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Law

Second edition

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The Cambridge International AS & A Level Law series consists of a Student's Book and Boost eBook.

Cambridge International AS & A Level Law	9781398312098
Cambridge International AS & A Level Law Boost eBook	9781398318151

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ISBN: 978 1 3983 1209 8

© Jayne Fry, Nick Price, Sue Teal, Tim Wilshire and Richard Wortley 2021

First published in 2017

This second edition published in 2021 by

Hodder Education,

An Hachette UK Company

Carmelite House

50 Victoria Embankment

London EC4Y 0DZ

www.hoddereducation.co.uk

Impression number 10 9 8 7 6 5 4 3 2 1

Year 2025 2024 2023 2022 2021

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Illustrations by Aptara Inc.

Typeset by Aptara Inc.

Printed in Slovenia

A catalogue record for this title is available from the British Library.



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Introduction

This book follows the Cambridge AS & A Level Law syllabus (9084) from 2023. The text does not assume any previous knowledge, and the law is as we believe it to be in June 2020.

Structure of this book

The Cambridge International AS & A Level Law syllabus is presented in sections. The contents of this book follow the syllabus sequence, with each section the subject of a separate topic:

- 1 English legal system
- 2 Criminal law
- 3 Law of contract
- 4 Law of tort.

AS students are only required to study sections 1 and 2; students taking the full A Level need to study all four sections.

Given the subject matter of some of the cases, teachers are advised to use their discretion when discussing with students.

Features of this book

A number of features appear after this introduction, to help students navigate through the book:

- » A **table of cases** lists all the cases covered in this book and states where they can be found.
- » A **table of Acts of Parliament** lists all the Acts covered in this book and states where they can be found.
- » A **study skills** feature provides tips for preparing for your examinations.

Throughout the chapters, you will encounter a variety of features to support your learning journey:

- » **Introductions** provide an overview of each chapter.

Introduction

Law affects many aspects of our lives, yet most people have little understanding of the legal system or their rights. For many, their main awareness comes from media headlines – newspapers, television, radio, internet reports and social-media posts. When the word ‘law’ is mentioned, many people think only of criminal law and the personnel and courts that deal with this type of case. In reality, law covers an enormous range of situations in everyday life, and the legal system in England and Wales has a variety of courts, personnel and methods for dealing with different types of cases.

- » **Activities** test knowledge and understanding.

ACTIVITY

Review the cases on blackmail that you have studied in this chapter.

- 1 List examples of menaces and unwarranted demands from those cases.
- 2 Do you know of any recent blackmail cases? What were the menaces and unwarranted demands?

- » **Key facts** provide concise overviews of areas of law.

Key facts	
Type of justice	Description
Procedural justice	Making and implementing decisions according to fair processes
Corrective justice	Sometimes known as restorative justice; when the law restores the imbalance that has occurred between two individuals, or between an individual and the state
Substantive justice	Where the content of the law itself must be just

- » **Case examples** go more deeply into cases relevant to areas of law.

CASE EXAMPLE

R v Inglis (2010)

The defendant killed her son because she believed she was acting in his best interests and did not want him to suffer any further. She was found guilty of murder. The trial judge imposed a nine-year tariff period, reduced on appeal to five years.

Lord Judge said:

‘Mercy killing is murder. Until Parliament decides otherwise, the law recognises a distinction between the withdrawal of treatment supporting life, which may be lawful, and the active termination of life, which is unlawful.’

- » **Comment boxes** provide further information and opinion on areas of law.

COMMENT

Evaluation of the law relating to blackmail

A number of criticisms emerge from the law on blackmail. There is no requirement to show that a demand had been made expressly. If a demand is implied, this may be enough to prove blackmail, although such proof could be difficult.

- » **Internet research boxes** provide opportunities to delve further into topics and to check for the latest information. Please note third-party websites and resources referred to in this publication have not been endorsed by Cambridge Assessment International Education.

Internet research

Look up the Constitutional Reform Act 2005 on www.legislation.gov.uk

What other constitutional changes were introduced by this Act?

- » **Exam-style questions** are included for practice. Please note that there are both exam-style questions written by the authors as well as past paper questions. Those from past exam papers are clearly identified with a reference to the paper from which they have been taken.

EXAM-STYLE QUESTION

Ahad has no money but wants to buy a present for Dewi. He knows his mother's credit card details, as he has been permitted to make a few purchases online in the past. Without his mother's consent, Ahad uses the details online to try to buy a present for Dewi. The transaction is declined because the card is already over its credit limit.

Discuss the liability of Ahad for offences under the Fraud Act 2006.

- » **Test yourself boxes** test how well you can recall information provided in the book.

TEST YOURSELF

- 1 Describe the difference between an adversarial and an inquisitorial legal system.
- 2 Assess the relationship between law and morals.
- 3 Assess whether justice is always achieved through use of criminal law.

- » **Stretch and challenge boxes** offer a chance to consider key issues in more depth and extend your knowledge and understanding of the law.

STRETCH AND CHALLENGE

Consider whether it is possible to balance the interests of both parties in a nuisance claim.

- » **Target skills boxes** will help to hone the skills you need in your study of Law, in line with the syllabus.

TARGET SKILLS

- 1 Identify the three factors in *Caparo Industries plc v Dickman* (1990) that are used to decide if a duty of care exists.
- 2 Assess whether policy considerations provide justice for both parties.
- 3 Consider whether the police should have blanket immunity.

Key concepts

An important part of the syllabus is the use of key concepts. These are essential ideas, theories, principles or mental tools that help learners develop a deep understanding of their subject and make links between different topics. The following icons appear where key concepts relate to activities.

- 1 **Rights, duties and responsibilities, and freedoms**
This is about how the law safeguards rights and freedoms, and imposes obligations on how citizens behave.
- 2 **Liability**
This concerns legal responsibility for actions or omissions.
- 3 **Justice, fairness and morality**
This is the broad notion of the purpose of law to bring about a state of fairness. This includes how and why laws are enacted and enforced, and how far the civil and criminal law achieve justice through the use of remedies and sentences. This also relates to how morality and the law interlink, and whether changing morality within society is reflected in the law.
- 4 **Power and its limits**
This is about who has power within society and how this power is regulated. It is also related to power within the legal system.
- 5 **Effectiveness and certainty**
This is about the aims of law and whether systems and provisions can meet these aims. It also relates to how citizens are aware of their rights and responsibilities to each other and to the state, and what distinguishes certainty in law.

