UNIT 2:

KEY CRIMINAL OFFENCES AND DEFENCES
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Unit 2

Part 1
Key criminal offences and defences

Aims

A criminal practitioner will face having to deal with literally hundreds of different criminal offences, but some offences crop up much more frequently than others. Furthermore a criminal practitioner needs to be aware of the creation of any new offences as a client may ask you for advice on a new offence that s/he has been arrested for or charged with. For example most recently a new offence of aggravated knife possession has been created under the Prevention of Crime Act 1953 s 1(A) and here is another -causing serious injury by dangerous driving under Road Traffic Act 1988 s1 A.

The same is true in relation to criminal defences (you will have almost certainly have heard the expression “self defence” frequently). The aim of this unit is to introduce those most familiar offences and defences.

For this unit you will need access to either Archbold or Blackstones Criminal Practice.

Learning outcomes

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1. Explain the key criminal offences

P1: Explain the elements of theft

P2: Identify if a robbery has occurred in a given set of circumstances

P3: Describe if a burglary has arisen from a given set of circumstances

P4: Explain the elements of assault

P5: Identify if affray has occurred from a given set of circumstances

P6: Describe if criminal damage has occurred in a given set of circumstances
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1 Introduction

As well as introducing you to specific offences, you will leave the unit having an understanding of how to interpret what elements make up offences, enabling you to research other offences with ease, in the main, criminal texts.

The offences to be covered are:

- Theft
- Robbery
- Burglary
- Assault occasioning actual bodily harm
- Affray
- Criminal damage
- Possession of a controlled drug with intent to supply

The defences to be covered are:

- Intoxication
- Duress
- Self defence, defence of another and defence of property
- Provocation

In addition, we will consider how to deal with defences that might be specific to certain crimes.

2. Theft

In most cases, theft can be categorised as “taking something that does not belong to you”. However, whilst applying that test would, in many cases, lead you to the right answer when advising a client, it is in fact the wrong approach, and should never be used as a starting point. Regrettably, the law is often written in arcane language, and is not easily understood, I want to start, therefore, by showing you how to break down an offence into meaningful sections.

The first thing you need to know, for any offence, is under what law is it made an offence. Except for a very few offences (such as murder, which are called “common law” offences), something is a crime because an Act of Parliament has made it a crime.

Theft is made a crime as a result of Section 1 of the Theft Act 1968, which states:

“A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.”
This can be broken down into the following parts:

- dishonestly
- appropriates
- property
- belonging to another
- with the intention of permanently depriving the other of it

If we take the scenario of a person who enters his brother’s bedroom and takes a DVD from the room, belonging to his brother, in order that he can watch it on television before returning it later in the day, we can see that under the test of “taking something that does not belong to you”, this would imply that he would be guilty of theft. But let’s now apply the law and see what happens:

- has he acted dishonestly? We will discuss what this means shortly, but the prosecution must prove he did act dishonestly to get a conviction.
- has he appropriated anything? In this case, yes, as appropriation includes the simple act of taking something.
- did he take property? Yes, a DVD is property, but we will see later some examples of things that are not.
- did it belong to another? In this case, yes, it was his brother’s.
- did he have intent to permanently deprive that other person of the property? In this case he did not, as he was going to return it. This is the reason we have an offence of taking a motor vehicle without consent, to cover “joy riders” who take vehicles and then abandon them; as they only intend to use the vehicle for a short time and then abandon it, they often lack intent to permanently deprive, so Parliament brought in a special law to cover this situation.

If you look at the section on theft in Archbold or Blackstones Criminal practice you will see that the offence is broken down in the same way. Both books break the offence down into “Actus Reus” and “Mens Rea”. The mens rea for the offence of theft is comprised of “dishonesty” and “intention to permanently deprive”.

I do not want you to get too bogged down worrying about the actus reus and mens rea, but if you want to explore these topics in more detail then visit: [http://en.wikipedia.org/wiki/Actus_reus](http://en.wikipedia.org/wiki/Actus_reus)
2.1 Dishonesty

Not all appropriation (taking) is dishonest. In the example above, few would say that taking a siblings DVD so that they could watch it was dishonest. It may well be wrong to do such a thing, but dishonesty implies more than that.

A person dishonestly takes property if:

(a) it would be considered dishonest by ordinary reasonable and honest people, and

(b) the accused knew that.

In most legal textbooks, you will see this test referred to as the “Ghosh” test, after a case of that name.

In most cases, it is obvious that something would be considered dishonest by “reasonable and honest people” (for example taking money from a person’s handbag in the workplace), and the accused would know, in most cases, that such conduct was dishonest.

However, do not make the automatic assumption that the accused would know something to be dishonest. Consider each client as an individual and consider their personal circumstances and background. A very young person may not appreciate something to be dishonest, even if most other people would. It is always open to any accused to say that he did not appreciate something to be dishonest, but the more obviously dishonest the taking is in the eyes of “reasonable and honest people”, the more unlikely, in most cases, it is that the accused would not know that the taking was dishonest.

