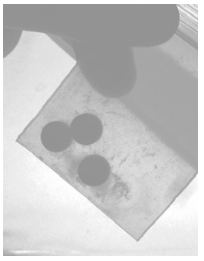

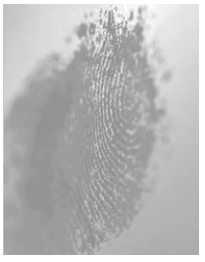

Criminal Litigation

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1 INTRODUCTION

1.1 INTRODUCTION

CPS Press release 16 February 2009

Lorry driver guilty of causing deaths of family of six

A lorry driver's inattention caused an horrific accident which wiped out an entire family including four children, said CPS Cheshire Chief Crown Prosecutor Ian Rushton.

A jury at Chester Crown Court found Paulo Da Silva guilty of six counts of causing death by careless driving.

Mr Rushton said: 'This is a tragic case where Michelle and David Statham died in a terrible car accident with their four children, Reece, Jay, Mason and Ellouise.

The prosecution had to prove that not only did Mr Da Silva's driving fall below the required standard, but as a direct result he killed the whole family in their car on the M6.'

Evidence that Cheshire Police gathered showed that the Stathams' car was crushed between a large lorry, which had been queuing in a long tailback due to an earlier accident, and Paulo Da Silva's lorry.

The jury heard both the prosecution and defence case and decided that Paulo Da Silva's driving was careless. They therefore acquitted him of six counts of causing death by dangerous driving, which is the more serious offence.

Mr Rushton said: 'Da Silva admitted in court that he had seen the electronic signs warning that the M6 was closed ahead and that queues were likely. He said that he reduced his speed but could not explain how the collision happened.

The prosecution said that it was clear that for a period of approximately one minute, Paulo Da Silva was not paying proper attention to the road and fatally hit the Stathams' van with his 40-tonne lorry.

We would like to thank the work of Cheshire Police who carried out a thorough investigation and all the witnesses who gave evidence in that case. Our thoughts are with the family and friends of Mrs and Mr Statham and their children.'

This tragic case provides a dramatic snapshot of the work of those involved in the criminal justice system. The case took only four months to come to trial, but required many hours of investigation by the police as well as painstaking file preparation and evaluation of the evidence by the Crown Prosecution Service (CPS). Mr Da Silva's lawyers also spent many hours preparing his case for trial. As the trial date approached, a number of ancillary criminal justice organisations became involved, including victim support, witness care and Her Majesty's Court Service. At the defendant's trial, the prosecution and defence advocates presented their parties' interpretation of the law to the facts of the case to the judge and jury. The judge summed the case up to the jury and Mr Da Silva's guilt or innocence was decided by the jury, which was made up of ordinary members of the public from wide and diverse backgrounds. At the conclusion of the case Mr Da Silva faced years of imprisonment, away from family and friends. For the foreseeable future his life is in tatters. The loss is even greater for the victims' family and friends, who are deprived forever of their loved ones and left with only memories.

For those studying to be criminal lawyers and for those already in practice, the purpose of the manual is to explain the legal, procedural and evidential rules governing how cases like Mr Da Silva's and thousands of others each year are dealt with by the criminal justice system.

The manual covers all the key aspects of the criminal litigation process. Whether you are studying criminal litigation as part of your LPC or BPTC or already work as a CPS lawyer, private practice solicitor, legal executive or paralegal, or have another professional involvement in the criminal justice system, we hope that you find the book an invaluable source of reference.

In this introductory chapter, we aim to:

- explain the philosophy of the manual and its unique features;
- introduce the key personnel and organisations within the criminal justice system;

- introduce the Criminal Procedure Rules;
- explain the classification of offences according to their trial venue;
- provide a summary of the jurisdiction of the criminal courts;
- stress the importance of the pervasive issue of human rights; and
- highlight professional conduct considerations in the context of criminal litigation.

1.2 PHILOSOPHY OF *CRIMINAL LITIGATION*

Criminal Litigation provides an innovative approach to the study of criminal litigation and evidence and gives students and practitioners a highly practical and comprehensive explanation of the key substantive, procedural and evidential issues that are encountered by both prosecution and defence lawyers in a criminal case. For those who wish to further their knowledge and understanding, there are also extensive learning resources that illustrate, through practice-based examples, diagrams, self-test exercises and case studies, the operation of the law in a very practical context.

1.2.1 TAKING AN INTEGRATED AND PRACTICAL APPROACH

Working as a criminal lawyer requires the practitioner to take an integrated and practical approach to their work. This approach is adopted in the manual. The integrated approach is reflected in our belief that students and practitioners should be aware that the rules of criminal procedure, criminal evidence, professional conduct and legal skills are not discrete elements, but are part of the integrated picture that is involved in representing a client in a criminal case.

The treatment of the rules of criminal evidence highlights this integrated approach. Both prosecutors and defence lawyers must understand that key evidential issues are relevant at all stages of a case including from when the CPS lawyer advises the police about the appropriate charge to the defence lawyer's earliest representation of a client at the police station or during the first interview in the office. Chapter 2 entitled: 'An Introduction to the Law of Criminal Evidence and Advocacy' provides an overview of criminal evidence and is designed to encourage you to think about evidence at the very outset, before aspects of criminal procedure and the substantive rules of evidence are covered in more detail later in *Criminal Litigation*.

The practical approach is achieved in different ways. We have attempted to explain the law and procedure in an accessible and reader-friendly style. The substantive content of each chapter is supplemented by practical examples and diagrams as well as self-test questions and answers. *Criminal Litigation* integrates three case studies throughout the book which are an essential part of our practical approach. The integrated case studies are:

Case study 1: *R v Lenny Wise (not guilty plea in relation to an either-way offence of burglary)*

Case study 2: *R v Roger Martin (guilty pleas in relation to summary-only offences of common assault and careless driving)*

Case study 3: *R v William Hardy (guilty plea in relation to an indictable-only sexual offence)*

A selection of documentation supporting case study 1 is included in Appendix 2. The complete documentation to *R v Lenny Wise* and the other two case studies can be found in the case study section of the Online Resource Centre. The case studies form the basis of ongoing exercises throughout the manual which are designed to give you the opportunity to apply your knowledge of criminal procedure and evidence in the context of a 'real' case. Those using the manual for study should consider some of the documentation in support of the three integrated case studies at the conclusion of this introductory chapter. Keep the case studies in mind as you work through each stage of the criminal litigation process. Treat these fictional characters as your clients!

online resource centre

Key areas of practice and procedure in all our case studies have been filmed. The 'cases' were heard before a bench of serving lay magistrates (and in the matter of *R v William Hardy* before a Crown Court judge). All the participants in the video clips gave up their valuable time to assist us in making the films. The clips (all of which are held on the Online Resource Centre) are learning aids that illustrate, in a practical way, aspects of criminal practice. We would ask you to make an allowance for the fact that some aspects of procedure have changed since filming was undertaken. We draw your attention to these changes where appropriate. The videos are not necessarily a depiction of how cases always proceed and they should not be regarded as definitive examples of how advocacy is conducted before a criminal court. Commentary is included on the clips. Transcripts of the principal submissions made by the advocates are included in the case study documentation.

online resource centre

1.2.2 DO I NEED TO READ ALL THE CHAPTERS?

LPC criminal litigation courses vary in length and substantive content. Whether you are a student embarking upon the vocational stage of your legal career or you work in criminal practice, *Criminal Litigation* aims to provide a practical and comprehensive explanation of the key principles of criminal procedure and evidence. In addition, the manual includes several additional chapters located on its accompanying Online Resource Centre which, if you are an LPC student, you are more likely to need in an advanced criminal litigation elective. It may therefore be unnecessary for you to read every chapter. Your course tutor will tell you which learning outcomes you need to achieve for this area of legal practice and so concentrate on those chapters and online materials that are relevant to your specific needs.

online resource centre

1.3 ONLINE RESOURCE CENTRE

online resource centre

Our Online Resource Centre can be accessed at www.oxfordtextbooks.co.uk/orc/crimlit15_16. Features included are fully explained in the 'Guided tour of the Online Resource Centre' at page xxi but it is helpful to introduce the resource here also. The website is divided into useful sections to help the individual reader and includes the following resources:

Section 1—Password protected lecturer resources: high-quality video clips bring to life the key procedural stages of the *Criminal Litigation*'s case studies and are formatted for download through broadband, suitable for viewing on a computer or intranet. The clips include accompanying selective transcripts broadly based on the principal submissions made by the advocates. For those using *Criminal Litigation* as a core text on the LPC or BPTC there are also two further role-play scenarios available in the lecturer resource section.

Case study 4: *Peter West: Police Station Scenario.*

Case study 5: *R v Nicholas Jones: Bad character applications before a Crown Court judge.*

Case study 4 was filmed at an operational, rural police station.

Full instructions on the use that you might make of these two learning resources are included.

Section 2—Open access lecturer resources: the video clips of the case scenarios are available for online browsing intended for lecturers to review the material available.

Section 3—Student and practitioner resources: these are freely available resources and include answers to the self-test questions which can be found at the conclusion of most of the chapters; updates to cover recent developments in criminal litigation and criminal evidence; complete documentation supporting case studies 1, 2 and 3; and a comprehensive web-links section which will take you directly to resources such as the PACE Codes of Practice and the Magistrates' Court Sentencing Guidelines. It also includes an interactive

timeline which will help you to see how the whole criminal litigation process fits together and the issues that you need to keep in mind at particular points. The timeline distinguishes between the three classifications of offences of summary-only, either-way and indictable-only.

