
**CRIMINAL LITIGATION
PRE-COURSE MATERIALS**

AN INTRODUCTION TO CRIMINAL LITIGATION

1. Introduction:

You will be studying Criminal Litigation as part of your litigation course. You will also be studying Civil Litigation. We teach Civil Litigation first, and then move on to Criminal Litigation. At the end of Stage 1, you will take an assessment in litigation. This will consist of an assessment in Civil Litigation and an assessment in Criminal Litigation. Your marks will be aggregated and to pass you must get a mark of 50% or over. If you get 40% in one assessment and 60% in the other, you would pass with a mark of 50%.

The course is a practical one and will focus on the procedure from arrest to sentence. There will be no teaching of criminal law as such. You are expected to know this as a result of the academic stage of your learning. Accordingly, we would ask you to re-acquaint yourself with the law relating to a number of offences and defences (see below)

Although few of you are likely to choose a career practising in criminal law, we are confident that most students will enjoy the course. It is in the context of the criminal justice system that issues of civil liberty and security come most into conflict. How does that system seek to protect and acquit the innocent whilst ensuring the guilty are convicted? And what should be done with the guilty? Should the emphasis be on punishment or rehabilitation? These are the sort of questions that underlie the course and give it its particular interest.

We will spend the first two study units looking at how the lawyer seeks to protect and defend the suspect who has been detained at the police station. You will see how the lawyer is meant to play a pro-active role at all times. It was the Court of Appeal judge L.J. Auld who said that 'the trial starts at the police station'. This emphasises how mistakes made at the police station can have serious consequences for any trial that later takes place.

One unit will focus on procedural matters when a case first comes to court (e.g. what determines whether a case goes to the Crown Court or stays in the Magistrates' Court?)

Two units will focus on preparing a case for trial. This will involve us looking at many issues of evidence and procedure. For example, when might a court of trial be told that a defendant has previous convictions? When can evidence simply be read out as against being given by a 'live' witness? Can the fact that a defendant said nothing during interview at the police station be held against him/her at court?

The final unit will look at sentencing. Though this marks the end of any criminal prosecution, it is essential at all stages to be aware of any likely sentence in the event of conviction. A suspect held at a police station may well want to know what sort of sentence s/he may receive if charged and convicted – the lawyer will need to be able to give such a suspect some idea. When the matter comes to court, the likely sentence if convicted is relevant as to whether an 'either-way' case should be dealt with in the Crown Court or the Magistrates' Court. So we will ask you to acquaint yourself with some of the basic principle of sentencing prior to embarking on the course itself (see below).

There is also an additional unit dealing with the issue of bail. We will examine what is the law on bail and consider the factors that may lead to a remand in custody or on bail for a defendant pending the resolution of his/her case. As you will be aware, you will be assessed in the skill of advocacy. This skill will be assessed by requiring students to make an application for custody/bail in an imaginary criminal case. You will have the chance to practice advocacy in the context of both civil and criminal litigation.

2. Offences and defences:

As indicated above, there will be no teaching of criminal law as such. You are expected to know this as a result of the academic stage of your learning. Accordingly, we would ask you to re-acquaint yourself with the law relating to a number of offences and defences.

The relevant offences are:

- Theft
- Handling
- Non-fatal offences against the person
- Taking a conveyance without consent
- Burglary
- Robbery.
- Possession of an offensive weapon
- Possession of a controlled drug with intent to supply
- Affray

Defences that you should also have a working knowledge of include:

- Self-defence
- Duress
- Intoxication

You do not need to consider partial defences to murder, such as loss of control and diminished responsibility. Equally, you do not need to consider defences such as insanity and non-insane automatism.

In order to assist you in this work, you should attempt the attached test addressing these core offences and some defences. You may need to carry out some basic legal research to find the correct answers. Once you have taken the test, look at the answers we supply. We suggest you keep these with your criminal litigation notes.

3. Sentencing:

We also want you to have a look at sentencing. This will be considered in more detail towards the end of the Criminal Litigation course but knowledge of sentencing is important throughout the course and accordingly we would ask that you read through these notes on sentencing.