In some cases, a person may claim that he was justified doing something that, on the face of it, seems dishonest. What if someone owed you money and failed to pay it back – would taking the money from that person’s wallet without them knowing be dishonest?

The law provides for this type of situation, and in particular section 2 of the Theft Act 1968 states:

“A person’s appropriation of property belonging to another is not to be regarded as dishonest–

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or “
Subsection (a) above covers the situation we have just been considering and is referred to as a “claim of right”, the suspect’s belief that he had a justified reason to take the property. This type of case sometimes arises with workers who have not been paid wages, or find out that a business is slipping into bankruptcy, they might take property with an eye to securing the monies that they are owed.

Subsection (b) might cover the brother taking a DVD. If a person cannot ask the owner for permission to take something, but believes that the person would have consented to the taking, then there is no dishonesty.

A willingness to pay for property does not negate dishonesty. So, if you took an item and left the money to pay for it, you may still be acting dishonestly. Everything would depend on the circumstances of course, if you were in a long queue in a shop and walked out with a newspaper leaving the correct money on the counter before doing so, few if any people would think you dishonest. However, if a person refused to sell you a painting and you took it, leaving the value of the painting in cash for the owner, this would still, in all likelihood, be dishonest, as unlike the paper seller, the gallery did not want to sell the item in question.

Task 1

Visit this site to read some of the cases on dishonesty:
http://www.bailii.org/

2.2 Appropriation

This is defined by section 3 Theft Act 1968 as:

“Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.”

An obvious example here is the simple taking of property, so for example leaving a shop with an item. However, to prove a theft from shop, it would not be necessary to show that the goods were taken outside the shop, just the act of placing the items in a shopping basket is sufficient for appropriation (R v McPherson [1973] Crim LR 191, CA) (although in that scenario it would be difficult to show at that stage that there was dishonesty or an intention to permanently deprive – unlike when someone secretes goods).

Similarly, the swapping of price labels on goods would be enough to amount to an appropriation of that property.
2.3 Property

2.3.1 What can be stolen?

Remember, that section 1 Theft Act 1968 makes it an offence to steal “property” belonging to another. So you need to know what “property” is. Property is defined by section 4 of the Theft Act 1968.

Task 3

Write down 10 examples of things you think would amount to “property”.

Task 4

Find Section 4 Theft Act 1968 in either Archbold or Blackstones Criminal Practice and read through the definition.

You will see that you cannot generally steal land, nor mushrooms or wild flowers (unless taken with a view to a gain). You will also see the rules in relation to wild creatures!

You cannot steal information. So, if you were to look at an exam paper and copy out the questions, this would not (in itself) amount to a criminal offence of Theft (see Oxford v Moss (1978) 68 Cr App R 183). However, if you took that exam paper, it might well be theft of the piece of paper.

Section 4(1) refers to “things in action and other intangible property”. The best example of this is a bank account balance. When you go to the bank and are told that the balance of your account is, say, £100, we all know that this does not relate to a specific set of bank notes or coins, in the sum of £100, which belongs to you. In law it is referred to as a “thing in action”. If a person works in a bank and transfers money from a customer’s account into his own, perhaps electronically, he may well have stolen a “thing in action”.

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A contractual right may also amount to a thing in action. Take, for example, the case of a parking ticket. The ticket is given to you, and allows you the right to park. What happens if, when leaving the car park, you pass the ticket (still valid) to another person? This will not be theft because you have passed the ticket, but may be theft because you have passed the contractual right to park to another person – in effect passed the thing in action. An important case on this topic, involving the resale of London underground tickets is *R v Marshall [1998] 2 Cr App R 282.*

**Task 5**

Read the case of *R v Marshall* ([www.bailii.org](http://www.bailii.org)).

### 2.3.2 What cannot be stolen?

You cannot steal electricity (but note that there is a separate offence that deals with this), nor can you steal a corpse (but, if the corpse has been subject to alteration (e.g. dissection), those parts that have been altered can be stolen (*R v Kelly [1999] QB 621* – this case is available in Bailii if you are interested in reading more on this topic).

### 2.3.3 Belonging to another

Section 5 Theft Act 1968 states:

“Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).”

We, normally, think of property belonging to someone, if they own it. Section 5 is, however, wider than that. For example, if you lent your television to a friend and the television was taken during the course of a burglary, the burglar would have stolen property belonging to your friend (as he had possession or control of it). The prosecution could also say that it belonged to you as well, so perhaps it makes little difference? In fact it might, in the case of *R v Turner [1971] 1 WLR 901*, Mr Turner had left his car in a garage for repairs. He entered the garage and took the car. As the garage was in “possession or control” of that car, Mr Turner had succeeded in stealing his own car! What would be the point of a prosecution in these circumstances, can you think of any? What if Mr Turner had crept into the garage in order to take his car, therefore avoiding the repair bill?
Another common example is golf balls within a golf course lake (*R v Rostron [2003] EWCA Crim 2206*). The owners of the golf course are in control of the lake, and they therefore own the balls (in this scenario it matters that you can identify the golf course owners as the owners of the balls as the prosecution would never be able to prove who owned the balls originally).

2.4 Intention to permanently deprive

Section 6 Theft Act 1968 states:

“A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other’s rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.”