Wherever you see this symbol there is a link to our Online Resource Centre. In order to derive maximum benefit from the manual you should make full use of the learning and information resources on our Online Resource Centre.

online resource centre

1.4 LOOKING AHEAD—REFORM

These are challenging times for criminal lawyers not least with the imminent implementation of severe cuts to public funding in criminal defence cases. In recent years there has been a raft of new legislation, including most notably the Criminal Justice Act 2003, which has reformed many of the well-established rules of criminal procedure and evidence. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced significant reforms to legal aid, sentencing and bail. The abolition of committal proceedings and the replacement of the mode of trial enquiry with the allocation hearing in relation to either-way offences were fully implemented during 2013. Sentencing practice changes regularly and developments through case law are frequent. It is likely that certain provisions under the Criminal Justice and Courts Act 2015, which make changes to aspects of criminal procedure in the magistrates' court and changes to youth cautions, will be implemented in the near future.

On 27 February 2014, the Lord Chief Justice asked Sir Brian Leveson, President of the Queen's Bench Division, to conduct a review to identify ways to streamline and modernise the process of criminal justice and to reduce the length of criminal proceedings. Sir Brian Leveson's report was published in January 2015: http://www.judiciary.gov.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/. The core recommendations, which are intended to improve the efficiency of the criminal justice system, include:

- more efficient decision-making about charging decisions;
- more efficient use of streamlined disclosure;
- more robust decision-making about which cases are sent to the Crown Court with the intention of reducing the number of either-way cases that are unnecessarily sent to the Crown Court;
- more robust and consistent case management by the courts;
- increased use of IT, including video-conference links from prisons to court;
- identification of a nominated person from the police/CPS and from the defence who has responsibility for the case.

In the words of Sir Brian Leveson:

> 'The changes I have recommended are all designed to streamline the way the investigation and prosecution of crime is approached without ever losing sight of the interests of justice. Our conduct of criminal trials was designed in the 19th century with many changes and reforms bolted on, especially over the last 30 years. The result is that it has become inefficient, time consuming and, as a result, very expensive.
>
> It is clear that all aspects of the system are going to have to live with diminished resources for years to come. Quite apart from questions of necessary reform, therefore, it is vital that we find ways to make best use of those resources by greater efficiency.
>
> As a society, it remains essential that we retain high quality lawyers to carry out publicly funded work. A more efficient system overall will allow all those involved in criminal justice to use their time productively with fewer hours wasted dealing with bureaucracy and less time lost through unnecessary delay.'

Although falling strictly outside its remit, the Leveson review also suggested that the appeal route from magistrates' court decisions be curtailed; a further review of which type of offences should be tried by jury; giving the accused the option of a judge-only trial; a unified criminal court; and the codification of sentencing law and practice.

The recommendations of the Leveson Review can be seen as complementing the suggested changes contained in 'Transforming the Criminal Justice System' (June 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209659/transforming-cjs-2013.pdf, which has seen the creation of a new national Criminal Justice Board and Action Plan (July 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330690/cjs-strategy-action-plan.pdf.

The update section of our Online Resource Centre will highlight any significant changes during 2015–16 and also consider the way in which the changes are being applied in practice. Any reforms likely to be brought into force in the next 12 months are highlighted in the text by the feature entitled 'Looking Ahead'.

Students should be aware of these legislative changes, not only for learning and assessment purposes, but also because questions about recent legal developments are commonly asked at job interviews.

1.5 RESEARCH SOURCES

Legal research is a vital part of the work of a student and practitioner. While our Online Resource Centre provides invaluable links to related websites from which you can access further useful information, we include here a summary of useful practitioner texts and practitioner journals.

1.5.1 PRACTITIONER WORKS

Blackstone's Criminal Practice

Also published by Oxford University Press, *Blackstone's Criminal Practice* is a leading work of reference for criminal practitioners. Annually updated and written in an accessible and user-friendly way, *Blackstone's* provides a detailed explanation of the main substantive criminal offences, the key stages of criminal procedure and the rules of criminal evidence. *Blackstone's* is also available on CD-ROM.

Archbold Criminal Pleading and Practice

This well-established authoritative practitioner text is specifically directed to the practice and procedure of trials on indictment. *Archbold* now publishes a companion volume for proceedings in the magistrates' court.

Stone's Justices Manual

This is the most authoritative text for proceedings in the magistrates' court. *Stone's* is an indispensable source of reference for all criminal practitioners.

1.5.2 TEXTS

Defending Suspects at the Police Station **(Ed Cape; published by the Legal Action Group)**

This book offers a clear explanation covering all aspects of representing a client at the police station, including a detailed exposition of police powers and invaluable advice about the strategies to be adopted by the legal adviser.

Active Defence **(Ede and Shepherd; Law Society Publications)**

This is an excellent, informative guide to representing a client at the police station.

The Golden Rules of Advocacy **(Keith Evans; Oxford University Press)**

An informative, short and entertaining book on developing or refining your advocacy skills.

Disclosure in Criminal Proceedings **(David Corker and Stephen Parkinson; Oxford University Press)**
This very practical book comprehensively explains all aspects of disclosure, from investigation through to trial and beyond.

1.5.3 JOURNALS

Journal articles can also provide information on current issues and recent developments in criminal procedure and evidence. The journals that might be of interest include the *Criminal Law Review, Criminal Law and Justice Weekly* and the *Legal Action Group Magazine*. The Law Society Gazette will keep you up to date with developments in practice (see http://www.lawgazette.co.uk/).

1.5.4 ELECTRONIC RESEARCH SOURCES

Electronic research sources from the key criminal justice organisations and an extensive set of web links can be accessed via the web-links section from our Online Resource Centre.

online resource centre

1.6 CLASSIFYING CRIMINAL OFFENCES

Whilst criminal offences can be classified in several ways, the most significant classification for criminal litigators determines whether the case will ultimately be dealt with in the magistrates' court or the Crown Court. An offence will either be:

- summary-only;
- triable either way; or
- indictable-only.

Always check the classification of an offence if you are not sure, whether in an assessment or in practice. The classification of all criminal offences can be researched in a practitioner work, such as *Blackstone's Criminal Practice*. The correct identification of the classification of an offence helps you accurately to explain the procedural course that a case will follow.

1.6.1 SUMMARY-ONLY OFFENCES

The least serious offences are known as summary-only offences and are dealt with summarily in the magistrates' court, whether or not the defendant pleads guilty or not guilty. Common assault (s. 39 Criminal Justice Act 1988) is a summary-only offence, as are a number of less serious motoring offences.

1.6.2 OFFENCES TRIABLE EITHER WAY

Either-way offences are middle-ranking offences in terms of seriousness and can be tried either summarily before a magistrates' court or on indictment before a judge and jury in the Crown Court. Theft (s. 1 Theft Act 1968) is an either-way offence. It is the defendant's indication of plea which determines where an either-way offence will be heard. If a defendant indicates a guilty plea, the case will remain in the magistrates' court and the court will proceed to sentence. The magistrates' court has the power to commit the defendant to be sentenced before the Crown Court upon conviction for an either-way offence where it considers its limited powers of sentence are insufficient.

If a defendant indicates a not guilty plea to an either-way offence, the magistrates' court will conduct an allocation hearing to decide whether to keep jurisdiction and try the case summarily or to decline jurisdiction and send the case to the Crown Court to be tried on indictment. If the magistrates' court declines jurisdiction, the accused has no choice and the case will be sent to the Crown Court, under s. 51 Crime and Disorder Act 1998,

following the allocation hearing. If the magistrates' court accepts jurisdiction to try the either-way offence summarily, the accused has a choice: consent to summary trial or elect trial by jury on indictment before the Crown Court.

1.6.3 INDICTABLE-ONLY OFFENCES

The most serious crimes are known as indictable-only offences, which will be tried at the Crown Court before a judge and jury. The common law offence of murder and the statutory offence of robbery (s. 8 Theft Act 1968) are indictable-only offences. Whilst the defendant's case will be heard at the Crown Court, the prosecution of an indictable-only offence will commence in the magistrates' court. Following the defendant's initial appearance before a magistrates' court, the case is immediately sent to the Crown Court for trial under s. 51 Crime and Disorder Act 1998.

Where a defendant is charged with more than one offence with different trial venue classifications, the general rule is that the most serious offence will dictate the procedural course of the cases.

Figures 1.1, 1.2 and 1.3 at the end of this chapter illustrate the stages of a summary-only, either-way and indictable-only offence. Figure 1.4 provides an overview of the criminal litigation process.

1.7 PERSONNEL AND ORGANISATIONS WITHIN THE CRIMINAL JUSTICE SYSTEM

1.7.1 INVESTIGATING AND PROSECUTING ORGANISATIONS

The responsibility for investigating and prosecuting a criminal offence is shared between several organisations.

The investigation of most criminal offences is undertaken by the police. At the completion of the investigation, the matter is passed to the CPS which decides whether there is sufficient evidence to charge the suspect. The CPS is divided into 42 areas, which are aligned to the number of police forces in England and Wales.

The conduct of most day-to-day prosecutions in the magistrates' court or the Crown Court will be dealt with either by a Senior Crown Prosecutor, Crown Prosecutor or an Associate Prosecutor. The former are legally qualified solicitors or barristers; the latter are not. An Associate Prosecutor's right to conduct a contested trial is restricted to non-imprisonable summary-only offences upon completion of designated training.