An offender is sentenced after he or she has either:

- pleaded guilty to a criminal offence; or
- been found guilty of a criminal offence following a trial.

The judge or magistrate will decide the appropriate sentence for the offence committed by taking into account a number of different factors including the facts of the case, the maximum penalty and any sentencing guidelines.

The Law

Parliament has passed legislation on sentencing in England and Wales. This includes:

- setting the maximum (and in some cases minimum) sentences for certain offences;
- creating and setting the rules relating to when different types of sentence may be imposed;
- setting out the courts sentencing powers; and
- creating a sentencing framework.

Legislation sets out broad powers and limits but within these it is up to the court to decide how they should be applied in each individual case. Within the limits of the legislation, judges and magistrates have discretion in sentencing.

The [Coroners and Justice Act 2009](#) established the sentencing framework in England and Wales.

Sentencing Council

The Sentencing Council is the body responsible for producing sentencing guidelines in England and Wales. The guidelines assist judges and magistrates in determining the appropriate sentence for an offence.

The duties of the courts in relation to sentencing guidelines are set out in legislation.

When sentencing an offender for an offence committed on or after 6 April 2010, the court 'must follow' any relevant sentencing guidelines unless it would be contrary to the interests of justice to do so.

When sentencing an offender for an offence committed before 6 April 2010, the courts must 'have regard' to any relevant sentencing guidelines.

For more information, go to the Sentencing Council website.

<https://www.sentencingcouncil.org.uk/>

The Council also has wider functions to promote public confidence in the criminal justice system and undertake analytical and monitoring work.

Criminal Justice Act 2003

The current law relating to the sentencing of adult offenders is largely contained in the [Criminal Justice Act 2003](#)

(Please note this link takes you to the original version of the Act which has been amended over time.) The Act aimed to provide a clearer and more flexible sentencing framework and sets out:

- the purposes of sentencing;
- general sentencing principles including:
 - the reduction in sentence for a guilty plea;
 - the principles relating to previous convictions and offences committed on bail; and
 - statutory aggravating factors.
- provisions relating to different types of sentence and when they may be applied;
- provisions relating to the sentencing of dangerous offenders; and
- provisions relating to release.

Maximum sentences

Legislation sets out the maximum sentence for certain offences. This sets the most severe penalty a court can give for an offence and the maximum sentences vary according to the seriousness of the offence. For example:

- the Theft Act 1968 sets a maximum sentence of seven years' imprisonment for the offence of theft;
- the Road Traffic Act 1988 sets maximum sentence of 14 years' imprisonment for the offence of causing death by dangerous driving.

For some offences, such as robbery and certain sexual offences, legislation provides for a maximum sentence of life imprisonment. Murder always carries a sentence of life imprisonment.

Maximum penalties are intended to be imposed rarely and only in the most serious and extreme cases. For certain offences, legislation also sets a minimum sentence. In each case, the judge or magistrate must decide the appropriate sentence for the offence committed.

Types of sentence and court sentencing powers

Legislation sets out the different types of sentence available to a court and when they may be used including fines, community sentences and custodial sentences.

The maximum sentence that may be imposed in the magistrates' court is six months imprisonment for a single offence (a year for two or more *either-way* offences). In the Crown Court the maximum sentence that may be imposed is life (where the offence justifies such a sentence) and/or an unlimited fine.

There are a number of different bodies who have a role to play in sentencing. These include:

Judiciary

Judges and magistrates have a key role in sentencing. It is a cornerstone of our constitution that the judiciary is independent of both parliament and ministers allowing them to make decisions freely and fairly. Judges and magistrates:

- apply the law within the framework set by parliament; and
- determine the appropriate type and length of sentence.

For more information please see the [Judiciary of England and Wales website](#).

Parliament

Legislation created by parliament is a principal source of sentencing law. Through legislation parliament has:

- established the sentencing framework in England and Wales;
- in some cases set the maximum and minimum sentences for criminal offences;
- created and set the rules relating to different types of sentences and when they may be imposed; and
- set out specific principles the court should take into account when sentencing.

Parliament also has a body called the [Justice Committee](#) which looks at the policies of the Ministry of Justice, the money it spends and how it is run.