Whether someone has an intention to permanently deprive must be ascertained from all the circumstances of the case. A person may take property with no authority whatsoever, but fully intend to return it, that person simply being contemptuous of the rights of the owner for a short time while the item is used.

Holding a person’s property to ransom would amount to an intention to permanently deprive, even though there was an intention to return the good once the ransom was paid (*R v Coffey [1987] Crim LR 498*), this is because the goods would be “treated as [his] own”.

If a person intends to return something when its usefulness has passed, it will amount to an intention to permanently deprive – for example taking someone’s ticket to a concert and then returning it after the concert.

Task 6

Read the cases on intention at:

http://www.bailii.org/
Task 7

Read the section in Archbold or Blackstones criminal practice on theft and find out:

a. Whether theft is triable summarily, either way or only on indictment (if you are unsure as to what is meant by these terms go back to unit 1 to refresh your knowledge).

b. What the maximum sentence for theft is.

2.5 Sentence

You will find this out when undertaking Task 7.

3. Robbery

Section 8 Theft Act 1968 states:

“A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.”

The elements are:

a. Steals (theft – see above), and

b. immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

Essentially therefore, robbery is theft with force or the threat of force – examples of this are: pushing someone to the ground and taking their wallet or bag, or approaching someone at a cashpoint and saying “give me your money or I will stab you”.

Note, though, that the force has to be used before or at the time of the theft. In *R v Hale (1978) 68 Cr App R 415, CA*, the thieves stole property from an occupied house, before leaving they tied the householder up and threatened her that if she rang the police she would come to harm. The defendant argued that at the time of the threat the theft was over and therefore he should not be convicted of robbery. The Court of Appeal dismissed this argument holding that the theft was a continuing offence.

Because force must be used “in order to steal”, any injury as a result of accidental contact would not suffice, so, for example, if A placed his bag on the floor and D ran towards it intending to take it and run off, but in fact collided with A when doing so, this would not amount to robbery.
Task 8

Find out whether robbery is triable summarily, either way or only on indictment (if you are unsure as to what is meant by these terms go back to unit 1 to refresh your knowledge).

3.1 Sentence

Robbery carries a maximum sentence of life imprisonment.

4. Burglary

There are 2 different offences of burglary, under section 9(1)(a) and 9(1)(b) Theft Act 1968.

Section 9 reads:

“S 9 Burglary.

(1) A person is guilty of burglary if-

   (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or

   (b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1) (a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm therein, and of doing unlawful damage to the building or anything therein.”

We can break this down as follows:

- Entry to a building (or part of a building), as a trespasser;
- With intent to steal, inflict grievous bodily harm on any person in the building, or cause criminal damage.

Or (for the section 9(1)(b) offence):

- Having entered as a trespasser steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.
The difference between the sections is when the intent to do the appropriate crime is formed. So, if you enter a building as a trespasser with intent to steal that will come under section 9(1)(a), but if you had entered a building as a trespasser, perhaps with an innocent or lawful purpose, but then stole, that would be section 9(1)(b).

4.1 Entry to a building or part of a building

This element of the offence is, normally, easily proved, either by direct evidence (someone is seen in the building), or by inference (they must have been in the building to have come into possession of the goods).

A person does not need to enter using all of his body, so, if a person smashers a jewellers window and reaches in to steal items on display, that would be sufficient for a charge of burglary.

Similarly, people sometimes insert rods or canes through letter boxes in order to steal car keys, this would be sufficient for burglary.

The phrase “part of a building” is designed to cover multi purpose buildings. Take a supermarket for example. People are allowed to enter the shop, but not the storeroom. By treating the storeroom as a separate part of the building, it allows stealing from that area to be treated as a burglary as opposed to just a theft.

Another common example that you are likely to encounter in practice is in relation to pubs, with residential areas above the main building, perhaps accessed via a private door.

4.2 As a trespasser

“Trespasser” is a term used in civil law, and simply means that you have entered the area without permission, or having had permission in the past, that permission has been withdrawn (you will encounter in practice some shoplifters being served notices by shops that they are no longer welcome to enter the store, this will then make them trespassers if they enter in the future, and any theft will become a burglary – in practice it is rare however for the CPS ever to proceed with the charge and a plea to theft is very often acceptable, but you will need to find out the practice in your area).

Task 9

Speak to a solicitor in your practice and ask whether they have had client’s served with a notice not to enter a shop, as described above. If they committed further offences were they ever charged with burglary? If you work for the CPS, ask a senior lawyer what their approach would be to this situation, and why?
4.3 With intent

Merely being a trespasser in a building is not enough. Many clients found in a building will say, for example, that they were homeless and entered the building to find somewhere to sleep. If that were correct, no offence of burglary would be committed as they lacked any of the intents required (to steal etc.).

The intent does not have to be realised, so if a person enters a building with an intent to steal if he found something of value (for example scrap metal), but in fact there are no such items, he would still be guilty, as he had the requisite intent.