The CPS employs a number of administrative staff known as caseworkers. A caseworker will assist CPS lawyers and Associate Prosecutors by preparing cases, attending court with counsel, liaising with witnesses and other criminal justice agencies as well as post-trial administration. Whilst the CPS clearly plays a dominant role in the prosecution of criminal offences, other public bodies also investigate and prosecute criminal offences in their specific areas of responsibility:

- the Serious Fraud Office investigates and prosecutes serious or complex fraud (http://www.sfo.gov.uk/);
- the National Crime Agency (NCA) became operational in 2013 and investigates serious and organised crime (http://nationalcrimeagency.gov.uk/);
- the Health and Safety Executive (HSE) investigates and prosecutes criminal offences arising out of accidents in the workplace under the Health and Safety at Work Act 1974 (the Enforcement section of the HSE's website contains a lot of useful information: http://www.hse.gov.uk/enforce/enforcementguide/index.htm);
- local authorities investigate and prosecute offences under the Trade Descriptions Act 1968, the Education Act 1996, environmental law cases and prosecutions relating to food and hygiene;

- the Environment Agency investigates and prosecutes environmental crime (http://www.environment-agency.gov.uk/business/regulation/31851.aspx);
- the RSPCA brings private prosecutions for offences relating to the welfare of animals (http://www.rspca.org.uk).

1.7.2 THE LEGAL AID AGENCY

A detailed examination of public funding of criminal defence services is considered in Chapter 9. The provision of public funding for legal services in England and Wales is overseen by the Legal Aid Agency (LAA). There are currently over 2,000 solicitors' firms which have contracts with the LAA to provide publicly funded criminal defence services. Public spending on criminal legal aid regularly exceeds £1 billion every year. This is set to be drastically reduced due to funding cuts over the next two years.

1.7.3 THE PUBLIC DEFENDER SERVICE

The Public Defender Service (PDS) provides a limited alternative to a criminal client seeking advice and representation from a solicitor in private practice. Through the LSC, the PDS employs solicitors, legal executives and paralegals to provide advice, assistance and representation to clients. Currently there are PDS offices located in Darlington, Swansea, Pontypridd and Cheltenham.

1.8 THE CRIMINAL COURTS AND PERSONNEL

It is likely that you studied the hierarchy of the criminal courts during your academic studies. This section is intended to briefly remind you of the jurisdiction of each criminal court.

1.8.1 MAGISTRATES' COURT

Prosecutors and defence lawyers spend most of their time preparing for and appearing in cases listed in the magistrates' court. It is the workhorse of the criminal justice system. Virtually all criminal prosecutions commence in the magistrates' court. Over 90% of all criminal cases are dealt with in the magistrates' court, with the remaining cases heard in the Crown Court. According to the Judicial and Court Statistics published by the Ministry for Justice, in the 12 months ending June 2014 over 1.39 million defendants were proceeded against in the magistrates' court. The practice and procedure in the magistrates' court is governed by the Magistrates' Courts Act 1980 (MCA 1980) and the Criminal Procedure Rules (2014).

The magistrates' court undertakes the following:

- deals with preliminary matters during the early stages of all prosecutions including:
  - application for an adjournment;
  - the defendant's bail status;
- tries summary offences (this includes an either-way offence which is to remain in the magistrates' court) and sentences defendants convicted of these offences;
- determines the allocation of an either-way offence for which the defendant has indicated a not guilty plea;
- commits a defendant convicted of an either-way offence to the Crown Court for sentence where the magistrates consider their maximum sentencing powers to be insufficient;
- sends an either-way offence to the Crown Court which the magistrates' court has decided should be tried at the Crown Court or because the defendant has elected trial at the Crown Court;
- sends indictable-only offences to the Crown Court for trial under s. 51 Crime and Disorder Act 1998.

A magistrates' court can also issue warrants for arrest, removal to a place of safety, search of premises and seizure of property. If the police wish to detain a person for questioning beyond 36 hours they must get an order from the magistrates' court authorising this further period of detention without charge. The court also deals with fine enforcement and adjudicates on a number of civil law applications, including applications for anti-social behaviour orders and football banning orders.

1.8.2 MAGISTRATES

A magistrate is either a justice of the peace or a District Judge. Lay magistrates are unpaid, and whilst they are not required to hold any formal legal qualifications all magistrates undergo a period of induction and training. They are required to 'sit' for a prescribed number of days each year. There are approximately 29,500 active lay magistrates in England and Wales who normally try cases sitting as part of a bench of three.

Salaried District Judges and Deputy District Judges are appointed from solicitors and barristers who have been qualified for at least seven years. A District Judge hears a case sitting alone and can exercise all the powers of a bench of lay magistrates. A District Judge may also exercise some of the powers of recorders who sit as judges in the Crown Court in certain cases (s. 65 Courts Act 2003).

1.8.3 THE LEGAL ADVISER

When conducting a summary trial, lay magistrates will be assisted by a legal adviser who is usually a solicitor or a barrister. The law maintains a strict division of responsibilities between the magistrates and their legal adviser. The magistrates are the sole arbiters of law and fact. The *Practice Direction (Criminal Proceedings: Consolidation)* [2000] 1 WLR 2870 provides that the legal adviser will sit with lay magistrates to advise the bench on matters of law, evidence, human rights points and procedure. The legal adviser will also put the charge to the accused, take a note of the evidence in the case and help an unrepresented defendant present his case.

When the justices retire to consider their verdict, the legal adviser must only advise them on points of law and evidence and not on issues of fact (*Stafford Justices, ex p. Ross* [1962] 1 WLR 456).

1.8.4 YOUTH COURT

Generally, defendants who are under 18 should be dealt with in the youth court. All magistrates' courts have a youth court panel of specially trained magistrates who have been appointed because of their suitability for dealing with youth cases. The practice and procedure is more informal and less intimidating than in the adult court. A District Judge (who has undertaken the required training) may also sit alone in the youth court. The youth court is regarded as a specialist jurisdiction. For this reason, youth justice is dealt with separately in Chapters 24 to 26.

1.8.5 THE CROWN COURT

The Crown Court, which sits at 77 different locations in England and Wales, deals with cases to be tried on indictment before a judge and jury. The practice and procedure in the Crown Court is now governed by the Senior Courts Act 1981 and the Criminal Procedure Rules (2014). In the year ended June 2014, 83,000 defendants were tried before the Crown Court. The Crown Court exercises the following jurisdiction:

- tries either-way offences committed/sent for trial at the Crown Court;
- tries indictable-only offences and any related offences;
- sentences offenders convicted before it and those who are committed for sentence by the magistrates' courts;
- hears an appeal against conviction and/or sentence arising out of a decision made by a magistrates' court or youth court.

Section 66 Courts Act 2003 enables a Crown Court judge to exercise the powers of a District Judge (magistrates' court).

The following types of judge preside over sittings of the Crown Court:

- High Court judges;
- circuit judges; and
- recorders and assistant recorders who are part-time judicial officers.

1.8.6 THE ADMINISTRATIVE AND DIVISIONAL COURTS

The Administrative Court has a limited jurisdiction in criminal matters. An action in judicial review can be commenced in the Administrative Court against a public body such as a court, the police or the CPS for exceeding or misusing their legal powers or for not following the correct procedures.

The Divisional Court hears appeals by way of case stated under s. 111 MCA 1980 arising from decisions taken in a magistrates' court. Both the prosecution and defence can appeal by way of case stated to the Divisional Court. This method of appeal is appropriate where it is submitted that the magistrates' court or its legal adviser has misinterpreted a point of law or evidence.

1.8.7 THE COURT OF APPEAL (CRIMINAL DIVISION)

The Court of Appeal (Criminal Division) hears appeals against conviction and/or sentence from cases tried in the Crown Court. It also hears appeals or 'points of reference' from the Attorney General (AG) on points of law and sentences that are considered too lenient. The work of the Court of Appeal is presided over by the Lord Chief Justice. Cases are normally heard by the Lord Chief Justice sitting with two puisne judges or a Lord Justice of Appeal sitting with two ordinary judges.

The Court of Appeal additionally gives guidance on the procedures and practices of the criminal courts by issuing sentencing guidelines and practice directions.

1.8.8 THE SUPREME COURT

The judicial work of the Supreme Court (formerly the House of Lords) is presided over by the President of the Supreme Court. It is the final and the highest court in the criminal jurisdiction and hears appeals from the Court of Appeal (and occasionally from the Divisional Court) on points of law of public and constitutional importance. Leave to appeal is required.

1.9 THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1950 (ECHR 1950)

The Human Rights Act 1998 (HRA 1998) provides the legal framework for using the ECHR 1950 in UK domestic law. Section 1 HRA 1998 formally incorporates ECHR law into UK domestic law which means that ECHR law can be cited in the criminal courts in support of the defendant's case.

1.9.1 HOW ARE THE RIGHTS GUARANTEED UNDER THE CONVENTION ENFORCED IN DOMESTIC LAW?

Section 3 HRA 1998 places an obligation on the criminal courts to interpret all legislation 'as far as possible' to comply with ECHR law. This is known as the interpretive obligation. In discharging the interpretive obligation to ensure compliance between Convention law and domestic law, s. 2 HRA 1998 requires courts to have regard to Convention law and to the decisions of the European Court of Human Rights (ECtHR). Therefore when citing a relevant ECHR point in support of your legal argument you should research any ECtHR decisions on the point and any relevant domestic case law. Where it is not possible to

give effect to the ECHR law in a case under the interpretive obligation, s. 4 HRA 1998 requires the superior courts (Court of Appeal and the Supreme Court) to make a declaration of incompatibility. It is then a matter for Parliament whether to amend the offending legislation.

In addition, s. 6 HRA 1998 places a duty on a public authority such as the police, the CPS and the courts, to discharge its legal duties in compliance with the ECHR 1950. Section 6(1) provides:

> 'It is unlawful for a public authority to act in a way which is incompatible with Convention rights.'

A range of remedies in the civil courts apply where a public authority acts in breach of its duties under s. 6 HRA 1998, including actions in tort and/or judicial review. Section 8 HRA 1998 requires that where a court finds that a public authority has acted unlawfully, it must grant a remedy that is 'just and appropriate'.