The key concepts and explanations above are reproduced from the syllabus, which can be found on the Cambridge International website.

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Study skills

What will you gain from studying AS & A Level Law?

This course will help you become aware of the importance of the law in the English legal system in real situations and how it is used and developed.

You will gain an understanding and appreciation of some core concepts: rights, duties and responsibilities, and freedoms; liability; justice, fairness and morality; power and its limits; effectiveness and certainty – all these will be explored in this book.

The aim of this course is to help you learn to use relevant knowledge and understanding as well as gaining skills of analysis, application and evaluation, communicating them through problem-solving of case-study questions and written answers. You can read more about these aims and the assessment objectives in the syllabus, and they will be explored in the different sections of this book.

Through studying A Level Law, you are encouraged to be someone who is confident, responsible, reflective, innovative and engaged. There is more detail about these qualities in the syllabus.

Start your revision early: ten tips

- 1 Believe that the road to success starts right at the beginning of your course.
- 2 Decide what you want to achieve and have a plan to get there.
- 3 Be organised; work out how you are going to store your notes and completed work (file dividers help with this).
- 4 Check your organisation weekly, so that you keep on top of your work.
- 5 If you have a plan that shows you the order in which topics are to be studied, use this to organise your notes.
- 6 Do whatever work you are set as well as you can. Get feedback on that work and make use of it in the next piece of work you do.
- 7 Revise for any tests. Building a base of knowledge as you go along takes the pressure off exam revision.
- 8 Prepare calmly; make revision notes or mind maps as you complete each topic. You can improve and refine these when you come to exam revision, but you will already have something to work from.
- 9 Pay as much attention to mastering skills as you do to learning information. What you know is important in an exam, but showing that knowledge in the appropriate way is just as crucial.

- 10 Don't leave a topic with unanswered questions. If you want to know more or haven't understood something, ask your teacher.

Study skills: ten tips

- 1 Be methodical; make a list of topics to be revised, like the one in Figure 1, and tick the boxes as you go.
 - **Revised** means you have made revision notes or a mind map, whatever system works for you.
 - **Factual test** means you have checked what you know. It's a good idea to revise a topic in the morning and check what you can remember later that day or the next day.
 - **Peer test** means having a revision buddy. It might be a friend in your class but it can be anyone. They ask you some questions about what you have revised and you explain your answers to them. This helps you to clarify your thinking and articulate your thoughts.
 - **Past-paper question test** means writing an answer to a previous exam question in timed exam-style conditions and getting feedback on what you have written.
 - **Consolidate** means reflecting on the previous steps and then refining further the knowledge you need and the skills you have to demonstrate.

▼ Figure 1 Make a list of topics to revise

Topic	Revised	Factual test	Peer test	Past paper question test	Consolidation
Police powers					
Bail					
Juries					

- 2 Learn Acts of Parliament. Names and dates are crucial; section numbers and subsection numbers might be necessary too, depending on the area of law. Aim to be precise and learn key definitions. For those that are very long, learn a form of words that makes clear what the law means.
- 3 Learn cases. This can be difficult as there are a lot, but you don't need to learn too many. A long list is a great feat of memory, but focusing on having good familiarity with some cases is more useful. Be familiar with a smaller number of cases, but ensure you understand the importance of each case and how to use it to make points in essays or to apply the law in scenario-based problem questions. Factual information

should be concise, just enough to show you are using the correct case and you know its key features. You might like to make typed notes or have handwritten index cards – whichever system works best for you for each unit or topic area. Figure 2 shows a useful layout for recording the information you need.

▼ **Figure 2** Key information when learning cases

Name and date of case, the court in which it was heard
 Key facts – the essence of the story
 Legal question – what is the issue the court had to decide?
 Decision – what did the court say?
 Importance of the case – why did you need to learn about the case?

- 4 Analysis and evaluation are essential skills you need to use. Rather than offer a list of points when answering questions, think about how you can use these skills to develop and extend on points you are making for greater impact. Work on expressing points clearly in your own words so you don't have to learn your evaluation verbatim – Figure 3 gives you an example.

▼ **Figure 3** How to make and develop an evaluative point

Point: Twelve jurors in a criminal trial represent the rest of society, which makes their role very important.

Developed point: As they have listened to all the evidence, they decide a case on behalf of the rest of us, and so it is important that their decisions are not easily overturned, so it is very unusual to appeal on a jury verdict.

Well-developed point: This gives credibility to the criminal justice system, as well as making jury service something people feel is important, and delivering a verdict the defendant knows is justice by his or her peers.

OR

Counter-point: The lack of research into how juries make their decisions can lead critics to say they cannot be trusted, and some cases show they can make perverse decisions.

- 5 Be active in your revision; just reading a book or your notes is less effective than doing something that will help to keep you focused.
- 6 Be honest and realistic in your revision. Know what works well for you and make a plan you can stick to. Think about times of day when you work best and build your plan around them. If you know you can't

sit still for more than an hour, don't plan to sit at your desk for a three-hour stretch. Build in breaks but stick to them. Have time to do things you enjoy to give your brain a break.

- 7 Use colours, images and even sounds in your revision – anything that triggers your memory in an exam situation.
- 8 Practise working to time limits. Look at the information on exam papers to be sure you have this right.
- 9 Use sample exam questions, mark schemes and other information provided by Cambridge International to build strong answers: <https://www.cambridgeinternational.org/programmes-and-qualifications/cambridge-international-as-and-a-level-law-9084/>.
- 10 Look after yourself. You want to be at your best when you sit your exams, so eat and sleep well, get enough exercise, and don't give up all the things that are important to you. If your life is very busy, you might need to make some changes, but take care not to resent your revision – that will make it hard to do your best.