Intent is a very complicated concept in criminal law, but intent is normally straightforward and it is obvious in most cases whether there is evidence to suggest that a person did intend something. For the purposes of this unit it is not necessary to dwell further on what intent means, but if you are interested in further study on the topic see:

http://crimeline.info/ (Put “Intention” in the search box on the left hand side.)

Please note that a new offence has been created by LASPO 12 s144 namely of squatting in a residential building. For further information please consider the Ministry OF Justice Circular no 2012/4

4.4 Sentence

Burglary of a dwelling carries a maximum sentence of 14 years imprisonment, burglary of a non-dwelling a maximum of 10 years imprisonment.

5. Assault occasioning actual bodily harm

This is an offence contrary to section 47 Offences Against the Person Act 1861. You may hear it referred to as a “section 47” or “ABH”.

There are 3 things that need to be proved:

- An assault
- Actual bodily harm
- The harm was caused by the assault

5.1 Assault

An assault can comprise of 2 different things, (a) causing a person to apprehend immediate unlawful violence (such as running at someone with a knife), and (b) actually punching or stabbing someone (this is technically called a battery).
It is very rare for the first form of assault to be charged, and therefore you do not need to trouble too much with the definition.

The assault must either be intentional or reckless, and must be unlawful.

5.2 Intentional or reckless

We mentioned intent above when dealing with burglary. With assaults, the issue of intent is, generally, straightforward and needs little elaboration. Recklessness is, however, more complicated. Take, for example, a person in a pub, in high spirits, who decides to run through the pub waving his arms around. If a person was hit in the face as a result, would an assault have been committed? Clearly, some force would have been inflicted, and it may be far from clear whether the person ever intended someone to be hurt. In that type of scenario, the law looks to recklessness to decide whether a person ought to be punished for his “reckless” (or foolish you might think) behaviour.

The test for recklessness is:

“To prove recklessness in assault you must be sure the defendant foresaw the possibility that the victim, X, would apprehend immediate violence, and then went on to take that risk; in battery, recklessness occurs where the defendant foresaw the possibility that the victim, X, would be subjected to unlawful force, even if slight, and took that risk.”

So, did the person know that by running through the pub, waving his arms around indiscriminately, that there was a risk that someone might be hit.

5.3 Occasioning

The harm must have been caused (“Occasioned”) by the assault. However it does not always need to be the direct cause. If someone was being assaulted and ran away, but tripped and broke their leg in the process, this would still be harm which was caused by the assault and so the assailant would still be guilty of ABH.

5.4 Actual bodily harm

This is harm that is more than merely “transient and trifling”, and can include shock. Cutting someone’s hair off can amount to actual bodily harm.

Task 10

Visit the CPS website and look at the legal guidance for the prosecution of offences under section 47; what types of injury that would justify a charge under this section?

http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#P189_14382

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5.5 Sentence

Assault occasioning actual bodily harm carries a maximum 5 year sentence of imprisonment.

6. Affray

Affray is a criminal offence by virtue of section 3 Public Order Act 1986, which states:

- A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

- Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).

- For the purposes of this section a threat cannot be made by the use of words alone.

- No person of reasonable firmness need actually be, or be likely to be, present at the scene.

- Affray may be committed in private as well as in public places.

The elements of affray are:

- Uses or threatens unlawful violence;

- His conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety;

- The accused must have intended to use or threaten violence; or have been aware that his conduct may be violent or may threaten violence.

We dealt with examples of threats or use of unlawful violence when discussing the offence of Assault Occasioning Actual Bodily Harm. This offence is aimed at criminalising violent incidents that take place in public, such as to cause (or have the potential to cause) people to fear for their personal safety.

6.1 A person of reasonable firmness

Section 3(4) needs to be considered, and it states that no-one need actually be present. Very often though people will be present and their reaction to the situation is of importance.
The notional bystander test is explained in the case of *R v Sanchez [1996] Crim. L.R. 572CA* and asserts that the hypothetical bystander, rather than the victim, must be put in fear for his or her personal safety. Apart from the hypothetical bystander, there must be present a “victim” against whom the violence is to be directed (*I & Others v DPP (2002) 1 AC 285 HL*).

The case of *R v Sanchez* covers the kinds of situation where 2 people are engaging in a fight; many people seeing the incident may in fact not fear for their personal safety as it might be clear from the circumstances that it is a matter between those 2 people only. However, the same fight, perhaps taking place at close quarters (in a bar, for example), may cause people to fear for their personal safety, as they might fear it spilling over or otherwise getting out of control.

6.2 Sentence

Affray carries a maximum sentence of 3 years imprisonment.

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7. Criminal damage

Section 1(1) Criminal Damage Act 1971 states:

“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.”

The elements of the offence are:

- without lawful excuse
- destroys or damages property
- belonging to another (note that if the property is jointly owned it can be criminally damaged)
- intending to damage or destroy the property or being reckless as to whether the property would be damaged or destroyed.

We have looked at what amounts to “property” when dealing with theft, for the purposes of this offence, however, you should look at section 10 of the 1971 Act. There is considerable overlap, but you should note than in relation to wild flowers which cannot (generally) be stolen, you can damage them.
The other important lesson to note from this is that whilst different offences use the same definitions, they do not always mean the same – you must always check with the main practitioner texts until you are familiar with the differences.

