount Sankey said the presumption of innocence is part of the common law 'and no attempt to whittle it down can be entertained'.

In practice, this means that the defendant does not have to prove he is not guilty; the prosecution has to prove beyond reasonable doubt that he is. You should state the burden of proof is (almost always) on the prosecution. Even when dealing with *defences*, it is usually the prosecution's task to disprove the defence. This is because most defences are no more than a denial of an element of the crime, so the burden of proof remains on the prosecution. For example, the prosecution carries the burden of proof in relation to self-defence. So, if the defendant asserts that he was acting in self-defence, he does not have to prove he was; rather,

the prosecution must prove he was not. That is not to say the defendant has no burden at all; he just does not have a burden of proof (also called a proof burden or a persuasive burden). He does, however, have a burden of raising the defence of self-defence. This is called being under an **evidential burden**. Evidential burdens are not proof burdens, but are duties to make issues 'live' in the case. You may sometimes see them referred to as burdens of 'passing the judge'. This means D must adduce enough evidence of the defence that the judge allows the defence to be put before the jury.

Revision tip

In an exam, it is important to phrase your answers correctly. When discussing the criminal law, make sure you explain what the prosecution has to prove to obtain a conviction. If you find yourself writing that the defendant has to prove he is not guilty, or that he has to prove his defence (unless the next section of this book applies), cross out your answer and re-phrase it. For example:

- ~~Bert has the defence of self-defence on these facts. If he can prove his reaction was reasonable, he will be acquitted.~~
- Bert has the defence of self-defence on these facts. If he can adduce sufficient evidence for the judge to leave the defence to the jury, and if the prosecution cannot prove Bert was not acting in self-defence, Bert will be acquitted.

What is a reverse proof burden?

There are occasions on which the defendant has to prove a defence. In ***Woolmington* [1935]**, Viscount Sankey explained the golden thread, and then added 'subject to what I have … said about the defence of insanity and subject also to any statutory exception'.

There are certain defences which D must prove, and if he cannot, he may well be convicted. For almost all criminal law modules, the only defences where the defendant has to prove anything are:

- insanity, and
- diminished responsibility (**s 2(2) Homicide Act 1957** expressly states the defendant has to prove this defence).

Whenever the burden of proof is reversed to the defendant, he has to prove the defence on a balance of probabilities. We will return to proof issues where they arise throughout this book.

Do reverse proof burdens breach the presumption of innocence?

Article 6(2) ECHR provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. All Acts of Parliament must be interpreted (as far as possible) to comply with this article (**s 3 Human Rights Act 1998**). Other than for insanity, reverse proof burdens are statutory, so a question that needs to be addressed is how judges should interpret any UK legislation which imposes a proof burden on D in light of **Article 6(2)**. That is to say, can a defendant receive a fair trial under a statute (which must comply with **Article 6**) if the burden of proof of some element of the *defence* is reversed to him?

Burden of proof

According to the House of Lords in ***R v DPP, ex p Kebilene* [1999]**, the answer is a provisional 'yes', provided it is reasonable and proportionate to reverse that element to D, see ***Salabiaku v France* (1998)**. Lord Steyn said in ***R v Lambert* [2002]** that the courts must focus on the extent to which the reversal is connected to the moral dimension of the offence through the *mens rea* requirement, which is closely linked to another key issue—whether the offence is 'truly criminal' or merely regulatory in nature. He continued that the burden is on the state to show that the legislative means were not greater than necessary. The leading case on the burden of proof, and reverse proof burdens, is the conjoined appeals of ***Sheldrake v DPP; AG Ref (No 4 of 2002)* [2005]** which you will find in 'Key cases' on p 9.

How is guilt proved?

There are extensive rules of evidence governing the admissibility of evidence which do not concern us here. One of the most common questions which taxes a student of the criminal law, though, is how the prosecution can prove what D was thinking. Certainly, if the crime has a *mens rea* requirement (see chapter 3), failure by the prosecution to prove the *mens rea* means D will be acquitted. However, you must resist the temptation to be distracted by this. Suffice to say (and once said, you must move on) *mens rea* can be proved because the fact-finder (usually the jury for our purposes) *infers* it from what D did or did not do. **Section 8 Criminal Justice Act 1967** provides:

> 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.

Revision tip

You will find it useful to weave proof into your revision notes. You might wish to write postcards for each of the main offences and defences. You could phrase your notes in terms of what has to be proved:

Offence—murder (see chapter 7)
What has to be proved? The *prosecution* must prove that:

- D killed **the victim** (V) under the Queen's Peace (the *actus reus*), and
- D intended to kill or cause serious harm (the *mens rea*).

Defence—insanity (see chapter 14)
What has to be proved? The *defendant* must prove on a balance of probabilities that:

- he was suffering from a defect of reason
- arising from a disease of mind so that

- he did not know the nature and quality of his act, or
- he did not know it was wrong.

Reform of the criminal law

You may have heard the phrase that the law is an ass. There are, at least, some curiosities and there are many inconsistencies in the criminal law. One of the statute laws still in force is over 150 years old; so too are some of the case authorities. Consequently, some are in desperate need of reform.

Revision tip

You must always have a critical eye when studying the criminal law. In essay questions in particular, some evaluative comments are required. Do not accept that, just because the law is 'x', that 'x' is therefore morally or ethically 'right'.