Cambridge International AS & A Level Law

Paper 1 English Legal System

- » 1 hour 30 minutes paper
- » 75 marks
- » Section A: answer five compulsory questions (four short-answer questions and one extended-answer question)
- » Section B: answer two essay questions from a choice of three; there are two parts to each question

Paper 2 Criminal Law

- » 1 hour 30 minutes paper
- » 60 marks
- » Section A: answer one compulsory scenario-based problem question using source material; there are three parts to the question
- » Section B: answer one question from a choice of two; there are two parts to the question – one short-answer question and one essay

Paper 3 Contract

- » 1 hour 30 minutes paper
- » 75 marks
- » Section A: answer one scenario-based problem question from a choice of two
- » Section B: answer two essay questions from a choice of three

Paper 4 Tort

- » 1 hour 30 minutes paper
- » 75 marks
- » Section A: answer one scenario-based problem question from a choice of two
- » Section B: answer two essay questions from a choice of three

The information in this section is taken from the Cambridge International syllabus. You should always refer to the appropriate syllabus document for the year of your examination to confirm the details and for more information. The syllabus document is available on the Cambridge International website at www.cambridgeinternational.org

Exam preparation

- » Practise writing questions to the appropriate time limit, so you know how much you can do and what the time limit feels like.
- » Use past paper questions to see the sort of things that have been asked in the past, but don't assume that things that have been asked before will come up again! Remember that the syllabus is new, so the questions will be new too.
- » Unpack questions so you know what to do: use a highlighter to indicate key words or important pieces of information in a case study.
- » Look at the mark allocations for each paper to help you focus on how you use your time in your exam and the extent to which you need to develop your answers.
- » Read reports on past papers as they become available as the answers they detail can help you understand what you need to do to write strong answers.
- » Understand the command words in the question: these will help you select key information, use it appropriately and approach the task you have been set in the best way to help you write strong answers. See Figure 4 for some examples (this is not an exhaustive list).

Make the best of what you have in an exam

- » Read all the questions carefully before you start, checking which are compulsory and which are optional.
- » Decide which optional questions are best for you.
- » Make sure you answer the correct number of questions.
- » Write down a few key points for each question before you start writing any answers, so that you have some triggers for each question as you come back to it.
- » Highlight key terms and commands about what to do in the question.
- » Plan your answer: this will keep you focused and help you avoid having to add extra bits in later.
- » Demonstrate a wide, accurate and detailed base of knowledge but be relevant in the context of the question, and focus on the law rather than lengthy accounts of facts.
- » Practise linking cases and statute law to legal principles and analysis of the law.
- » Have a range of evaluative points at your disposal, so that you can select the most appropriate ones, based on the question.
- » Answer the question you have been asked: don't rely on pre-planned answers to previous questions.
- » Use your time wisely; resist the temptation to spend too long on any one question.
- » Answer questions in the order that suits you best: it might be worth considering dealing with case-study or application questions first while you are mentally fresh and have time to think.
- » Take care with your presentation. Make your script easy to navigate with clear and accurate numbering of questions, and use your best handwriting so that it is easy to read everything you have written.
- » Try to avoid lots of crossing out and arrows to different parts of your script. If you do need to do this, perhaps because you have missed something out, ensure you give clear directions.

▼ **Figure 4** Command words used for Cambridge International AS & A Level Law
This list can be found at <https://www.cambridgeinternational.org/Images/595453-2023-2025-syllabus.pdf>

ADVISE	Write down a suggested course of action in a given situation
ANALYSE	Examine in detail to show meaning, identify elements and the relationship between them
ASSESS	Make an informed judgement
COMPARE	Identify/comment on similarities and/or differences
CONTRAST	Identify/comment on differences
DEFINE	Give precise meaning
DESCRIBE	State the points of a topic / give characteristics and main features
DISCUSS	Write about issue(s) or topic(s) in depth in a structured way
EVALUATE	Judge or calculate the quality, importance, amount, or value of something
EXAMINE	Investigate closely, in detail
EXPLAIN	Set out purposes or reasons / make the relationships between things evident / provide why and/or how and support with relevant evidence
IDENTIFY	Name/select/recognise
JUSTIFY	Support a case with evidence/argument
STATE	Express in clear terms

Phrases such as ‘How far do you agree...?’ and ‘To what extent...?’ may also be seen in the assessment for this syllabus.

Other things to help you

- » Learning about the law requires effort and the mastery of good skills, but it is also about gaining an understanding of the English legal system and wider societal values and issues.
- » Do as much reading, writing and listening in English as you can to widen your vocabulary and powers of expression, as well as your understanding.
- » Use the BBC News website as a springboard for all kinds of information about the UK, legal issues and wider matters that can impact on the law: www.bbc.co.uk/news.
- » Read the blogs of people writing about the law; for example, search for articles by the BBC legal affairs correspondent.
- » Search for programmes such as *Law in Action* to find out about wider topical legal issues.
- » Read an English newspaper online: *The Guardian* and *The Independent* have plenty of free content you can access. Look at news stories but investigate other areas such as arts, culture, sport – anything that takes your interest to broaden your understanding.
- » Use YouTube. Search for law-related videos, but make sure you select ones that deal with the English legal system. Be selective in the quality of what you watch: look at videos posted by reputable universities, some of which have their own YouTube channels, or members of the legal profession, for example.
- » Use the Cambridge International website to read in more detail about subject-specific information such as the syllabus.
- » Follow law-related issues on social media.

1

The English legal system and its context

Introduction

Law affects many aspects of our lives, yet most people have little understanding of the legal system or their rights. For many, their main awareness comes from media headlines – newspapers, television, radio, internet reports and social-media posts. When the word ‘law’ is mentioned, many people think only of criminal law and the personnel

and courts that deal with this type of case. In reality, law covers an enormous range of situations in everyday life, and the legal system in England and Wales has a variety of courts, personnel and methods for dealing with different types of cases. This chapter links to the key concept of power and its limits.

1.1 Legal systems around the world**1.1.1 Codified civil legal system**

A codified legal system is where the laws of a country are written down in a code or codes. The code contains all the law in an area, for example tax law. They are arranged to avoid any inconsistency, and contain only legislative enactments. Judges have to strictly apply the code to cases that appear before them – they have little or no discretion in making their decision and there is little or no precedent in the law. The code is known to every citizen or lawyer in the country, so a judge’s final decision can be predicted at an early stage.

Many European countries have codified legal systems, including France, Germany, Holland, Spain and Portugal, and they are also found in former colonies of these countries, for example in Central and Southern America. It is more difficult to change the law in a code, as it often requires a large majority of the legislature (for example 75 per cent) to agree to a change. As a result, the law is generally more prescriptive than in a common law system, which leaves the law more open to interpretation.

A country with a codified system will generally have a written constitution and a constitutional court as the highest appeal court. Its role is to interpret the constitution and code, not to make new law.

In contract law, for example, a code will imply various terms into a contract, so there will be less need to set out all the terms as any inadequacies or ambiguities will be settled by operation of law.