We have, also, looked at intent and recklessness when dealing with other offences.

7.1 Lawful excuse

Section 5 Criminal Damage Act 1971 provides for 2 instances where a person might have lawful excuse to damage property:

a. if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances;

b. if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed-

   i. that the property, right or interest was in immediate need of protection; and
   
   ii. that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

The first exception, allows for property to be damaged lawfully if there is consent, or would have been consent had the owner been asked. Someone might ask you to break into a car and damage the door seal in order to recover keys for example. Similarly, if you became aware that there was a flood in a neighbour’s property while they were away on holiday, and you broke a window in order to enter and deal with the problem, you would be able to rely on the fact that the neighbour would have consented to the damage had he known of the circumstances.

The second exemption is called a “protection” defence, this is where you have to cause damage in order to protect other property. So, for example, you may cause damage to enter a property in order to extinguish a fire, if you simply left the fire to rage it might endanger your own property.
The protection defence is sometimes used by anti war protestors, and in one case damage to a perimeter fence of a military base was said to be lawful on the grounds that they were seeking to prevent war. This type of defence is rarely encountered in practice and in a judgment the House of Lords severely curtailed its future use (see:


7.2 Destroy or damage property

Whether property has been destroyed or damaged is a matter of fact and degree. The daubing of graffiti on a pavement using water soluble paint has been held to amount to damage, as has graffiti smeared in mud.

Task 12

Read the case of R v Fiak 11 October 2005, which deals with many of the issues surrounding criminal damage that we have discussed in this section.

www.bailii.org

7.3 Sentence

Criminal damage carries a maximum sentence of 10 years imprisonment. (always be aware of the precise nature of the charge that your client is facing – e.g. if s/he has been arrested for or charged with Racially Aggravated criminal damage the maximum sentence is 14 years !)

Task 13

Consider what Archbold or Blackstones Criminal Practice says about mode of trial for criminal damage. Research whether there are any special rules, dependent upon the value of damage (you will be tested on this later).

8. Possession of controlled drugs, with intent to supply

The possession of controlled drugs, with intent to supply, is an extremely prevalent offence, and is unlawful under section 4 Misuse of Drugs Act 1971.

The elements of the offence that need to be considered are:

- possession
- controlled drug
- intent to supply
8.1 Possession

There are 2 parts to possession, the first is that the person has control over the drug and second that the person knew that the item was a controlled drug. So, for example, a person may be carrying a parcel (and therefore be in possession of it), but not know of its contents.

A person can control an item even if he is not physically close to it. So, if a person leaves drugs in his bedroom, and the room was searched when he was 100 miles away, he would still be held to have possession of the drug.

To show that someone knew the item to be a controlled drug it is not necessary to prove that they knew which type of drug. So, a person could believe that they were in possession of cannabis, but in fact it was cocaine. In those circumstances they could be charged with the more serious charge relating to cocaine as opposed to cannabis. The same would be true if the person believed that the package contained salt, but in fact contained a controlled drug.

You will appreciate that this law can produce some very serious consequences for people, in order to mitigate those consequences a defence is provided under section 28 Misuse of Drugs Act 1971, which reads:

“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.”

This defence would allow a defendant to show that, for example, he thought the package contained salt and not drugs. Whether he is believed will, of course, be a matter for the jury. Note however, that the person who thought he had cannabis and not cocaine, would not be provided with a defence.

Task 14

Read [http://www.urban75.org/legal/drugs.html#possession](http://www.urban75.org/legal/drugs.html#possession)

8.2 Controlled drug

There are 3 classes of controlled drugs, A, B and C. A is the most serious, C the least.
Class A drugs include: Cocaine, coca leaf, dicanol, heroin, LSD, mescaline, methadone, morphine, opium, PCP, pethadine, poppy straw, psilocybin, STP, ecstasy and cannabinol except where it is contained in cannabis or cannabis resin. Class B drugs become class A drugs if they are prepared for injection.

Class B drugs include: Amphetamine, codeine in concentrations above 2.5%, DF118, ritalin, cannabis and barbiturates.

Class C drugs include: Methaqualone, benzodiazepines (valium etc).

8.3 Intent to supply

You can see, again, how important the issue of “intent” is in English criminal law. To prove this offence there must be an intent to supply, essentially, a passing of the drugs from one to another. Note, that the intent merely needs to be present, no supply needs to have taken place (if it had the defendant could be charged with supplying a controlled drug).

Example:

A gives his friend B £10, so that B can buy an ecstasy tablet for him when he buys his own. B buys the tablets and passes one to A. B has made no profit from the transaction.

Would B be guilty of supplying a controlled drug? Yes he would, and until the time of supply would be guilty of possession with intent to supply.

Task 15

Read the chapters on “intent to supply” in either Archbold or Blackstones criminal practice, you will be tested on some of the other concepts later.