1.9.2 CRIMINAL LITIGATION—THE RELEVANT CONVENTION ARTICLES

Article 3—the prohibition of torture

> 'No one shall be subjected to torture or inhuman or degrading treatment or punishment.'

Thankfully this provision is unlikely to be invoked on a frequent basis, although it might be relevant when challenging the admissibility of a defendant's confession on the ground that it had been obtained by 'oppression' under s. 76(2)(a) Police and Criminal Evidence Act 1984. Article 3 will be relevant when arguing that the manner in which the police interrogated your client (e.g. by shouting or making threats to the suspect) breached Convention law.

Article 3 is an absolute right from which no derogation is permitted.

Article 5—the right to liberty and security

> '1. Everyone has the right to liberty and security of person. No one shall be deprived of liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court . . .;
>
> (c) the lawful arrest and detention of a person except for the purpose of bringing him before a court of competent legal authority on reasonable suspicion of having committed an offence or fleeing after having done so; . . .
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with paragraph 1c shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.'

Article 5 is a qualified right allowing the state to derogate from it in defined circumstances.

Article 5 may be invoked where your client has been unlawfully arrested or otherwise detained by the police and may be relevant when challenging the decision of the police or the court to deny your client bail.

Article 6—the right to a fair trial

'1. In the determination of his civil rights and obligations, or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press or public may be excluded in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.

3. Everyone charged with a criminal offence has the following minimum rights:

   (a) to be informed promptly, in a language which he understands and in detail of the nature and cause of the accusation against him;

   (b) to have adequate time and facilities for the preparation of his defence;

   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

Article 6 is the most significant Convention right for criminal litigators and is relevant at all stages of a criminal case including:

- the defendant's right to have legal representation at the police station and at trial;
- the procedural and evidential rules adopted by the court at trial; and
- the principles applied when passing sentence.

The right to a fair trial in Article 6(1) is drafted in absolute terms. What constitutes a fair trial, however, is not defined. The presumption of innocence in Article 6(2) and the provisions of Article 6(3) are specified minimum general components of a fair trial. The jurisprudence of the ECtHR has implied a number of rights into Article 6, including the privilege against self-incrimination. In deciding the fair trial provisions under Article 6, it should be stressed that the ECtHR is not concerned with the guilt or innocence of the accused but rather whether the whole trial process was in accordance with Article 6.

It is open to a defence advocate to argue that the admissibility of a particular piece of evidence in a case will violate the defendant's right to a fair trial in accordance with Article 6.

Article 8—the right to respect for private and family life

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime etc . . .'

Article 8 seeks to protect the individual from arbitrary interference by the state. It is, however, a qualified right and permits interference for the reasons stated above. Nonetheless, any interference must be authorised in accordance with the law and must be proportional. Article 8 may be cited by defendants to challenge the admissibility of evidence obtained in breach of the defendant's right to a fair trial under Article 6 (see Chapter 6).

1.9.3 THE ECHR 1950 AND THE RULES OF CRIMINAL PROCEDURE AND EVIDENCE

Whilst generally the practice and procedure of the English criminal trial satisfies the obligations laid down by the Convention, since the implementation of the HRA 1998 a number of important decisions have been made by the courts where Article 5 or Article 6 have been directly invoked. These decisions include:

- *R (on the application of the DPP) v Havering Magistrates' Court* [2001] 2 Cr App R 2 confirmed that proceedings under the Bail Act 1976 were governed by Article 5;
- *T and V v UK* (2000) 30 EHRR 121 decided that the boys tried for the killing of James Bulger had not had a fair trial in the Crown Court under Article 6 because of their young age and also that the formality of the Crown Court procedures had prevented them from effective participation in the trial process;
- *R (Anderson) v Secretary of State for the Home Department* [2003] 1 Cr App R 32, the House of Lords decided that to comply with Article 6, where a prisoner was sentenced to life imprisonment, the decision as to how long the prisoner should serve in prison (known as the tariff) should be taken by a judge and not by the Home Secretary;
- *Murray v UK* (1996) 22 EHRR 29, the ECtHR held that adverse inferences could not be drawn from a suspect's silence at the police station where he had not been offered legal advice. UK domestic law was found to be in breach of Article 6(3) ECHR 1950. Section 34 Criminal Justice and Public Order Act 1994 had to be amended as a consequence.

These and other important decisions influenced by the ECHR 1950 are considered in more detail at appropriate places in the text. The recognition of a defendant's rights under Article 6 is specifically identified in Part 1 of the Criminal Procedure Rules as a component of the overriding objective of dealing with criminal cases justly.

1.10 CRIMINAL PROCEDURE RULES (CRIM PR)

The Criminal Procedure Rules (Crim PR) first came into effect on 4 April 2005. The rules, which were most recently revised in October 2014, provide a comprehensive criminal procedure code that governs the conduct of all criminal cases and should be read in conjunction with the new Consolidated Practice Directions reported at [2013] EWCA Crim 1631 (CPD). Both the rules and the CPD can be accessed via the Criminal Procedure Rule Committee's website (http://www.justice.gov.uk/criminal/procrules_fin/rulesmenu.htm). The web-links section of our Online Resource Centre (Guidelines section) will take you there. You will see references to the application of the Criminal Procedure Rules throughout this work.

The overriding objective of the Criminal Procedure Rules is stated in Part 1. It requires that all criminal cases must be dealt with justly. Part 1.1 defines this to include:

> '(a) acquitting the innocent and convicting the guilty;
>
> (b) dealing with the prosecution and the defence fairly;
>
> (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
>
> (d) respecting the interest of witnesses, victims and jurors and keeping them informed of the progress of the case;
>
> (e) dealing with the case efficiently and expeditiously;
>
> (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
>
> (g) dealing with the case in ways that take into account:
>
> (i) the gravity of the offence alleged,

(ii) the complexity of what is in issue,

(iii) the severity of the consequences for the defendant and others affected, and

(iv) the needs of other cases.'

Everyone involved in the criminal justice process must prepare and conduct cases in accordance with the overriding objective (Crim PR, Part 1.2).

To ensure that the overriding objective is achieved, courts are required to engage in robust and active management of cases (Part 3). Active case management is defined in Part 3.2 to include:

'(a) the early identification of the real issues;

(b) the early identification of the needs of witnesses;

(c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;

(d) monitoring the progress of the case and compliance with directions;

(e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;

(f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion and avoiding unnecessary hearings;

(g) encouraging the participants to co-operate in the progression of the case; and

(h) making use of technology.'

Active case management involves courts giving directions to the parties that are appropriate to the needs of the case and are consistent with the overriding objective.

Crim PR, Part 3.3 imposes a duty on all parties to actively assist the court in fulfilling its duty under Part 3.2. A court can impose sanctions on parties for failing to comply with a rule or direction of the court (Part 3.5(6)). These might include a wasted costs order, the exclusion of evidence or the refusal of a request for an adjournment. In *DPP v Hammerton* [2009] EWHC 921, the High Court upheld a decision of a magistrates' court (taken in accordance with the overriding objective) to refuse to allow the CPS to substitute at a late stage and for no good reason, a less serious charge in place of the original charge.

The extent to which the defence solicitor's duties under Part 3 conflict with duties owed to a client in the conduct of a criminal case are considered at para. 1.11.7.

The case management responsibilities under Crim PR, Part 3 must now be read in conjunction with the principles enshrined in Stop Delaying Justice (SDJ) which applies to all cases that can be tried in the magistrates' court. SDJ is an initiative from the senior judiciary which came into effect in all magistrates' courts on 1 January 2012. It aims to ensure that all contested trials in the magistrates' court are fully managed from the first hearing and disposed of at the second hearing. SDJ builds upon the improvements to the more efficient disposal of summary cases begun by the Criminal Justice—Simple, Speedy and Summary (CJ-SSS). The practical effect of both initiatives on the conduct and management of summary cases is fully explained in Chapter 9.

The Criminal Procedure Rules are revised from time to time. Any significant developments will be brought to you via the updating section of our Online Resource Centre.

online resource centre

1.11 PROFESSIONAL CONDUCT—AN INTRODUCTION

The rules of professional conduct are an important pervasive area of legal practice that governs the solicitors' profession. A new regulatory framework governing legal practice in England and Wales came into force in October 2011. The 2011 Code of Conduct moves away from the detailed and prescriptive rule-based approach adopted by the previous Code (published in 2007) to a more flexible, proportionate, 'outcomes-focused' regulatory framework.

All solicitors, legal executives and paralegals are required to uphold the spirit and letter of the 2011 Code.

A copy of the 2011 Code can be accessed at: http://www.sra.org.uk/handbook/. What follows is an early interpretation of the obligations imposed on practitioners by the 2011 Code when acting for a client in a criminal case. A failure to abide by the Solicitors Regulation Authority (SRA) Code of Conduct may result in disciplinary proceedings being brought against the individual concerned as well as the firm or organisation they work for. If a solicitor is found to have broken the Code he or she can be disciplined or even struck off the Roll.

The new regulatory framework published in the SRA Handbook identifies ten mandatory, all-pervasive *Principles*. The *Principles*, which are listed below, define the fundamental ethical and professional standards that are expected of all firms when providing legal services and should be used by firms as a starting point when faced with an ethical dilemma. The SRA *Principles* are:

You must:

'1. Uphold the rule of law and the proper administration of justice;
2. Act with integrity;
3. Not allow your independence to be compromised;
4. Act in the best interests of each client;
5. Provide a proper standard of service to your clients;
6. Behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. Comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
8. Run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. Run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity;
10. Protect client money and assets.'