Parole Boards

The Parole Board is an independent body that assesses the risks of releasing prisoners and helps decide whether they can be safely released from prison.

For more information please see the [Parole Board](#) website.

Probation Service

The National Probation Service (NPS) was set up on 1 June 2014 to manage high risk offenders released into the community, along with 21 community rehabilitation companies (CRCs) that manage low and medium risk offenders.

For more information please see the [National Probation Service](#) website.

Youth Offending Teams

Youth Offending Teams (YOT) supervise young people and are made up of representatives from the police, Probation Service, social services, health, education, drugs and alcohol misuse and housing officers. The YOT identifies the needs of each young offender by assessing them with a national assessment. It identifies the specific problems that make the young person offend as well as measuring the risk they pose to others. This enables the YOT to identify suitable programmes to address the needs of the young person with the intention of preventing further offending.

For more information please see the [Youth Offending Teams](#) website.

Crown Prosecution Service

The Crown Prosecution Service is responsible for prosecuting criminal cases investigated by the police in England and Wales. Its functions are to:

- advise the police on cases for possible prosecution;
- review cases submitted by the police;
- determine any charges in more serious or complex cases;
- prepare cases for court; and
- present cases at court.

For more information please see the [CPS](#) website.

Ministry of Justice

The Ministry of Justice is the government department responsible for criminal, civil and family justice, democracy and rights.

It has responsibility for the different parts of the justice system: the courts, prisons, probation services and attendance centres. It is also responsible for making new laws, strengthening democracy, and safeguarding human rights.

For more information please see the [Ministry of Justice](#) website.

How sentences are worked out

In addition to having regard to the five purposes of sentencing (Punish the offender, Reduce crime, Reform and rehabilitate offenders, Protect the public, Make the offender give something back), a judge or magistrate will use sentencing guidelines, which set out the process they should follow and the factors they should consider, to work out the appropriate sentence.

Factors include:

- the seriousness of the offence – this is determined by looking at the harm caused, or intended to be caused, and the culpability of the offender;
- the offender's previous convictions;
- aggravating factors – these are factors which may suggest that a higher sentence is appropriate such as targeting a particularly vulnerable victim;
- mitigating factors – these are factors which may suggest a lower sentence is appropriate such as having been provoked;
- personal mitigation – these are factors relating to the offender such as having had no previous history of offending;
- whether the offender pleaded guilty – admitting guilt would usually result in a lesser sentence;
- totality – in other words, where an offender is being sentenced for more than one offence;
- the relevant law including the maximum, and in some cases minimum, sentence; and <http://www.sentencingcouncil.org.uk/the-magistrates-court-sentencing-guidelines/>

relevant to the offence committed.

These factors may be relevant in determining the **type of sentence** as well as the sentence length, requirements or amount. The factors taken into account in each case will vary depending upon the facts of each individual case, but the approach taken by the sentencing judge will be consistent. More information about how sentences are worked out can be found in the sentencing guidelines:

More information about how sentences are worked out can be found in the sentencing guidelines:

- **Overarching Principles: Seriousness**

The Hearing

Once a person has pleaded guilty to a criminal offence or been found guilty following a trial they will be sentenced.

The appropriate sentence will be decided at a sentencing hearing. This will often be held on a separate day to the trial or hearing, will take place in a court and be conducted by a judge or magistrate.

The sentencing decision is taken by the judge or magistrate. The prosecution have a duty to assist the court when sentencing and may present or draw the judge or magistrates' attention to any information relevant to the sentencing decision including aggravating and mitigating factors, a victim personal statement and any relevant legislation, case law or sentencing guidelines. The defence may put forward evidence and arguments as to what the sentence should be. The court may also obtain a pre-sentence report and other reports, such as a medical report, to help them decide the most appropriate sentence.

Once the sentence has been decided it must be stated in open court. The court must also explain, in ordinary language, the reasons for the sentence and the effect of the sentence on the offender.

As already mentioned, when determining the appropriate sentence, the judge or magistrate must have regard to the five purposes of sentencing set out in section 142(1) of the Criminal Justice Act 2003.