1.1.2 Common law

In Anglo-Saxon times, there were local courts which decided disputes, but it was not until after the Norman

Conquest in 1066 that a more organised system of courts emerged. This was because the Norman kings realised that rule of the country would be easier if they controlled, among other things, the legal system. The first Norman king, William the Conqueror, set up the Curia Regis (the King’s Court) and appointed his own judges. The nobles who had a dispute were encouraged to apply to have the king (or his judges) decide the matter.

As well as this central court, judges were sent to major towns to decide cases and to dispense justice in the king’s name. During the reign of Henry II (1154–89), these tours became more regular, and the country was divided into ‘circuits’ or areas for the judges to visit. Initially, the judges would use local customs or the old Anglo-Saxon laws to decide cases, but over a period of time it is believed that the judges on their return to Westminster in London would discuss with each other the laws or customs they had used, and the decisions they had made. Gradually, the judges selected the best customs and these were then used by all the judges throughout the country. This had the effect of making the law more uniform or ‘common’ across the whole country, and it is from here that the phrase ‘common law’ seems to have developed.

Common law is the basis of English law today: it is unwritten law that developed from customs and judicial decisions. The phrase ‘common law’ is still used to distinguish laws that have been developed by judicial decisions from laws that have been created by statute. For example, murder is a common law crime, while theft is a statutory crime. This means that murder has never been defined in any Act of Parliament, but theft is defined by the Theft Act 1968.

Judges can still create new law today. However, they can only do this when a relevant case comes before them, and even then, they can only rule on the point in that case. This then becomes the law for future cases. Judicial decisions cannot make wide-ranging changes to the law or set penalties. This can only be done by statute law.

1.1.3 Customary law

A custom is a rule of behaviour which develops in a community without being deliberately invented. Historically, customs are believed to have been important, in that they effectively formed the basis of English common law. As mentioned above, it is thought that following the Norman Conquest, judges were appointed by the king to travel around the land making decisions in the king's name, and they based some of their decisions on common customs existing at the time. This caused Lord Justice Coke in the seventeenth century to describe these customs as being 'one of the main triangles of the laws of England'. However, custom in England is a historical source and unlikely to create new law today.

It is unusual for a new custom to be considered by the courts today, and even rarer for the courts to decide it will be recognised as a valid custom, but there have been some such cases. In *Egerton v Harding* (1974), the court decided that there was a customary duty to fence land against cattle straying from the common. In *New Windsor Corporation v Mellor* (1974), a local authority was prevented from building on land because the local people proved there was a custom giving them the right to use the land for lawful sports.

1.1.4 Religious law

Religious laws come from the sacred texts of a religion and cover most parts of personal and contract law. They are generally based on Sharia or Judaic law. They can apply in countries that have another legal system in place, such as a codified or common law system.

Because they are based on religious texts, religious laws are seen to be eternal and unchanging. They govern a person's behaviours and beliefs, and issues and disputes are settled by a priest or other religious official. By comparison, non-religious laws can be changed by a legislature, they deal with a person's actions towards another, and disputes are resolved by an independent judiciary.

Following Sharia law is an important part of the Muslim faith, and it is considered to be the infallible law of God. It deals with topics such as crime, politics, family, trade and economics, as well as covering personal issues such as hygiene, diet, prayer and everyday etiquette.

1.1.5 Mixed legal systems

Most legal systems are based on civil code, common law, statute law, religious law or a combination of these. However, some countries, such as South Africa and Cyprus, are said to have a mixed legal system because:

- » they have a mix of common law and civil-code rules
- » the contributions of common law and civil code to the whole law of the country are substantial and recognisable, and
- » private law is likely to be dominated by civil-code elements, and public law by common law elements.

Private law covers personal matters of tort and contract, whereas public law covers criminal law. Many countries with mixed legal systems were originally colonies of European countries such as France and Spain but then taken over by Britain, which imposed its common law system on top of the code. For example:

- » Malta's laws were initially based on Roman law, but they developed into the French Napoleonic Code with influences from Italian civil law and English common law (especially in public law).
- » The Channel Island of Jersey has a mixture of Norman customary law, English common law and modern French civil law.

1.2 Adversarial and inquisitorial systems

1.2.1 Adversarial system

The adversarial system is used in countries with common law jurisdictions. In court, advocates for both sides represent their parties' case or interest. Each party builds a case by producing evidence and witnesses and attempts to discredit the opposition. The case is presented to an impartial judge or jury to decide the outcome, after hearing both sides.

It could be argued that this system protects the right of individuals and the presumption of innocence of the accused in a criminal case. The accused has the right to remain silent, obtain a lawyer in serious cases and remain innocent until proved guilty. Before a criminal trial, the investigation is run by the police, who have to follow certain procedural rules (see Chapter 9 on police powers).

The system is not necessarily designed to arrive at 'the truth' in a case. In civil cases, it allows both parties to consider the strength of each other's case and to come to a pretrial settlement, or indeed to use other methods of dispute resolution.

On the other hand, critics of the system argue that it leads to a contest between the parties, with an

objective to win at all costs. As a result, there may be injustice if, for example:

- » there is a procedural issue which leads to the freedom of an accused against whom there is strong evidence of guilt, or
- » an innocent defendant is handicapped by an unskilled lawyer or unable to afford a lawyer to defend them.

1.2.2 Inquisitorial system

The inquisitorial system often applies in countries with a codified system of law. An initial investigation is often led by an examining magistrate, whose report is presented to a trial court. The judge acts as a fact finder, and the officers of court – the advocates – help the judge to decide the truth, rather than to take one side over the other. The judge takes a more active role and questions witnesses.

This system emphasises impartiality and truth-finding over ‘winning’ in court. It reduces the advantage of wealth of one of the parties in a dispute and reduces emotion and possible bias. It makes sure that no one receives special treatment and everyone is asked the same questions by the court.

On the other hand, due to the need for a thorough investigation, the case may be lengthy and it is often impossible for unrepresented, or untrained, defendants to defend themselves, and there is generally no right to remain silent. It may not be fully independent, as the minds of the judge and advocates may be predetermined before the hearing and the outcome could be decided by just one person – the judge.

1.3 The rule of law and its application

1.3.1 The rule of law

The ‘rule of law’ is a symbolic idea. It is difficult to give a precise meaning to the concept, and academic writers have defined it in different ways. However, the main principle is that all people are subject to and accountable to law that is fairly applied and enforced. Also, the process by which the laws of the country are enacted, administered and enforced must be fair.