8.4 Sentencing

Penalty depends upon the classification of drug:

- Class A: Maximum life imprisonment
- Class B: Maximum 14 Years
- Class C: Maximum 14 years

Task 16

Read: http://www.urban75.org/legal/drugs.html#intro
Part 2 - Criminal Defences

1. Intoxication

Intoxication is often thought to be a defence to a criminal charge. Intoxication does not just involve drink, but also includes drug induced incapacity. Note, however, that a drunken intent is still an intent, many people know full well what they are doing, despite being heavily intoxicated. In effect, it is an attempt to deny the mental element of the offence (normally either intent or recklessness).

There are also 2 kinds of intoxication, voluntary (e.g. consuming drugs or drink), and involuntary (having your drink spiked with alcohol for example).

Whether intoxication might amount to a defence also depends on the type of offence, in law there are offences of specific intent (e.g. theft – “intent to permanently deprive”) and basic intent (e.g. assault occasioning actual bodily harm). Offences of basic intent are those involving recklessness.

For involuntary intoxication, there is a defence to crimes requiring intent, if you were indeed unable to (or did not) form intent. Remember what is said above however, a drunken intent is still an intent. The involuntary intoxication defence applies to crimes of both specific and basic intent, e.g. those crimes which can be committed recklessly as well as those which can only be committed intentionally.

For voluntary intoxication the only defence is in relation to crimes of specific intent. So, a person who consumes so much alcohol that they stab someone may well have a defence to a section 18 charge, but would have no defence to a section 20 charge.

There is an exception: The Dutch Courage Rule: A person who deliberately makes himself intoxicated in order to commit a crime cannot raise a defence based on such intoxication, even to a crime of specific intent (A-G for Northern Ireland v Gallagher [1963] AC 349).

Also intoxication is no defence to crimes of strict liability e.g. drink driving

Task 17

Read: http://www.jsboard.co.uk/criminal_law/cbb/mf_03.htm#13

2. Duress

Duress is often pleaded by defendants, but is rarely successful as it is very difficult to prove. Essentially, the defendant is admitting the criminal conduct but stating that he only did it because he or another person would suffer death or really serious harm if he had refused.
The following factors need to be considered:

- There must be a threat of death or grievous bodily harm.
- A fear of false imprisonment may be sufficient (authorities are not clear on this).
- Threat can be against D or a third party e.g. Family (Ortiz (1986) 83 Cr App R 173). E.g. Bank manager being made to open safe in knowledge that his children would be harmed if he refused.
- The threat must be cogent: if a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats then the defence is not available. Consider:
  
  (1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed [the threatener] had said or done, he had good cause to fear that if he did not so act [the threatener] would kill him or . . . cause him serious physical injury?; and
  
  (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [the threatener] said or did by taking part [in the offence] (Graham [1982] 1 WLR 294)?

- Relevant characteristics are: Age, Sex, Pregnancy (and a fear for an unborn child), serious physical disability that might inhibit self-protection.

- Hegarty [1994] Crim LR 353, which excluded psychiatric or medical evidence to the effect that the accused was unusually pliable or vulnerable to pressure or emotionally unstable or in a ‘grossly elevated neurotic state’.

- Intoxication is not a relevant characteristic, nor is a drug addiction. It is undecided whether involuntary intoxication may be deemed relevant.

- Hudson [1971] 2 QB 202: It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed. The threat must be a ‘present’ threat in the sense that it is effective to neutralise the will of the accused at that time. The existence at that moment of threats sufficient to destroy his will ought to provide him with a defence even though the threatened injury may not follow instantly, but after an interval.
• A jury must consider whether D could have taken steps to avoid the threat, and in doing so will consider the characteristics of the accused. E.g. did D have time to escape and report the matter to the police. A jury is entitled to find that police protection would be ineffective (perhaps in relation to an established or sophisticated criminal gang).

• Duress is not a defence to murder or attempted murder (*Howe [1987] AC 417*).

• May not be available on a charge of Treason (probably only of academic significance in any event).

• Voluntary exposure to the threat means that the defence is not available (e.g. associating with criminal gangs etc): “A defendant could not plead duress when he had foreseen or ought to have foreseen that his voluntary association with a known criminal involved the risk of being subjected to any compulsion by acts of violence, which was not restricted to compulsion to commit crimes of the kind with which he was charged” (*R v Hasan, House of Lords 17 March 2005*).

• *Shepherd (1987) 86 Cr App R 47*: Shoplifting gang turning to burglary: “. . .the concerted shoplifting enterprise did not involve violence to the victim either in anticipation or in the way it was actually put into effect. The members of the jury have had to ask themselves whether the appellant could be said to have taken the risk of P’s violence simply by joining a shoplifting gang.”

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**Task 18**

Read the cases on duress at:

[www.crimeline.info](http://www.crimeline.info)

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3  **Self defence, defence of another and defence of property**

Self defence is a very common defence. The other 2 types (defence of another, defence of property) are rarely used, but based on essentially the same principles (see: [http://en.wikipedia.org/wiki/Defense_of_property](http://en.wikipedia.org/wiki/Defense_of_property)).

3.1  **Self defence**

The basic principle is that A defendant is entitled to use reasonable force to protect himself (*R v Beckford*).