These purposes apply, except in certain specified circumstance, when sentencing an adult offender aged 18 or over. The five purposes of sentencing are:

- **the punishment of offenders**
This shows society's unhappiness with the offence committed. Punishment can include loss of, or restrictions to, a person's liberty or the payment of a fine.
- **the reduction of crime** (including its reduction by deterrence)
This includes individual deterrence (aimed at preventing the individual offender from committing another crime) and general deterrence (using the sentence

imposed on an offender as an example to deter others from committing a similar offence).

- **the reform and rehabilitation of offenders**

This is aimed at reforming the offender and changing their behaviour. It also links to the purpose of reducing crime. An example of reform and rehabilitation includes a drug and/or alcohol treatment requirement.

- **the protection of the public**

This can include protecting the public from the offender and from the risk of further crimes being committed. This may be achieved, for example, by removing an offender from society (putting them in prison), restrictions on their activities or supervision by probation.

- **the making of reparation by offenders to persons affected by their offences**

This requires the offender to make amends to those who have been affected by their criminal behaviour. This may be achieved, for example, by the payment of compensation or through restorative justice.

The Criminal Justice Act 2003 does not indicate that any one purpose should be treated as more or less important than another. In an individual case, any or all of the purposes may be relevant to a certain degree and it will be for the judge or magistrate to decide how they apply.

Types of Sentence

There are a number of different types of sentences available to the courts when sentencing an offender aged 18 or over. These include the most common types of sentences such as fines and more severe sentences for the most serious (and more rare) offences such as life sentences.

The judge or magistrate will decide the appropriate type and length of sentence depending upon the facts of each individual case, referring to sentencing guidelines and the law. Sentencing guidelines for the most common offences used on the course will be found in the back of your manual.

QUESTIONS ON COMMON OFFENCES AND DEFENCES

We would ask you to attempt the following questions:

1. George leaves a shop in possession of a book for which he has not paid.
 - (a) For what offence may he be liable (please specify its statutory source)?
 - (b) What are the elements of the actus reus of this offence?
 - (c) What are the elements of the mens rea of this offence?

2. Peter becomes involved in a fight with Darren as a result of which Darren suffers a hairline fracture to the jaw.
 - (a) For what offences against the person may Peter be liable (please specify their statutory sources)?
 - (b) What are the elements of the actus reus of each offence?
 - (c) What are the elements of the mens rea of each offence?

3. Vikram enters an unoccupied house with a view to seeing if there is anything inside that is worth stealing. He finds nothing and then leaves the house empty-handed.
 - (a) For what full offence (i.e. other than an attempted offence) may he be liable (please specify its statutory source)?
 - (b) What are the elements of the actus reus of this offence?
 - (c) What are the elements of the mens rea of this offence?

4. Would the offence in question 3 above be different had Vikram stolen something from the house? If so:
 - (a) For what offence would he be liable (please specify its statutory source)?
 - (b) What are the elements of the actus reus of this offence?
 - (c) What are the elements of the mens rea of this offence?

5. Brendan, Mike, Wayne and Richard become involved in a violent brawl in the city centre one night. There are many members of the public in the vicinity at the time.
 - (a) For what public order offence may Brendan, Mike, Wayne and Richard be liable (please specify its statutory source)?
 - (b) What are the elements of this offence?

6. Winston is visited by a friend who asks him to look after a large bag of herbal cannabis. The friend says that he will return and take back the bag of cannabis in a week's time. Winston takes the bag of cannabis. 3 days later, the police search his house and find the bag of cannabis.
 - (a) For what offence would Winston be liable (please specify its statutory source)?
 - (b) What are the elements of this offence?