The rule of law is a safeguard against dictatorship. It supports democracy. This is because the government and its officials are accountable under the law. Also, authority is distributed in a manner that ensures that no single organ of government can exercise power in an unchecked way.

One example is the police power of arrest, set out in more detail in Chapter 9. The police may only arrest a suspect if they have authority to do so by a statutory rule, such as the Police and Criminal Evidence Act

1984, or common law, such as the ability of an ordinary member of the public to arrest a person they know has committed an offence.

Tony Honoré, an academic lawyer, points out that the rule of law exists when a government’s powers are limited by law and citizens have a core of rights that the government is bound to uphold. These rights include:

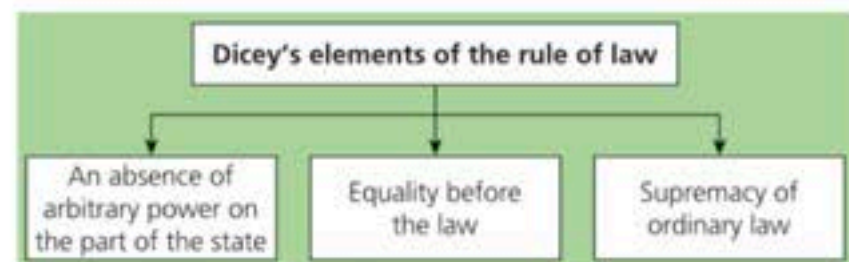
- » no person shall be sanctioned except in accordance with the law (this is relevant to both civil and criminal matters)
- » there is equality before the law and there must be no discrimination on any grounds
- » there must be fairness and clarity of the law.

Professor Dicey’s views on the rule of law

The best-known explanation of the rule of law was given by Professor A.V. Dicey in the nineteenth century, but many other academics have written differing views on the topic.

Dicey thought that the rule of law was an important feature that distinguished English law from law in other countries in Europe. He held that there were three elements that created the rule of law:

- » An absence of arbitrary power on the part of the state: the state’s power must be controlled by the law, i.e. the law must set limits on what the state can or cannot do. An example of this branch of the theory is the successful court challenge on Prime Minister Teresa May’s decision not to hold a parliamentary vote on the decision to leave the EU.
- » Equality before the law: no person is above the law. It does not matter how rich or powerful a person is, the law must deal with them in the same way as it would anyone else.
- » The supremacy of ordinary law: this is particularly true in the law of England and Wales in the time of Dicey, as many of the main developments up to that time were through judicial decisions rather than being created by Parliament.



▲ Figure 1.1 Dicey’s elements of the rule of law

Problems with Dicey’s views

A major problem with Dicey’s view of the rule of law is that it conflicts with another fundamental principle, that of parliamentary supremacy. This concept holds that an Act of Parliament can overrule any other law, and that no other body has the right to override or set aside an Act of Parliament.

So, under the rule of law there should be no arbitrary power on the part of the state, yet under parliamentary supremacy, Parliament has the right to make any law it wishes and this can include granting arbitrary powers to government ministers.

Also, laws passed by Parliament cannot be challenged through judicial review. This is different from some other countries where the legislative body is subject to the rule of law, so that laws passed by them can be challenged in the courts.

Another problem is that equality before the law in Dicey's theory refers to formal equality. It disregards the differences between people in terms of wealth, power and connections. Real equality can only be achieved if there are mechanisms in place to address these differences. For example, the cost of taking a case to court is very high. In order to allow the poorest in society to be able to enforce their rights, and so be equal under the law, it is necessary to have some form of state help in financing their case.

Dicey's view of the rule of law is based on abstract ideas, which makes it difficult to apply in real-life situations.

Other academic views on the rule of law

F.A. von Hayek, a twentieth-century academic economist, agreed with Dicey that the key component of the rule of law is the absence of any arbitrary power on the part of the state. However, von Hayek thought that the rule of law had become weaker, because provided actions of the state were authorised by legislation, then any act in accordance with this legislation was lawful. He also pointed out that the modern state is directly involved in regulating economic activity and this is in conflict with the rule of law.

Another twentieth-century academic, Joseph Raz, recognised that the rule of law was a way of controlling discretion rather than preventing it completely. He saw the rule of law as of negative value, acting to minimise the danger of the use of discretionary power in an arbitrary way. He thought that the key point which emerged from the rule of law was that the law must be capable of guiding the individual's behaviour.

He set out a number of principles which come from this wider idea, for example:

- » There should be clear rules and procedures for making laws.
- » The independence of the judiciary must be guaranteed.
- » The principles of natural justice should be observed; these require an open and fair hearing, with all parties being given the opportunity to put their case.
- » The courts should have the power to review the way in which the other principles are implemented, to ensure that they are being operated as demanded by the rule of law.

▼ Figure 1.2 Comparison of views of the rule of law

Key facts	
Dicey	• Absence of arbitrary power on the part of the state • Equality before the law • Supremacy of ordinary law
von Hayek	• Absence of arbitrary power on the part of the state • Rule of law weakened by an increasingly interventionist state • Modern state is directly involved in regulating economic activity in conflict with the rule of law
Raz	• Clear rules and procedures for making laws • Judicial independence must be guaranteed • Principles of natural justice should be observed • Courts should have the power to review the way in which the other principles are implemented

There have been changes in the twenty-first century which support these principles. A major example is the Constitutional Reform Act 2005, which recognised the rule of law and the importance of the independence of the judiciary. Section 1 of the Act states:

'This Act does not adversely affect –

(a) the existing constitutional principle of the rule of law; or

(b) the Lord Chancellor's existing constitutional role in relation to that principle'

Section 3(1) states:

'The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.'

These safeguards show the importance that is attached to the rule of law.

Internet research

Look up the Constitutional Reform Act 2005 on www.legislation.gov.uk

What other constitutional changes were introduced by this Act?

1.3.2 The rule of law and law making

The rule of law is important when it comes to law making. The process by which laws are made must be open and fair.

Acts of Parliament have to be passed by both Houses of Parliament. In practice, the government of the day usually has a majority in the House of Commons, so most laws proposed by the government will be passed by the House of Commons, although there can be debate on any contentious issues which can then lead to changes being made.

The House of Lords exercises a check on the law-making process, as all new laws also have to be agreed by it. One area where the House of Lords has consistently voted against change in the law has been in relation to allowing serious criminal trials without a jury.