Self defence is founded in common law, but also Statute, and in particular Section 3(1) Criminal Law Act 1967.
Task 19

Read the cases on self defence on www.crimeline.info

The following points should be borne in mind:

- A person is allowed a pre-emptive strike as long as X believes that force is imminent.

- **Beckford v The Queen [1988] AC 130**, Lord Griffiths said (at p. 144 in the reported case) ‘a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike’. However, if a threat of force may be expected to deter the attacker, it may be difficult to convince the jury that it was reasonable to use actual force.

- Is there a duty to retreat? Because the focus of the test is whether the defendant is acting reasonably in the particular situation, there is no specific requirement that a person must retreat in anticipation of an attack. Although some withdrawal would be useful evidence to prove that the defendant did not want to fight, not every defendant is able to escape.

- In **R v Bird (1985) 1 WLR 816** the defendant was physically attacked, and reacted instinctively and immediately, without having the opportunity to retreat. Had there been a delay in the response, the reaction might have appeared more revenge than self-defence.

- It might be different if the defendant sees an enemy approaching and decides to stand his ground. The answer may depend on where the threat is recognised. In a public place, where there are many other people present, a judgement must be made on whether an attack is imminent. As a matter of policy, no-one should be forced out of the streets because of fear, but prudence might dictate a different answer at night when the streets are empty.

- How much force is allowed? **Palmer v The Queen [1971] AC 814**: it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.
A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence.

- A mistaken belief that you are under attack allows force to be used.

- The belief must be subjectively assessed (Williams [1987] 3 All ER). The jury must look at belief from the defendant’s perspective, not their own, or that of a reasonable bystander.

- However, a voluntarily intoxicated mistaken belief cannot be relied upon (O’Grady [1987] QB 995).

- The Defendant must raise the defence, it is then for Crown to disprove to the criminal standard of proof.

- Where self defence is relied upon by a householder, the Crown Prosecution Service has provided specific guidance on how the defence should be applied which can be found at [http://www.cps.gov.uk/news/pressreleases/archive/2005/106_05.html](http://www.cps.gov.uk/news/pressreleases/archive/2005/106_05.html)

- It is important to keep aware of change to the law regarding what is deemed to be ‘reasonable self defence’ as it may affect the advice given to a defendant. On this topic please be aware of any changes (which at the time of writing this manual were being proposed) regarding self defence in the home and the possibility of a ‘gross and disproportionate’ test being introduced relating to the householder’s use of force against an intruder. This will not cover situations where your client has being attacked on the street – current law applies.

- Is there a duty to retreat? Because the focus of the test is whether the defendant is acting reasonably in the particular situation, there is no specific requirement that a person must retreat in anticipation of an attack. Although some withdrawal would be useful evidence to prove that the defendant did not want to fight, not every defendant is able to escape

Please see s148 LASPO which clarifies the position and states that there is no duty to retreat but if there was a chance to retreat this should be taken into account when deciding whether force was reasonable at the time.
4 Provocation

Provocation is only ever a defence to murder. Successfully pleaded, it has the effect of reducing the charge to one of manslaughter. The law in relation to this defence is very complicated and you are unlikely to encounter many cases requiring a consideration of provocation during your career. It is more important to understand the lack of availability of this defence in most cases – provocation can, however, provide powerful mitigation in some cases.

Under s3 Homicide Act 1957:

“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”

There are 2 parts to the defence:

- A sudden and temporary loss of self control; and
- The question whether the provocation was enough to make a reasonable man do as he did.

5. Loss of control

In R v Duffy (1949) 1 AER 932, Devlin J. said that:

“Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.”

Under normal circumstances, the response to the provocation will be almost immediate retaliation. If there is a “cooling-off” period, the court will find that the accused should have regained control, making all subsequent actions intentional and, therefore, murder.

In R v Ibrams & Gregory (1981) 74 Cr. App. R. 154, the defendants had been terrorised and bullied by the deceased over a period of time so devised a plan to attack him. There was no evidence of a sudden and temporary loss of self-control as required by Duffy. Even the period of time to fetch a weapon should be sufficient to cool off.
In *R v Thornton (1992) 1 AER 306* a woman suffering from “battered woman syndrome” went to the kitchen, took and sharpened a carving knife, and returned to stab her husband. The appeal referred to s3 which requires the jury to have regard to “everything both said and done according to the effect which in their opinion it would have on a reasonable man”. The appellant argued that instead of considering the final provocation, the jury should have considered the events over the years leading up to the killing. Beldam L.J. rejected this, saying:

“In every such case the question for the jury is whether at the moment the fatal blow was struck the accused had been deprived for that moment of the self-control which previously he or she had been able to exercise.”

But in *R v Thornton (No 2) (1996) 2 AER 1023* after considering new medical evidence, a retrial was ordered and the defendant was convicted of manslaughter on the ground of diminished responsibility.

Similarly, in *R v Ahluwaliah (1992) 4 AER 889* a retrial was ordered. The defendant had poured petrol over her husband, causing burns from which he died. When the defence of diminished responsibility on the ground of “battered woman syndrome” was put, she was convicted of manslaughter.