7. Rachael has fallen out with her boyfriend Mark and, in a moment of anger, throws paint stripper onto his overcoat.

- (a) For what offence may Rachael be liable (please specify its statutory source)?
- (a) What are the elements of the actus reus of this offence?
(b) What are the elements of the mens rea of this offence?
- 8.** Julie is approached in a pub by a man who offers her a brand-new i-phone for £100. When she asks why it is so cheap, he says it is an unwanted present. She buys it for £100, suspecting it may be stolen. It subsequently turns out that the i-phone was stolen in the course of a burglary
- (a) For what offence may Julie be potentially liable (please specify its statutory source)?
(b) What are the elements of this offence?
- 9.** Rajiv, Ahmed and Zahid are searching the streets near where they live trying to find a group of youths who earlier smashed the window of their father's shop. Rajiv has a flick knife, Ahmed is holding a bottle by its neck, the bottom having been broken off, and Zahid is carrying a baseball bat.
- (a) As far as the items they have in their possession are concerned, for what offence may they be potentially liable (please specify its statutory source)?
(b) What are the elements of the offence?
(c) Consider each item held by each person. Are they in the same or different categories for the purpose of the offence in question?
- 10.** David is approached by a drunken man as he walks down the street. The man is abusive, and then raises his clenched fist as if he is about to punch David. David responds by punching the man very hard in the face. As a consequence, the man falls backwards, hitting his head on the pavement. The man suffers a fractured skull as a result.
- (a) What defence may David raise in the event of being charged with an offence against the person?
(b) Who bears the legal and evidential burdens of proof in respect of this defence?
(c) What are the elements of the defence?
(d) What is the effect of this defence being successfully run?
- 11.** Harry owes some money to Fred, who has a history of violence. When Harry says he is unable to pay, Fred says he is not prepared to wait any longer. He tells Harry that if he does not immediately rob a woman who is passing by where they are talking, he will scar him with the Stanley knife which he says he is carrying. Harry responds by carrying out a robbery on the woman in question.
- (a) What defence may Harry raise to a charge of robbery?
(b) What are the elements of this defence?
(c) To what crime(s) does this defence not apply?
(d) What is the effect of the defence if successfully run?

ANSWERS TO QUESTIONS ON COMMON OFFENCES AND DEFENCES

1. Answer:

- (a) Theft, contrary to s. 1 Theft Act 1968
- (b) The actus reus consists of:
 - an appropriation
 - of property
 - belonging to another
- (c) The mens rea consists of:
 - dishonesty
 - the intention permanently to deprive the owner of the property.

2. Answer:

- (a) Depending on the circumstances, he may be liable for:
 - Grievous bodily harm, with intent, contrary to s. 18 Offences against the Person Act 1861 (OAPA 1861)
 - Grievous bodily harm, contrary to s. 20 OAPA 1861
 - Assault occasioning actual bodily harm, contrary to s. 47 OAPA 1861
- (b) the elements of the actus reus of each offence are as follows:
 - S. 18 – unlawfully causing grievous bodily harm
 - S. 20 – unlawfully inflicting grievous bodily harm
 - S. 47 – (i) an assault (this means either an assault or a battery)
(ii) occasioning actual bodily harm
- (c) the elements of the mens rea of each offence are as follows:
 - S. 18 – intent to cause grievous bodily harm
 - S. 20 – foresight that the victim might suffer *some* harm (there is no need to show the defendant intended or foresaw that the victim would suffer GBH)
 - S. 47 – intent or recklessness as to the assault (there is no need to show the defendant intended or foresaw actual bodily harm)

3. Answer:

- (a) Burglary, contrary to s. 9(1)(a) Theft Act 1968
- (b) The actus reus consists of:
 - entering
 - a building or a part of a building
 - as a trespasser
- (c) The mens rea consists of:
 - an intent, at the time of entering the building, to steal, cause criminal damage or inflict grievous bodily harm

4. Answer:

- (a) Burglary, contrary to s. 9(1)(b) Theft Act 1968
- (b) The actus reus consists of:
 - having entered
 - a building or a part of a building
 - as a trespasser

- (c) The mens rea consists of:
- stealing or attempting to steal
 - inflicting or attempting to inflict GBH

5. Answer:

- (a) Affray, contrary to s. 3 of the Public Order Act 1986
- (b) The elements of the offence of affray are as follows:
- the use or threatened use of unlawful violence
 - towards another
 - where the defendants intend to use or threaten such violence or are aware that their conduct may be violent or threaten violence
 - where the conduct is such that a person of reasonable firmness present at the scene may fear for his or her personal safety (objective test)

6. Answer:

- (a) Possession of a controlled drug with intent to supply, contrary to s. 5 Misuse of Drugs Act 1971
- (b) the elements of the offence are as follows:
- possession – there are 2 elements to this
 - i. the defendant must have the thing in his custody or subject to his control
 - ii. the defendant must know that he is in possession of something which is, in fact, a controlled drug
 - an intent to supply it to another (here, Winston intends to 'supply' the cannabis to his friend. It does not matter that the cannabis in fact 'belongs' to his friend).