The 2011 Code of Conduct is divided into five sections. Each section in turn contains chapters dealing with particular regulatory matters. For example, in the first section of the Code (entitled 'You and your client') there are chapters on 'Conflicts of interest', 'Confidentiality and Disclosure' and 'Your Client and the Court'. Each chapter explains how the *Principles* apply in a particular context through mandatory and non-mandatory provisions. Each chapter identifies mandatory 'Outcomes' which individuals and firms are expected to achieve in order to comply with the relevant *Principles*. The 'Outcomes' provide a non-exhaustive list of the application of the *Principles*. They are supplemented by (non-mandatory) 'Indicative Behaviours' and 'Notes'. The Indicative Behaviours specify, but do not constitute, an exhaustive list of the kind of behaviour which may establish compliance with, or contravention of, the *Principles*.

1.11.1 THE 2011 CODE AND ITS APPLICATION TO CRIMINAL LITIGATION

Criminal cases are conducted in an adversarial system of enquiry where the aim of each side is to win. *Principle 4* requires a defence solicitor to act in the best interests of her client. In an effort to win, the solicitor will need to be a partisan advocate for and on behalf of her client. However, as an officer of the court, a solicitor also serves the wider public interest in upholding the highest standards in relation to the administration of justice (*Principle 1*). Serving the best interests of a client can sometimes bring a solicitor into conflict with

her duty to the proper administration of justice. Where it does so, Note 2 of the *Principles* states:

> 'Where two or more *Principles* come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.'

The purpose of this final section is to provide an overview of your professional conduct duties, with specific emphasis on criminal practice.

Professional conduct issues in relation to criminal clients are most likely to arise in the following contexts:

- duties to the client;
- duties to the court;
- confidentiality;
- conflict of interest;
- interviewing witnesses;
- specific duties on advocates.

Nearly all of these are covered in the first section of the 2011 Code under the heading: *You and Your Client*.

1.11.2 *CHAPTER 1*: CLIENT CARE

Note: (O) denotes an Outcome; (IB) denotes Indicative Behaviours

The Outcomes identified in *Chapter 1* of the Code include, amongst others:

O (1.1) you treat your clients fairly;

O (1.2) you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice;

O (1.3) when deciding whether to act, or terminate your instructions, you comply with the law and the Code;

O (1.4) you have the resources, skills and procedures to carry out your clients' instructions;

Indicative Behaviours include:

IB (1.1) agreeing an appropriate level of service with your client, for example the type and frequency of communications;

IB (1.2) explaining your responsibilities and those of the client;

IB (1.3) ensuring that the client is told, in writing, the name and status of the person(s) dealing with the matter and the name and status of the person responsible for its overall supervision;

IB (1.6) in taking instructions and during the course of the retainer, having proper regard to your client's mental capacity or other vulnerability, such as incapacity or duress;

IB (1.7) considering whether you should decline to act or cease to act because you cannot act in the client's best interests;

IB (1.9) refusing to act where your client proposes to make a gift of significant value to you or a member of your family, or a member of your firm or their family, unless the client takes independent legal advice;

IB (1.10) if you have to cease acting for a client, explaining to the client their possible options for pursuing their matter;

IB (1.14) clearly explaining your fees and if and when they are likely to change;

IB (1.15) warning about any other payments for which the client may be responsible;

IB (1.16) discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union;

IB (1.18) where you are acting for a publicly funded client, explaining how their publicly funded status affects the costs;

IB (1.19) providing the information in a clear and accessible form which is appropriate to the needs and circumstances of the client;

Acting in the following way(s) may tend to show that you have not achieved these Outcomes and therefore not complied with the *Principles:*

IB (1.28) acting for a client when there are reasonable grounds for believing that the instructions are affected by duress or undue influence without satisfying yourself that they represent the client's wishes.

Chapter 1 Outcomes apply to all aspects of legal practice and are certainly not unique to the criminal litigator. A number of the Indicative Behaviours outlined previously will be explained in the client care letter sent to the client upon acceptance of instructions to act. Of relevance to the criminal litigator is Outcome (1.4) which requires you to consider whether the nature or complexity of the case is beyond your experience and ability. As public funding is widely available for the conduct of criminal proceedings (see Chapter 9), you should discuss this funding option with your client. It falls within *Principle 4* acting in the best interests of your client. Similarly, it should be explained to a client charged with a criminal offence that if he is convicted, he could be made to pay some or all of the prosecution's costs. Whilst no client should be advised to plead guilty if the prosecution case against him is not strong, a defence solicitor (when purporting to act in the best interests of his client) ought to explain the advantages of a timely guilty plea in terms of sentence (see Chapter 21).

It is also important to be aware that when dealing with clients, staff, other lawyers and third parties, a solicitor must have regard to equality and diversity issues detailed in *Chapter 2* of the new Code.

1.11.3 *CHAPTER 3*: CONFLICTS OF INTEREST

All legal firms are required to have in place a system that enables conflicts of interests to be identified. *Principle 4*, which requires you to act in the best interests of your client, also requires you to observe your duty of confidentiality (see later) and your obligations with regard to conflict of interests. The two sometimes overlap.

Chapter 3 of the Code defines a conflict to include 'own interest conflict', which is a conflict between you and your client, and 'client conflict', which is a conflict arising between one or more current clients. An 'own interest conflict' could arise because of a financial interest, personal or employment relationship you may have or because you or a member of your firm or family have been appointed to public office. Outcome (3.4) provides that you must not act if there is an 'own interest conflict' or a significant risk of an 'own interest conflict'. Outcome (3.5) provides that you must not act if there is a 'client conflict' or a significant risk of a 'client conflict'. There are exceptions outlined in Outcomes (3.6) and (3.7) which include a situation where two or more clients have a substantially common interest. It is difficult to envisage a situation in a criminal litigation context where these exceptions would apply.

When considering instructions from more than one client, the solicitor needs to ask: is there a conflict of interest between them or might a conflict arise at some point in the future? A conflict of interest can commonly arise when the solicitor is called upon to represent two or more suspects at the police station who are being investigated for the same offence. A conflict may subsequently arise in a case where both clients plead not guilty but one of them later pleads guilty. The solicitor should be aware that even when two clients indicate that they will plead guilty, a conflict of interest could still arise when the solicitor comes to mitigate on their individual behalf.

Further very useful guidance on the practical application of the conflict rule is available in the Law Society Practice Note 'Conflicts of interests in criminal cases' which was published on 3 October 2013. The Practice Note can be accessed at: http://www.lawsociety.org.uk/support-services/advice/practice-notes/conflict-of-interests-criminal/.

The Practice Note suggests that a conflict of interest can arise where it is in the best interests of client A:

(a) to give evidence against client B;

(b) to make a statement incriminating client B;

(c) to implicate client B in a police interview;

(d) to provide prejudicial information regarding client B to an investigator;

(e) to cross-examine client B in such a manner as to call into question his or her credibility;

(f) to rely upon confidential information given by client B without his or her consent; or

(g) to adopt tactics in the course of the retainer which potentially or actually harm client B.

The Practice Note cautions that if these obligations actually come into conflict when acting for two or more clients, the lawyer will have to cease to act for one and often both.

The obligation as regards conflict can arise at a very early stage (i.e. at the police station). The Practice Note advises that in order to assess whether you can act for both clients it is important that you do not interview the clients together and that you get instructions which are as full as possible from the first client before any substantial contact with the second client. You should not allow the police to deter you from seeing the second client because they think there is a conflict—that decision must be yours.

Obvious indicators of a conflict would include clients having differing accounts of the important relevant circumstances of the alleged crime, or where one seems likely to change his or her plea. Less obvious indicators which may give rise to a significant risk of future conflict include situations where there is clear inequality between the co-defendants which might, for example, suggest that one client is acting under the influence of the other rather than on his or her own initiative. If you act for both, it may be difficult to raise and discuss these issues equally with them. By helping one, you might undermine the other. If you believe you are unable to do your best for one without prejudicing the other, you should only accept instructions from one. Should two or more clients decide to plead guilty, you need to consider at the outset whether you would be able to mitigate fully and freely on behalf of one client without harming the interests of the other. If one client is more criminally sophisticated than the other, it may be that the other client was led astray or pressurised into committing the crime and would want you to emphasise this in mitigation. If there is a significant risk of this happening you should not accept instructions from either.

Where a conflict has arisen and you must decide whether you can continue to act for one client but not another, the Practice Note advises that you need to consider whether in the changed circumstances your duty to disclose all relevant information to the retained client will place you in breach of your duty of confidentiality to the other client. In practice you must decide whether you hold confidential information about the former client which is now relevant to the retained client. If you have this information then you cannot act for either client.

From a public funding perspective it is cheaper for the same solicitor to represent two clients than having different firms represent each client. However, the Practice Note clearly states that you should resist such pressure from whatever source (court or police station) if it would be unprofessional for you to act or to continue to act for both clients. If asked by the court why you cannot act for both defendants, you must not give information which would breach your duty of confidentiality to your client(s). This will normally mean that you can say no more than that it would be unprofessional for you to continue to act.

1.11.4 *CHAPTER 4*: CONFIDENTIALITY AND DISCLOSURE

Chapter 4 of the Code states that protection of confidential information is a fundamental feature of your relationship with clients and that the duty continues after the end of the retainer and even after the death of the client. You therefore have a strict duty to keep your client's affairs confidential (O (4.1)), which of course will be particularly important to a client under suspicion of a criminal offence. This duty continues for all time unless the client agrees to waive confidentiality. There are exceptional situations when the duty of confidentiality can be overridden. These include requirements under the money-laundering reporting regulations and issues involving child protection and disclosure to the Legal Aid Agency in the case of a publicly funded client.