Government ministers can make laws by statutory instruments. As these regulations do not always have to be considered by Parliament before they come into force, there are several checks on this method of law making. First, Parliament must have previously passed an Act granting power to a minister to make statutory instruments. Parliament also has power to scrutinise and check the instrument. Finally, the statutory instrument can be challenged in the courts through judicial review, to make sure that the minister has not gone beyond the powers granted by Parliament.

1.3.3 The rule of law and the legal system

The rule of law also covers the way in which the legal system works. One of the most important points is that every defendant in a criminal case must have a fair trial. Trial by jury is seen as an important factor in maintaining fairness and protecting citizens' rights.

Another important point is that no person can be imprisoned without a trial. In countries where the rule of law is disregarded, opponents of the government can be detained without a trial.

The rule of law is also important in the civil justice system, where ordinary people need to be able to resolve their disputes effectively. This means that the system should be free from discrimination, free from corruption and not improperly influenced by public officials. The UK system is trusted and recognised for being impartial.

The civil justice system should be accessible and affordable. This point is open to debate, as there have been major cuts to public funding of cases over the past 20 or so years. At the same time, the cost of taking a civil case to court has increased. People of modest means are unlikely to be able to afford to take a case to court. However, there has been an increase in alternative ways of resolving civil disputes, which are much cheaper to use.

1.3.4 The rule of law and substantive law

Substantive law means different areas of law as set out below. In every area of substantive law, it is important

that the rules recognise that people have key rights and that the laws are not oppressive.

Substantive criminal law

Substantive criminal law sets out the definitions of criminal offences. Criminal laws serve several purposes:

- » to protect people, for example laws concerning murder, manslaughter and non-fatal offences against the person
- » to protect people's property, for example laws concerning theft, burglary and criminal damage
- » to prevent disruptive behaviour and protect public order.

There are also regulatory offences, aimed at issues such as preventing pollution and ensuring food sold in shops is fit for human consumption, and a wide range of driving offences aimed at safety on the roads.

For all offences, the law has to be clear and the prosecution has to prove that the defendant has committed the offence. All offences also have a stated maximum penalty and the courts cannot impose a higher penalty.

Substantive civil law of tort

Substantive civil law of tort sets out the rights and responsibilities people owe to each other in everyday life. Many torts are aimed at protecting people and their property and give the right to claim compensation for damage caused by breaches of the law. Unlike criminal law, where the prosecution is nearly always brought by the state, it is the person affected by the tort who claims. For example, if there is an accident caused by one driver's negligence, any other driver or pedestrian who has suffered injury or damage has the right to claim compensation for the damage or injuries.

A considerable problem is that public funding for making a claim in tort through the courts is no longer available. This means that although everyone has, in theory, the right to claim, financial issues can, in practice, make it difficult to pursue a claim. Conditional fee agreements (explained in Chapter 7) can be used to fund such cases, but there are still problems, such as showing at an early stage that there is a good chance of success.

Substantive law of contract

Substantive law of contract lays down rules on:

- » when a contract is formed
- » what events may make that contract void or voidable
- » what can amount to a breach of contract.

Contract law recognises that, in most cases, people are free to make what agreements they wish. However,

it also recognises that consumers may have very little choice when making contracts with businesses, and that there is not really equality between the parties. In order to bring about a greater equality, some rights are given to consumers.

COMMENT

Evaluation of the substantive law of contract

The Consumer Rights Act 2015 applies to contracts between a consumer and a trader for the supply of goods, digital content or services. The Act sets out the statutory rights of a consumer, including that goods must be of satisfactory quality and fit for purpose. In this way, contract law supports real equality in the law.

Another example is the Consumer Protection Act 1987, which gives consumers much wider rights where they are injured or their property is damaged by faulty goods. The Act allows any consumer to claim, not just the buyer of the goods. So, where an item is bought as a present for another person, that person can claim if there is a fault in the goods which causes them injury.

Substantive law of human rights

Human rights law supports the rule of law in many ways. For example, all rights must be applied without discrimination. The European Convention on Human Rights (ECHR), which is incorporated into UK law by the Human Rights Act 1998 (HRA), sets out the right to liberty. This right should only be taken away where it is in accordance with the law, such as imprisoning someone who has been found guilty of murder. The Convention also states that there is a right to a fair trial.

1.4 The difference between civil and criminal law

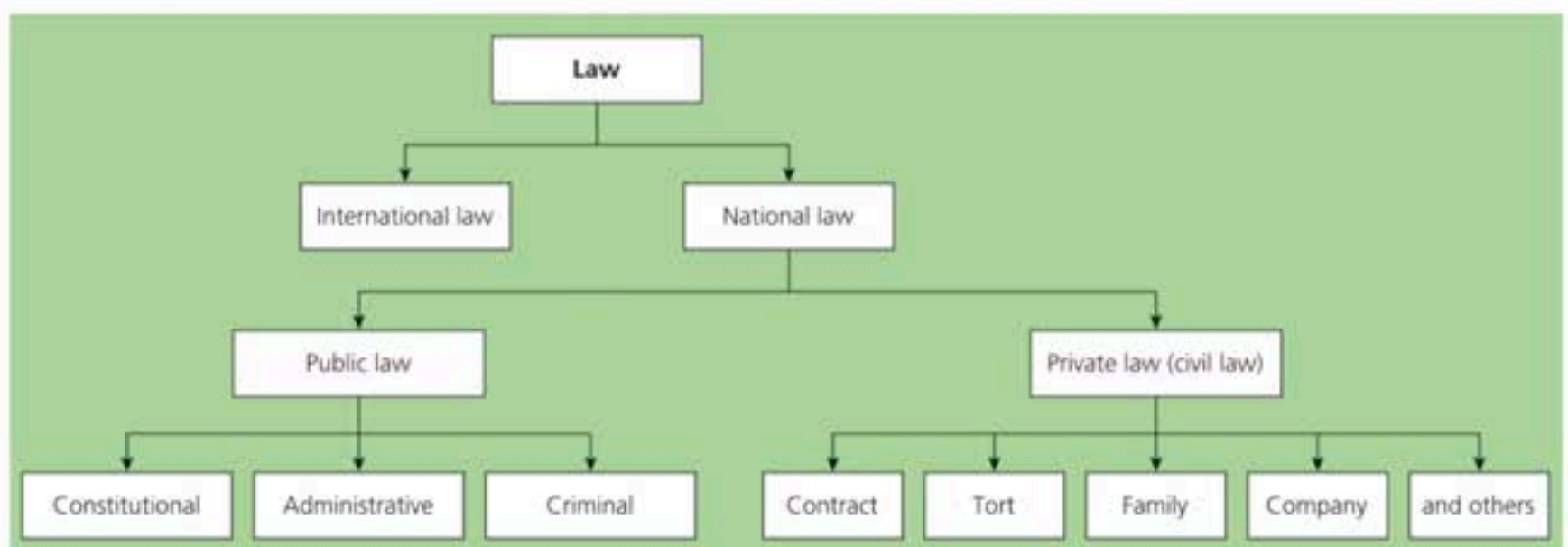
Civil law is very different from criminal law:

- » Civil law is called private law, because the issues it deals with are generally between two individuals, though it could be between an individual and a business or between two businesses.
- » Criminal law is part of public law, because crime is regarded as an action against the state and society as a whole.