7. Answer:

- (a) Criminal damage, contrary to s. 1(1) Criminal Damage Act 1971
- (b) The actus reus consists of:
- the destruction or damage to property
 - belonging to another
 - without lawful excuse
- (c) The mens rea is that the defendant intended or was reckless:
- that his/her action would damage or destroy property
 - that that property belonged to another.

8. Answer:

- (a) Handling stolen goods, contrary to s. 22 Theft Act 1968
- (b) The offence can be broken down into 4 elements:
- It must be shown that the goods have been already stolen
 - It must be shown that the defendant handled the property (which includes receiving)
 - It must be shown that the defendant knew or believed that the goods were stolen. Suspicion is **not** enough – nor is wilful blindness. So on the facts of the question, Julie is not guilty
 - It must be shown that the defendant was dishonest

9. Answer:

- (a) Possession of an offensive weapon, contrary to s. 1(1) prevention of Crime Act 1953
- (b) The elements of the offence are:
 - Having an offensive weapon
 - In a public place
 - Without lawful authority or reasonable excuse (the defence bearing the legal burden – therefore on a balance of probabilities – of proving lawful authority or reasonable excuse)
- (c) According to the Court of Appeal in *Simpson*, there are 3 possible categories of offensive weapon, namely:
 - an article made for use for causing injury to the person, commonly known as a weapon that is offensive *per se* (Rajiv's flick knife)
 - an article adapted for use for causing injury to the person (Ahmed's broken bottle)
 - an article which the person carrying it intends to use for the purpose of causing injury to the person (Zahid's baseball bat)

10. Answer:

- (a) Self-defence
- (b) The defendant bears the evidential burden. In other words, the defendant has to raise some evidence that he was acting in self-defence for the defence to become a fact in issue. Once the defendant has discharged this burden, the prosecution bears the legal burden of proving beyond reasonable doubt that the defence is not made out.
- (c) Put simply, common law states that a person may use such force as is reasonable in the circumstances for the purpose of self-defence. A person may use force to ward off an anticipated attack provided that is anticipated as 'imminent'. There is no duty to retreat *per se*. The degree of force used will not be regarded as reasonable unless the accused believed it was necessary to use that degree of force. If the accused misjudges the degree of force permissible and uses excessive (or 'disproportionate') force, he is deprived of the defence. However, this apparently objective test is given a considerable subjective twist and the motives and situation of the accused is taken into account. S. 76 Criminal Justice and Immigration Act 2008 sets out in statute (and seeks to clarify) the relevant rules but, it is suggested, in no way alters those rules.
- (d) It makes the force used 'lawful' and thus results in a full acquittal, whatever the charge of violence may be (including murder).

11. Answer:

- (a) Duress (by threats)
- (b) Duress is a defence that involves asserting that, because of special circumstances, an offence can be *excused* or *justified*. It deals with the situation where someone is impelled to commit a specific crime as a result of threats from another that, if the defendant does not commit the crime, then the defendant or a member of the defendant's family or

someone for whom the defendant reasonably feels responsible, will be subjected to death or grievous bodily harm.

Duress has 2 limbs, a subjective & an objective limb:

- *Subjective*: was the defendant *actually* impelled by the threats to commit the crime? Did the threats directly cause him to commit the crime charged? Note *objective* elements to *subjective* limb – the defendant must have had *good cause* to fear the person making the threats was serious in making those threats and that he intended to carry them out.
- *Objective*: would an ordinary person have been similarly influenced to commit the crime?

Note: The defence fails if the defendant fails to take advantage of a reasonable opportunity to escape. Further, the threat must be *imminent*.

- (c) Duress by threats does not apply to murder and attempted murder
- (d) Acquittal (even though the actus reus and the mens rea of the offence are both present).