The Law Commission is very active in the field of the criminal law (see lawcommission.justice.gov.uk). In 1989, the Law Commission published a full Draft Criminal Code: *Criminal law: a criminal code for England and Wales* (Law Com No 177, 1989). It was a huge report and contained recommendations for the codification of the whole of the criminal law of England and Wales. On reflection, it was more than Parliament could cope with in terms of the volume of legislative change required, so the Law Commission took on smaller, discrete tasks. This piecemeal approach attracted more political support, and the Law Commission has since enjoyed considerable success, seeing many of its recommendations for reform reach the statute books.

Revision tip

You are strongly advised to be aware of the main proposals for laws which have not yet been changed. There are two good reasons why. First, if you are able to see how the Law Commission thinks the law should be changed, you will be able to give an evaluative comment on the current state of the law, and this will get you marks. Secondly, the Law Commission's proposals might be in force by the time you get into practice (if that is your ultimate wish), so the earlier you familiarise yourself with the proposals, the better off you will be when advising your clients.

Looking for extra marks?

Your examiner will give you credit if you can state and apply the current law correctly, but there will be more credit if you are then able to show the examiner how the outcome might differ under the key proposals for reform. You would also do very well to be able to give a brief indication of which outcome is to be preferred, and why.

Judicial reform of the criminal law

On the theme of change to the criminal law, judicial reform is unlikely to occur on a large scale. Judges cannot create new criminal offences, and can develop existing laws only within the rules of precedent (*stare decisis*) and then only where the facts of the case before them give rise to that legal issue (***Shaw v DPP* [1962]**). You should therefore have an awareness of the judicial developments in the criminal law that occur during your studies, but for wholesale reform, watch carefully the proposals of the Law Commission and Parliament.

Influences of Europe

Another key reform in the criminal justice system is, of course, the **Human Rights Act 1998** which provides that English law must comply, if possible, with the Articles in the **European Convention on Human Rights 1950**. Most students are able to cite **Article 6**, at least, which is the right to a fair trial. It may, however, surprise you to learn that the Act has had very little impact on the substantive criminal law. One of the reasons is because **Article 6** is limited to procedural matters (the rules on the admissibility of evidence, etc) and not the substantive criminal law (the rules which govern liability). The Act is not totally without effect, however. Two articles in particular have the potential to impact the substantive criminal law. **Article 2** provides for the right to life, and this has an effect where a person uses self-defence to kill an aggressor (see 'Self-defence and the right to life' in chapter 15, p 193). **Article 7**, which in essence provides that the criminal law must be reasonably certain so people can predict whether their conduct may contravene the criminal law, might yet have an impact on a few key crimes; notably strict liability offences (see 'Can strict liability be justified?' in chapter 4, p 47), manslaughter by gross negligence ('Gross negligence manslaughter' in chapter 8, p 103) and the element of dishonesty in theft ('Dishonesty' in chapter 11, p 144).

Key cases

Case	Facts	Principle
***Lambert* [2002] 2 AC 545**	D appealed against his conviction for possession of a class A drug with intent to supply. He had been found in possession of a bag containing a drug but said he neither knew, nor suspected, nor had reason to suspect the nature of the contents of the bag. The question on appeal was whether he had to prove his lack of knowledge of the contents, or if the prosecution had to prove he did know. The section in issue was **s 28 Misuse of Drugs Act 1971**.	**Section 28**, insofar as it contained an express reverse proof burden, should be 'read down' as imposing an evidential burden only on the accused (note: this is in fact **obiter** as the majority of the House held that the **Human Rights Act 1998** did not have retrospective application).

Case	Facts	Principle
***Sheldrake v DPP; AG Ref (No 4 of 2002)* [2005] 1 AC 264**	***Sheldrake*** D was convicted of drink-driving. He appealed on the ground that the defence, which cast upon the defendant the burden of proving that there was no likelihood of his driving the vehicle while over the limit, violated his right to a fair trial under **Article 6**.	The House of Lords held that the allocation of a proof burden to the accused did not violate Article 6. It was directed to a legitimate objective (the prevention of death, injury, and damage caused by unfit drivers); and the likelihood of the defendant driving was a matter so closely conditioned by his own knowledge as to make it much more appropriate for him to prove on a balance of probabilities that he would not have been likely to drive than for the prosecution to prove, beyond reasonable doubt, that he would. In addition, the imposition of a legal burden on D did not go beyond what was necessary and reasonable, and was not in any way arbitrary.
	AG Ref D was charged with two offences relating to terrorism (belonging to and professing to belong to a proscribed organisation). The appeal concerned the elements of the offences and related defences, and who had to prove them.	The House held that if there was a reverse proof burden, there was a real risk that a person who was innocent of any blameworthy or properly criminal conduct, but who was unable to establish a defence to one of these charges, might nevertheless be convicted. The provisions in question therefore breached the presumption of innocence.
***Woolmington* [1935] AC 462**	D was charged with murder. The trial judge directed the jury that, once the prosecution had proved a person had died at D's hands, it was for D to prove it was not murder.	Viscount Sankey held that the burden of proof lies on the prosecution, and that includes proof of each element of the crime, and the elements of any defence, other than the defence of insanity and other 'statutory provisions'.

Key debates

Topic	Reform of the law; who does it and how they do it
Author/Academic	Professor Sir John Smith QC
Viewpoint	Examines and evaluates the roles of academics, judges, and Parliament in reforming the criminal law.
Source	'Judge, jurist and Parliament', Judicial Studies Board Annual Lecture 2002, available at www.smithy.org/JSB_Judge_Jurist_Parliament.pdf