Some of the differences between the two types of law are shown in Figure 1.3.

▼ Figure 1.3 Distinctions between civil and criminal law

	Civil law	Criminal law
Purpose	To uphold the rights of individuals	To maintain law and order; to protect society
Person starting the case	The individual whose rights have been affected	Usually the state through the Crown Prosecution Service
Legal name for person starting the case	Claimant	Prosecutor
Courts	County Court or High Court	Magistrates' Court or Crown Court
Standard of proof	The balance of probability	Beyond reasonable doubt
Person/s making the decision	Judge	Magistrates or jury
Decision	Liable or not liable	Guilty or not guilty
Powers of the court	Usually an award of damages, also possible: injunction, specific performance of a contract, rescission or rectification	Prison, fine, community order, discharge etc.



▲ Figure 1.4 The different categories of law

1.5 The relationship between law and morality

'Morality' is defined in the Oxford English Dictionary as 'a particular system of values and principles of conduct, especially one held by a specified person or society'.

Morality can be a personal morality or a collective morality of society as a whole. It is 'normative' or prescriptive; that is, it specifies what ought to be done and delineates acceptable and unacceptable behaviour. In our society and in many others, morality has been influenced to a large extent by religious beliefs. The Bible provides a moral code for Christian communities, both in the very basic and strict rules of the Ten Commandments, and in the more advanced, socially aware teachings of Jesus. In Islam, the Koran provides an extensive moral code for Muslims.

Morality is the ethical code that touches virtually every area of our lives – behaviour towards fellow human beings, money and property, and sexuality. There are 'core' moral beliefs, such as issues surrounding birth, death and families.

Although morality is concerned with issues of 'right' and 'wrong', it is not at all black and white. Mary Warnock, an academic who has been predominantly concerned with moral issues, said:

'I do not believe that there is a neat way of marking off moral issues from all others; some people, at some time, may regard things as matters of moral right and moral wrong, which at another time or in another place are thought to be matters of taste, or of no importance at all.'

Moral attitudes change over time. This can be seen in attitudes to issues such as abortion, homosexuality, drugs and drink-driving. Morality was easy to see as a common morality when societies were insular, structured and not exposed to different beliefs and values. The customs of society formed the basis of a code of conduct that reflected that society, and members of the society accepted these customs in large measure. It was therefore part of the morality of that age. However, UK society is considered multicultural, where there is a wide range of views.

Sociologist Emile Durkheim identified a range of factors as potentially contributing to the breakdown of a common morality, including:

- » increasing specialisation of labour
- » growing ethnic diversity within society
- » fading influence of religious belief.

All of these factors are increasingly apparent in pluralist societies today. Under Durkheim's analysis, we should not be surprised to discover a parallel growth in the

diversity of moral outlook and in norms of behaviour in modern Britain. There is, therefore, a more obvious difference between an individual's moral code and that of society as a whole.

The essential core of society is based on a shared morality; without a shared morality, society disintegrates. Law aims to prevent the disintegration of society, and so will reflect morality.

Throughout the study of law we can see the overlapping of law and morality. All of the criminal law set out in this book classifies behaviour as criminal that is also immoral. Every society believes theft is wrong. Thieves are always punished in the writings of religions. Equally, the use of violence to engage in theft is seen as an even worse offence.

There is also morality in the law of civil wrongs (torts), such as negligence where the sanctions aim to compensate and follow the idea that there should be no unjust enrichment. Whether this is reflected by exemplary damages is debateable.

Contract law is based on the moral idea that you should abide by your agreement. Where there is unequal bargaining power, the law steps in to try to redress the balance, as in consumer legislation.

The difficulty is that law does not reflect the morality of the time, as public morality may well lead the law and vice versa. Moral issues arise rapidly to the public forefront in times of crisis. In a pandemic, if there is a shortage of medicine, who should go without? Sometimes the law has to be amended quickly to protect the most vulnerable. The 2020 COVID-19 pandemic has shown different nations taking different solutions to the problem of protecting society and dealing with the sick. For example, Australia and New Zealand quickly shut their borders and issued isolation orders for the whole or part of their populations while South Korea continued their existing track and trace system developed to combat a previous virus.

1.6 Law and justice

Justice is a concept that can be described simply by a synonym, such as fairness, equality or even-handedness. We have a sense of justice from a very young age.

The idea includes treating like cases in a like manner, showing impartiality and acting in good faith. However, the term 'justice' has occupied the minds of some of the greatest thinkers across the ages. As a result, there is a wide range of theories available to explain its meaning and application.

To consider the extent to which the law (civil and criminal) achieves justice, we need to consider procedural justice and corrective justice, as well as substantive justice.

A distinction is often made between procedural law and substantive law. Professor Hart referred to justice 'according to law' and justice 'of the law'. The former term relates to how laws are made and how the legal system operates, the latter to the laws themselves. It is a useful distinction upon which to base this topic.

▼ Figure 1.5 Types of justice

Key facts	
Type of justice	Description
Procedural justice	Making and implementing decisions according to fair processes
Corrective justice	Sometimes known as restorative justice; when the law restores the imbalance that has occurred between two individuals, or between an individual and the state
Substantive justice	Where the content of the law itself must be just

1.6.1 Procedural justice

This can be considered from the aspect of the availability of legal aid. Legal aid is an important part of social justice. Everyone has a right to access justice, to receive a fair hearing and to understand their legal rights and obligations. Many people need help to access and use these rights, and legal aid should do this. In 2010, when introducing the government's legal-aid reforms, the then Justice Secretary Ken Clarke said, 'I genuinely believe access to justice is the hallmark of a civilised society'.