Communications between a solicitor and her client are additionally protected from disclosure even to the court by legal professional privilege. The privilege extends in criminal cases to communications passing between a solicitor and a third party, such as a barrister or expert witness, provided the communication was made in connection with actual or contemplated litigation. Legal professional privilege does not extend where a solicitor has been used in furtherance of a crime. In such a case the police can seize documents relevant to the investigation. The rules relating to legal professional privilege are considered further in Chapter 20.

Issues of confidentiality are likely to arise in criminal cases where professional embarrassment (see the solicitor's overriding duty to the court later) forces the solicitor to withdraw from a case. Solicitors cannot in these circumstances explain to a court why they are no longer acting.

The issue of confidentiality may also arise at the police station. When advising a suspect to remain silent, the legal adviser may be called upon to explain the reasons for this advice if s. 34 Criminal Justice and Public Order Act 1994 is invoked at trial. The legal adviser can only do this if the client consents to waive his legal professional privilege. The matter is considered further in Chapter 5.

You are under a duty when advising a client to make the client aware of all information material to the client's retainer (O (4.2)). The confidentiality and disclosure rule often overlaps with the conflict rule (see earlier, *Chapter 3* of the 2011 Code). A solicitor cannot continue to act for A and B where a conflict of interest arises between them. Can the solicitor continue to act for A but not B? The answer is yes, but only where the solicitor's duty of confidentiality to B is not put at risk. Outcome (4.3) provides that where your duty of confidentiality to one client conflicts with your duty of disclosure to another client, your duty of confidentiality takes precedence. You cannot therefore continue to act for A in these circumstances.

1.11.5 *CHAPTER 5*: YOUR CLIENT AND THE COURT

Principle 1 requires you to uphold the rule of law and the proper administration of justice. The Outcomes identified in *Chapter 5* of the Code are:

- O (5.1) you do not attempt to deceive or knowingly or recklessly mislead, the court;
- O (5.2) you are not complicit in another person deceiving or misleading the court;
- O (5.3) you comply with court orders which place obligations on you;
- O (5.4) you do not place yourself in contempt of court;
- O (5.5) where relevant, clients are informed of the circumstances in which your duties to the court outweigh your obligations to your client;
- O (5.6) you comply with your duties to the court;
- O (5.7) you ensure that evidence relating to sensitive issues is not misused;
- O (5.8) you do not make or offer to make payments to witnesses dependent upon their evidence or the outcome of the case.

The Outcomes apply to both litigation and advocacy, whilst some of the Indicative Behaviours outlined here may be relevant only when you are acting as an advocate.

Acting in the following way(s) may tend to show that you have achieved these Outcomes and therefore complied with the *Principles:*

IB (5.1) advising your clients to comply with court orders made against them, and advising them of the consequences of failing to comply;

IB (5.2) drawing the court's attention to relevant cases and statutory provisions, and any material procedural irregularity;

IB (5.3) ensuring child witness evidence is kept securely and not released to clients or third parties;

IB (5.4) immediately informing the court, with your client's consent, if during the course of proceedings you become aware that you have inadvertently misled the court, or ceasing to act if the client does not consent to you informing the court;

IB (5.5) refusing to continue acting for a client if you become aware they have committed perjury or misled the court, or attempted to mislead the court, in any material matter unless the client agrees to disclose the truth to the court;

IB (5.6) not appearing as an advocate, or acting in litigation, if it is clear that you, or anyone within your firm, will be called as a witness in the matter unless you are satisfied that this will not prejudice your independence as an advocate, or litigator, or the interests of your clients or the interests of justice.

Acting in the following way(s) may tend to show that you have not achieved these Outcomes and therefore not complied with the *Principles*:

IB (5.7) constructing facts supporting your client's case or drafting any documents relating to any proceedings containing:

- any contention which you do not consider to be properly arguable; or
- any allegation of fraud, unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud;

IB (5.8) suggesting that any person is guilty of a crime, fraud or misconduct unless such allegations:

- go to a matter in issue which is material to your own client's case, and
- appear to you to be supported by reasonable grounds;

IB (5.9) calling a witness whose evidence you know is untrue;

IB (5.10) attempting to influence a witness, when taking a statement from that witness, with regard to the contents of their statement;

IB (5.11) tampering with evidence or seeking to persuade a witness to change their evidence;

IB (5.12) when acting as an advocate, naming in open court any third party whose character would thereby be called into question, unless it is necessary for the proper conduct of the case;

IB (5.13) when acting as an advocate, calling into question the character of a witness you have cross-examined unless the witness has had the opportunity to answer the allegations during cross-examination.

Chapter 5 of the Code makes it abundantly clear that a solicitor must not attempt to deceive or knowingly or recklessly mislead the court (O (5.1)).

It is common for clients charged with criminal offences to lie or be economical with the truth. What should a solicitor do if she becomes aware that her client intends to lie to the police or to the court or has lied? What if the prosecution gives information to the court which the defence solicitor knows is incorrect?

A solicitor must not be complicit in another person deceiving or misleading the court (O (5.2)). This could arise where a solicitor is satisfied that her client is adopting false particulars (name or address or date of birth) with the intention of deceiving a court by

failing to disclose previous convictions to achieve a more favourable sentence or bail outcome. In such circumstances, the solicitor would need to explain to her client that she cannot allow such a course to be pursued and that unless her client is willing to correct the details or is willing to change his mind, the solicitor will have to withdraw from the case (IB (5.5)).

In accordance with *Principle 1* and *Chapter 5*, you should not:

(a) submit inaccurate information or allow another person to do so;

(b) indicate agreement with information that another person puts forward which you know to be false;

(c) call a witness whose evidence you know is untrue;

(d) attempt to influence a witness when taking a statement from that witness, with regard to the contents of their statement; or

(e) tamper with evidence or seek to persuade a witness to change their evidence.

IB (5.4) acknowledges that a solicitor may inadvertently mislead the court. If the solicitor becomes aware of this during the proceedings, the solicitor must, with the client's consent, immediately inform the court. If the client does not consent, the solicitor must cease to act. A solicitor may believe that the client is being untruthful. However, suspicion is not the same as knowledge. If a client was to admit to his solicitor, during ongoing proceedings, that he had misled the court or committed perjury, the solicitor must not act further unless the client agrees to disclose the truth (IB (5.4)).

Is a solicitor under a duty to correct an omission or mistake by the prosecution?

What if the prosecution gives information to the court which the solicitor knows is incorrect? For example, if on checking a client's list of previous convictions, the defence solicitor realises that it is incomplete by failing to show the client's most recent conviction. When the prosecutor hands in a copy of the defendant's previous convictions, is the solicitor under a duty to advise the court about the omission? The guidance to Rule 11 (Note 15) of the 2007 Code covered this dilemma. It provided that a solicitor acting for the defence is not under an obligation to correct information given to the court by the prosecution or any other party which the solicitor knows may allow the court to make an incorrect assumption provided the solicitor does not indicate agreement with that information. The position would of course be different if the defence solicitor was asked to confirm the list of previous convictions as being correct. Guidance Note 15 is not reproduced in the 2011 Code. The incorrect assumption made by the court may well assist the client; however, it could also be said that you would not be upholding the proper administration of justice (*Principle 1*) or acting with integrity (*Principle 2*). The sensible course to take would be to discuss the prosecution's omission with your client and gain his consent to correct the omission.

Where there has been a procedural irregularity in the case or a failure by the prosecution to draw the court's attention to relevant case law or to a statutory provision then to comply with *Principle 1*, you should bring it to the court's attention (IB (5.2)). Apart from this, there is no wider obligation upon the defence to disclose to the court or the prosecution facts or witnesses that may be of assistance to the other side. Such disclosure would not be acting in the best interests of your client (*Principle 4*) and would be a breach of confidentiality in any event (*Chapter 4* of the Code).

Duties on the prosecutor

The prosecutor has a duty to act as a minister of justice and must never attempt to secure a conviction at all costs. The role of the CPS is considered in Chapter 8. The chapter explains in detail the onerous nature of the prosecutor's duty to make pre-trial disclosure of relevant

material that undermines the case for the prosecution or assists the defence which is fundamental to a defendant's right to a fair trial under Article 6.

What action should a solicitor take where her client changes his version of events?

A commonly encountered professional conduct issue occurs where a client keeps changing his version of the facts in the case. There is no general duty upon a solicitor to enquire in every case whether the client is telling the truth. If a client makes inconsistent statements, this is not a ground for refusing to act. However, the solicitor would need to be wary and must cease to act where it is clear that the client is attempting to put forward false evidence as this will conflict with the solicitor's duty as an officer of the court (O (5.1) and (5.2) and IB (5.5)). A solicitor should never suggest a defence to the client to fit the facts, nor must the solicitor fabricate a defence. This extends to taking witness statements (IB (5.10)). A solicitor must never put words into a witness's mouth (IB (5.10)).

What is the position where a client admits guilt but wants to plead not guilty?

This situation can arise at the police station as well as at court. Can the solicitor continue to act? An earlier version of the Code contained the following statement:

> 'A solicitor who appears in court for the defence in a criminal case is under a duty to say on behalf of the client what the client should properly say for himself or herself if the client possessed the requisite skill and knowledge. The solicitor has a concurrent duty to ensure that the prosecution discharges the onus placed upon it to prove the guilt of the accused.'

The statement was not reproduced in the 2007 Code and is not reproduced in the 2011 Code. In answer to the question posed above, a solicitor can continue to represent the client on a not guilty plea, as it is the solicitor's professional duty to require the prosecution to prove its case beyond reasonable doubt.

However, the solicitor must not do anything to positively assert his client's innocence. If at the close of the prosecution's case, the client gave evidence on oath or called witnesses to testify about the client's innocence (i.e. which expressly or by implication suggests someone other than the client committed the crime), the solicitor would be knowingly misleading the court. If the client persisted in this course of action, the solicitor would be required to withdraw from the case (O (5.1)) and IB (5. 5)).