In *R v Humphreys (1995) 4 AER 1008*, the defendant, finally, lost self-control after years of abuse and stabbed her partner. She pleaded that the final words had been the straw that broke the camel’s back. The conviction for murder was held unsafe because the accused’s psychiatric condition stemming from the abuse should have been attributed to the reasonable person when the jury considered the application of the objective test.

5.1 The reasonable person test

If the jury is satisfied that the defendant was provoked, the test is whether a reasonable person would have acted as the defendant did - an objective test. For this purpose, the reasonable person should be endowed with the particular characteristics of the accused.

In a number of leading cases, including *Camplin (1978) AC 705 (HL), Morhall (1995) 3 AER 659 (HL), and Luc Thiet Thuan v R (1997) AC 131 (PC)* it was held that the judge should direct the jury to consider whether an ordinary person, with ordinary powers of self-control would have reacted to the provocation as the defendant did and that no allowance should be given for any characteristics that might have made him or her more volatile than the ordinary person.

These decisions acknowledged, however, that, in addition to age and sex, characteristics which affected the gravity of the provocation to the defendant should be taken into account. In *R v Smith (2000) 4 AER 289* the defendant was charged with murder and relied on the defence of provocation, alleging that he had been suffering from serious clinical depression and had been so provoked by the deceased as to lose his self-control.
Lord Hoffman held that the test was whether the jury thought that the, circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter.

Furthermore, the House held, by a majority, that no distinction should be drawn, when attributing characteristics for the purposes of the objective part of the test imposed by s3 Homicide Act, between their relevance to the gravity of the provocation to a reasonable man and his reaction to it. Account could be taken of a relevant characteristic in relation to the accused’s power of self-control, whether or not the characteristic was the object of the provocation.

But in HM’s AG for Jersey v Holley (2005) 3 AER 371 the Privy Council regarded Smith as wrongly decided, interpreting the Act as setting a purely objective standard. Thus, although the accused’s characteristics were to be taken into account when assessing the gravity of the provocation, the standard of self-control to be expected was invariable except for the accused’s age and sex.

The defendant and the deceased both suffered from chronic alcoholism and had a violent and abusive relationship. The evidence was that the deceased was drunk and taunted him by telling him that she had had sex with another man. The defendant then struck the deceased with an axe which was an accident of availability. Psychiatric evidence was that his consumption of alcohol was involuntary and that he suffered from a number of other psychiatric conditions which, independently of the effects of the alcohol, might have caused the loss of self-control and induced him to kill. Lord Nicholls said:

“Whether the provocative acts or words and the defendant’s response met the ‘ordinary person’ standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self control was sufficient excusable. The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant’s conduct is ‘excusable’.”

In R v Faqir Mohammed (2005) EWCA Crim 1880 a devout Moslem returning from the mosque caught a young man leaving his daughter’s bedroom window. He immediately killed his daughter by repeatedly stabbing her with a knife. Following the death of his wife five years earlier he suffered from depression, and there was credible evidence that he had a violent temperament and had repeatedly been violent towards his daughters and his wife. Despite the fact that a Privy Council decision is only persuasive authority, the Court of Appeal applied it and reinstated the law before Smith. Scott Baker LJ. said:
“Properly directed the jury should therefore have applied a narrow and strict test of a man with ordinary powers of self-control rather than the wider test of excusability that was put to them by the judge. The jury having convicted on the basis of the wider test, we cannot see any unsafety in the conviction. The same result would have been inevitable if the provocation direction had been on the basis of Holley.”

In *R v James (2006) EWCA Crim 14* the court again considered the relationship between the Privy Council decision in Holley and Smith. In his commentary on Holley, Ashworth (2005) said:

“Is Holley binding on English courts? There may be a purist strain of argument to the effect that it is not, since it concerns another legal system (that of Jersey). However, the reality is that nine Lords of Appeal in Ordinary sat in this case, and that for practical purposes it was intended to be equivalent of a sitting of the House of Lords.”

Viewing this situation as exceptional, Phillips CJ. accepted that the Privy Council decision had indeed overruled the House of Lords, recognising the error that the Lords had made in their earlier interpretation of the law. Rather than follow the strict rules of precedent and send the issue back to the Lords for clarification, the Court of Appeal accepted the de facto situation and recognised Holley as the binding precedent.

6. Other defences

**Task 20**

**Briefly**, read the following web resources to gain an understanding of the wide variety of different defences available:


Motorists defences: http://www.pepipoo.com/Section_172.htm

Due diligence:

7. **Student reflection**

At the end of this unit you may be starting to get a little daunted by the amount of knowledge you need as a criminal lawyer. This unit is in fact only a small fraction of what could be written on the subject of criminal offences and defences, you would need to read tens of thousands of words to know it all. And, by the time you had read it all, much would have changed. The important point is to appreciate the foundation, being able to recognise the common themes that run through criminal law, and the availability of various resources. You will always have an opportunity to thoroughly research the more complicated matters when they arise!

Remember to log in and attempt the multiple choice questions at [www.paralegaldistancelearning.co.uk](http://www.paralegaldistancelearning.co.uk)