In those cases where a solicitor ceases to act, the solicitor's duty of confidentiality owed to the client (*Chapter 4* of the Code) precludes the solicitor from informing the court of the reason for the decision to withdraw.

What if a client has a defence but wishes to plead guilty?

A client may not wish to stand trial even though he has a defence to the allegation. It is the duty of the defence solicitor to point out such a defence. If the client insists on pleading guilty because it is more convenient to do so, the solicitor can continue to act for the client but the client should be warned when the solicitor is delivering a plea in mitigation on his behalf, that the solicitor will not be able to rely on any facts that would constitute a defence. A solicitor should keep a file note of advice given and ask the client to sign a written statement confirming his wishes notwithstanding the advice given.

1.11.6 INTERVIEWING AN OPPONENT'S WITNESS

You will frequently encounter the phrase 'there is no property in a witness'. In a criminal case, this means that the defence solicitor may interview a prosecution witness and the prosecution may interview a defence witness. This is not something which a defence solicitor would routinely do because if the witness provides a statement which is inconsistent with the statement originally given to the police, there is a danger that the defence solicitor could be accused of attempting to influence the witness or persuading the witness to

change his evidence which would be contrary to *Principle 1* and *Chapter 5* (IB (5.10) and (5.11)). The 2007 Code provided guidance on how to deal with this situation: 'To avoid such allegations it would be wise, when seeking to interview a witness for the other side, to offer to interview them in the presence of the other side's representative.' The guidance remains valid in our view. Consequently, if a defence solicitor takes the unusual step of wishing to interview a prosecution witness, it is good professional practice to contact the prosecution, in order to ascertain whether a member of the prosecution team wishes to be present at the interview.

1.11.7 SPECIFIC PROFESSIONAL CONDUCT OBLIGATIONS ON ADVOCATES

There are further Indicative Behaviours which apply specifically to the solicitor acting as an advocate. They are detailed in IB (5.6), (5.7), (5.8), (5.12) and (5.13). They cover the situation where an advocate or a member of the advocate's firm could be called as a witness at trial. You should not appear as an advocate if it is clear that you, or anyone within your firm, will be called as a witness in the matter unless you are satisfied that this will not prejudice your independence as an advocate, or litigator, or the interests of your clients or the interests of justice (IB (5.6)). They also govern the way in which an advocate should treat a witness whilst giving evidence.

Outcome (5.8) states quite simply that a solicitor must not make, or offer to make, payments to a witness dependent upon the outcome of the case or the nature of the evidence the witness should give. It is, however, permissible to pay reasonable witness expenses.

Can an advocate refuse to act on the ground that the nature of the case is objectionable to her? Under the 2007 Code, r. 11.04 provided that a solicitor could not refuse to act as an advocate for any person on the grounds that the nature of the case was objectionable to them or to any section of the public or that the conduct, opinions or beliefs of the prospective client were unacceptable to the solicitor or to any section of the public. The 2011 Code makes no reference to this situation.

1.11.8 PROFESSIONAL CONDUCT AND THE CRIMINAL PROCEDURE RULES

A defence solicitor must always act in the best interests of her client (*Principle 4*). In a case where a solicitor is instructed by the client to plead not guilty, it is the duty of the defence solicitor to put the prosecution to proof of its case. In an attempt to frustrate the prosecution, the defence solicitor may feel that the client's best interests are served by playing a tactical game, perhaps by withholding certain information from the prosecution and the court. Such a tactical game could frustrate the obligation of the court to actively manage cases in accordance with Crim PR, Parts 1 and 3 (see para. 1.10). The effect of the case management powers given to the court under Crim PR, Part 3 and initiatives like CJ-SSS and SDJ (see Chapter 9) have significantly increased the pressures on all those involved in the conduct of criminal cases as they are now much more accountable to the court for a failure to actively progress a case. In a situation where a solicitor perceives a conflict between his duty to act in the best interests of the client and the duty to promote the administration of justice by actively assisting the court's management of cases (*Principle 1*), which takes precedence?

In *R v Gleeson* [2004] 1 Cr App R 29, defence advocates were reminded that:

> 'A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.'

In response to the challenges posed by Crim PR, Part 3, the Law Society has issued an important Practice Note (October 2013), entitled 'Criminal Procedure Rules 2013'. It can

be accessed at: http://www.lawsociety.org.uk/advice/practice-notes/criminal-procedure-rules-2013/.

The Practice Note makes it clear that defence solicitors must assist a court to conduct cases justly and expeditiously and be aware of the consequences of failing to do so. However, a court cannot, in the exercise of its case management powers, compel a defence solicitor to breach a professional conduct obligation owed to a client. Thus, for example, a court cannot compel a defence solicitor to represent two clients where the solicitor concludes that there is a significant risk of conflict between them, even though single representation might be more expeditious. Neither can a court require the defence solicitor to disclose privileged communications with her client (*R (on the application of Kelly) v Warley Magistrates Court (the Law Society intervening)* [2008] 1 Cr App R 14).

The Practice Note echoes the 2011 Code. Outcome (5.3) makes it clear that you must comply with court orders. Outcome (5.4) states you must not place yourself in contempt of court. Outcome (5.6) states you must comply with your duties to the court. The new Code therefore takes account of the overriding objective under the Criminal Procedure Rules. Outcome (5.5) specifically provides that, where relevant, clients must be informed of the circumstances in which your duties to the court outweigh your obligations to your client. It is submitted that Outcome (5.5) adopts the position under the Practice Note outlined previously.

1.11.9 YOUR CLIENT AND INTRODUCTIONS TO THIRD PARTIES

It is not unusual for a criminal practitioner to refer a client to a third party such as another lawyer or to suggest that the client ought to obtain an expert's report. Outcome (6.1) provides that whenever you recommend that a client uses a particular person or business, your recommendation is in the best interests of the client (*Principle 4*) and that it does not compromise your independence (*Principle 3*). Outcome (6.2) requires that clients are fully informed of any financial or other interest which you have in referring the client to another person or business.

KEY POINT SUMMARY

- Understand that criminal offences are classified as either summary-only, either-way or indictable-only and that the classification enables you to chart the procedural course of the case.
- Always research the classifications of the offence(s) you are dealing with: never guess.
- Know the jurisdiction of the criminal courts.
- Arguments based on Article 6 ECHR 1950 can arise in many situations in criminal procedure and evidence.
- The right to a fair trial in Article 6 comprises many rights, some of which are specifically defined in Article 6 while others are implied.
- Domestic courts must as far as possible interpret domestic law in accordance with Convention rights.
- In determining rights under the Convention, regard must be had to the jurisprudence of the ECtHR.
- Human rights issues and professional conduct are pervasive—they can arise at any time.
- Have a thorough working knowledge of the rules of professional conduct and know the typical instances where professional conduct dilemmas are likely to arise in the context of criminal litigation.

SELF-TEST QUESTIONS

1. We would like you to begin to familiarise yourself with our fictional clients, Lenny Wise, Roger Martin and William Hardy and the nature of the accusations that have been made against each of them. Documentation pertaining to the first case study can be found in Appendix 2 of this manual.

   The complete version of the documentation supporting *R v Lenny Wise* and the entire documentation supporting *R v Roger Martin* and *R v William Hardy* can be accessed from the student resource section of the Online Resource Centre. Analysis of all self-test questions can be found on the Online Resource Centre.

   (a) Case study 1: *R v Lenny Wise*

   Consider Document 6 (Lenny Wise's (proof of evidence) and Documents 26(A)–(J) which comprise the nature of the prosecution's evidence against Lenny. What offence is Lenny charged with? What is the classification of this offence?

   (b) Case study 2: *R v Roger Martin*

   Consider Document 1 (Roger Martin's initial statement given to his solicitor) and Documents 9(A)–(F) which comprise the nature of the prosecution's evidence against Roger. What offences is Roger Martin charged with? What is the classification of the offences he faces?

   (c) Case study 3: *R v William Hardy*

   Consider Document 1 (William Hardy's initial statement given to his solicitor) and Documents 10(A)–(E) which comprise the nature of the prosecution's evidence against William. What offence is William Hardy charged with? What is the classification of the offence William is charged with?

2. How are the following offences classified according to place of trial? (You may have to do some legal research to discover the answer to some of the questions. A good place to start is *Blackstone's Criminal Practice*.)

   (a) Criminal damage where the value of the damaged property is less than £5,000, s. 1 Criminal Damage Act 1971.
   (b) Criminal damage where the value of the damaged property is more than £5,000.
   (c) Possession of a controlled drug, s. 5 Misuse of Drugs Act 1971.
   (d) Careless driving, s. 3 Road Traffic Act 1988.
   (e) Burglary, contrary to s. 9 Theft Act 1986.
   (f) Affray, contrary to s. 3 Public Order Act 1986.

3. Explain what is meant by a summary-only offence.
4. Explain what is meant by an indictable-only offence.
5. In what circumstances would an allocation hearing be held?
6. Identify the overriding objective of the Criminal Procedure Rules.
7. Explain how Convention rights are incorporated into domestic law and how a defence solicitor might make use of such Convention rights.
8. What are the potential consequences of failing to spot and comply with an aspect of the Solicitors' Code of Conduct?

FIGURE 1.1 SUMMARY-ONLY OFFENCE

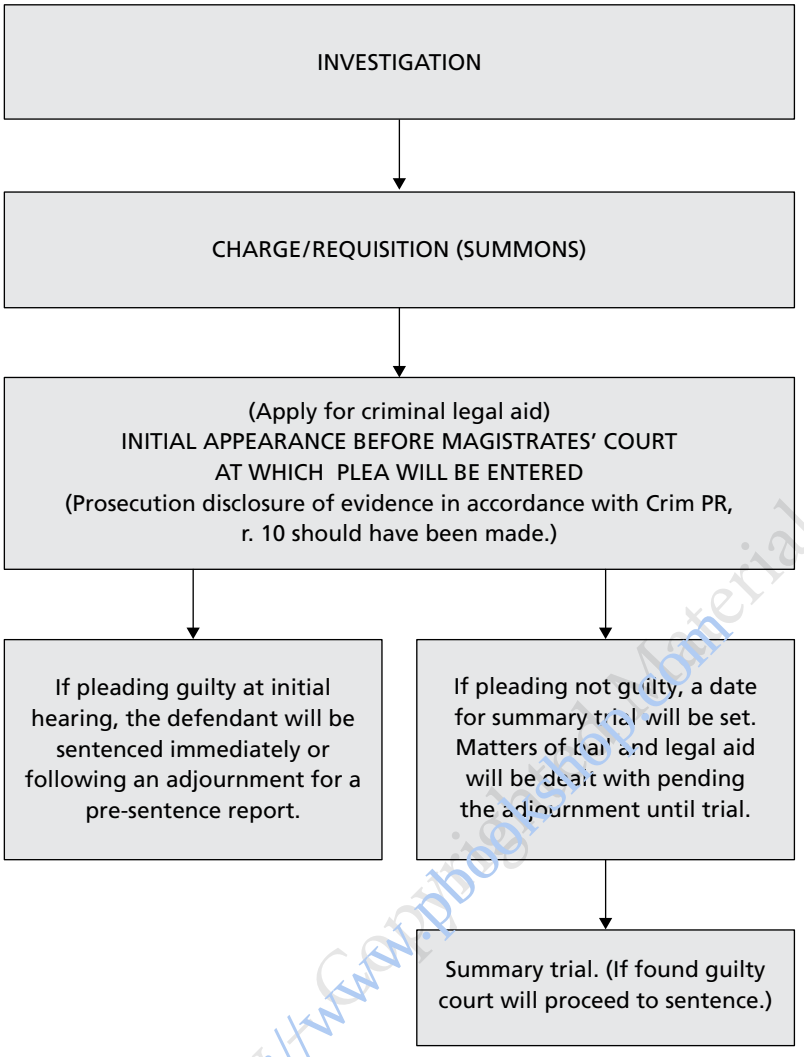

FIGURE 1.2 EITHER-WAY OFFENCE

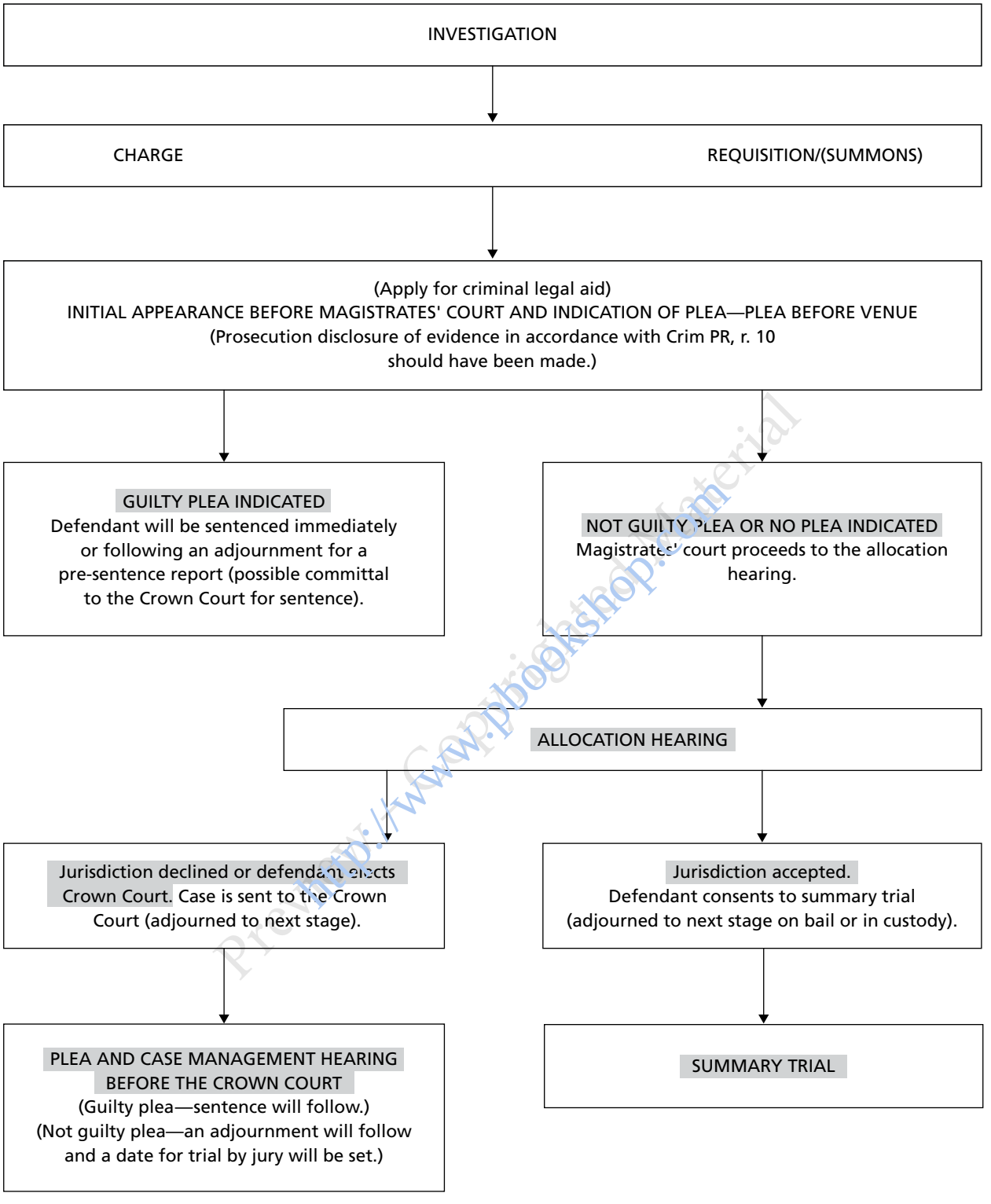

FIGURE 1.3 INDICTABLE-ONLY OFFENCE

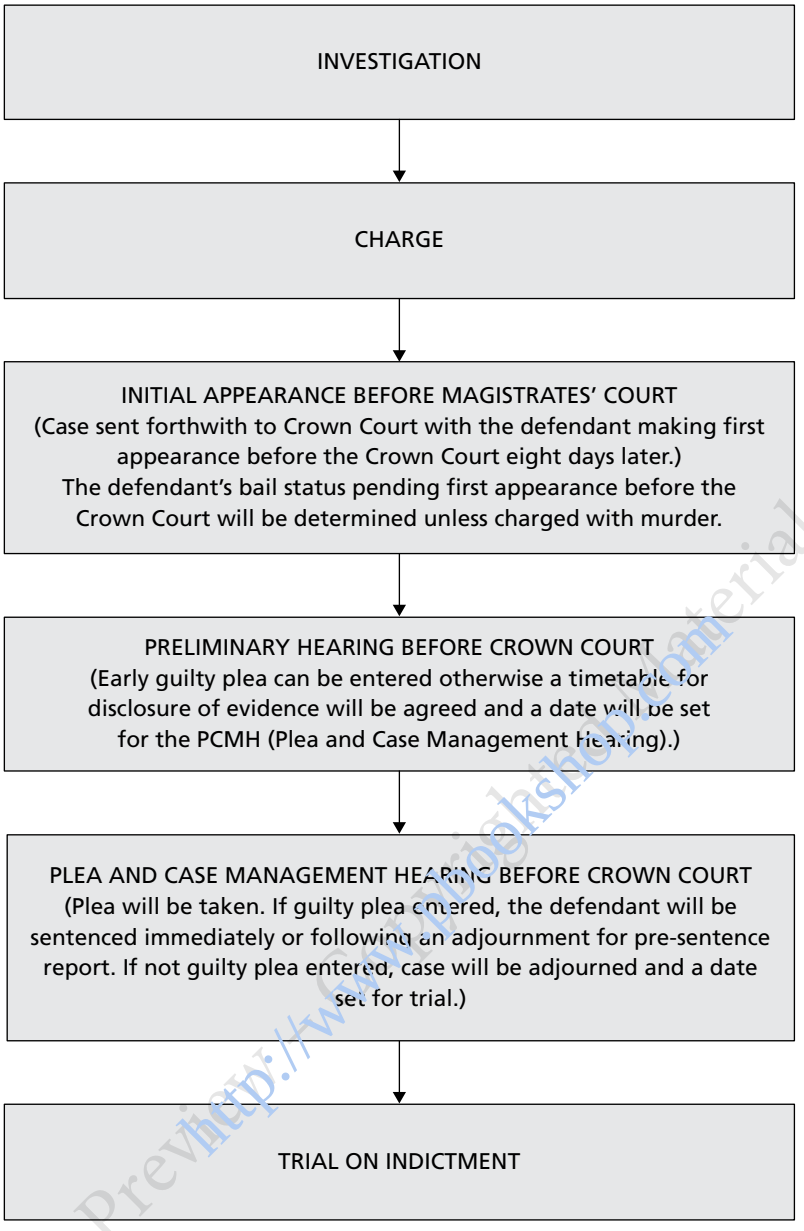

FIGURE 1.4 A FLOWCHART OF CRIMINAL PROCEDURE IN ENGLAND AND WALES