Originally, 80 per cent of the population qualified for legal aid. That proportion declined as means testing became progressively tougher. By the early 1990s, the percentage who were eligible was estimated to be about 45 per cent. It was estimated that as few as 20 per cent of people were entitled to legal aid at the start of 2019.

The effects of changes made by the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012 reduced the availability of legal aid. The sections that were removed included 'social welfare law' – advice on welfare benefits, employment, housing (except homeless cases), immigration (except asylum) and family (except in cases of domestic violence).

Internet research

Read this article to track the history of legal aid:
www.theguardian.com/law/2018/dec/26/legal-aid-how-has-it-changed-in-70-years

Legal aid is important because a person who cannot afford legal representation can be said to have no right to a fair trial. This right is protected under Article 6 ECHR, enshrined in HRA 1998. The right of access to a court must be meaningful and practical, not theoretical.

With respect to legal aid in criminal proceedings, anyone arrested and taken to a police station is entitled to free legal advice, whatever their means. After being charged or issued with a summons, a person's eligibility for further legal assistance becomes means-tested. This covers the work that a solicitor needs to do to prepare the case and representation at the Magistrates' Court and the Crown Court. It must also be established that it is in the interests of justice for a person to be granted legal aid. If a person is found guilty, they may be required to repay their legal costs. The rules are constantly changing, and it is important to take advice from a solicitor who specialises in criminal law.

Legal aid deserts have therefore appeared, as firms can no longer afford to offer these services. Many firms have given up their criminal legal aid practices, raising serious concerns about increased risks of miscarriages of justice. This is alarming, as many of those most in need of legal aid are those who are most vulnerable and least well able to represent themselves. Many are terrified of the whole process of the law, even with help from a lawyer.

Justice requires access to the law. This is, arguably, achieved, as no one in the UK is specifically denied access to the law. *Effective* access to the law is a different matter, as those who are less able to act for themselves or to pay for someone to act for them may be denied justice.

1.6.2 Corrective justice – sanctions and damages

When judges or magistrates pass sentence on an offender, they take into consideration a number of factors. These include the aim of the sentence: this may simply be to punish the offender for breaking the rules or to deter others from committing the same offence. Balanced against these may be the desire to rehabilitate the offender. The court will also consider aggravating and mitigating factors relating to the offence and to the offender and will have to follow sentencing guidelines.

Civil law

In negligence, the aim of compensation is to restore the claimant to their pre-tort position, in so far as money can achieve this. To balance this, any contributory negligence on the part of the claimant will reduce their award.

For example, in *Jebson v Ministry of Defence* (2000), 75 per cent of the claimant's award was deducted for his contributory negligence. This reduction is just because it is proportionate: it reflects that the claimant was largely responsible for his own harm.

Contract law

The basis of assessment of damages is loss of bargain: the claimant is placed in the position they would have been in had the contract been performed. However, only losses that are reasonably within the contemplation of the parties may be recovered. This can be seen in *Victoria Laundry Ltd v Newman Industries Ltd* (1949).

The judgments in the two cases above reflect the 'concept of proportionality', in that damages are awarded according to the merits of the claim, and not automatically in relation to the harm suffered. Under these tests, the awards of damages are just.

Criminal law

Trial by jury enables jury members to use their view of justice, rather than adhering strictly to the rules of law and the evidence presented to them. In *R v Ponting* (1985), a civil servant was charged under the Official Secrets Act for releasing secret information about the sinking of the Argentinian warship General Belgrano. The judge told the jury that any public interest in the information did not provide a defence but the jury acquitted him. The rules of evidence adopted in criminal trials seek to balance the interests of the parties to the action.

For this reason, evidence of previous convictions is not generally admissible unless the facts are strikingly similar to those in the instant case.

On the other hand, even illegally obtained evidence may be admissible. In *Jeffrey v Black* (1978), the police arrested a student for the theft of a sandwich, and then conducted an illegal search of his flat, where they discovered drugs. The magistrates threw out the case after ruling the evidence inadmissible. However, the Divisional Court ruled that the illegality of the search did not justify excluding the evidence it had exposed. This may at first seem to be unjust.

However, consider a situation where the police had discovered plans and materials to commit a terrorist attack. They would surely be justified in relying upon the material found in the 'illegal' search in court. To assist this aim, the Counter-Terrorism and Border Security Act 2019 has strengthened the powers of the police, including the use of stop and search.

Injustices arise where people serve prison sentences for crimes they are not guilty of. Famous cases include the Birmingham Six and the Guildford Four. The publicity of these and other similar cases led to the establishment in 1997 of the Criminal Cases Review Commission (CCRC), whose role is to review the cases of those it feels have been wrongly convicted of criminal offences, or unfairly sentenced.

ACTIVITY

In 1952, police officers discovered Derek Bentley and Christopher Craig attempting to burgle a factory. Bentley was aged 19 and suffered from mild learning difficulties. He did not have a gun and quickly gave himself up to the police. Craig did have a gun and he fired it, killing one of the policemen. Before the shooting, a police officer shouted to Craig to hand over the gun and Bentley shouted 'Let him have it, Chris'. The prosecution case relied on Bentley's shouted words. The prosecution alleged that they amounted to an incitement, or encouragement, to Craig to shoot the officer. The defence argued that Bentley meant 'hand over the gun' and he was trying to satisfy the police orders.

Bentley was convicted of the murder of the policeman, despite neither possessing, nor firing, a gun. He was sentenced to death. Craig, was, at 16 years of age, too young to be executed and served ten years in prison. Bentley was one of the last men in Britain to be executed. His conviction was eventually quashed in 1998, after years of campaigning by his family.

Questions

- 1 Was it just that Bentley should be found guilty of murder and executed? Justify your views.
- 2 Explain the meaning of the phrase 'quashing a conviction'.
- 3 Who makes a decision to quash a conviction?
- 4 Do you think that justice was eventually achieved by the quashing of the conviction?

1.6.3 Justice and substantive law

Criminal law

The principle of proportionality generally governs the sentencing practice of judges and magistrates. This satisfies our expectations that the more serious the offence, the harsher the sanction that will be imposed.

Those convicted of murder are subject to a mandatory life sentence. The sentencing judge will then impose a tariff, this being the minimum term the murderer has to serve.

Many agree that imposing a life sentence on a killer is just. Public-opinion polls regularly show strong support for the return of the death penalty, to provide a degree of retributive justice.

Some murderers are viewed as worse than others: the setting of a tariff does not allow for proportionality, and so may lead to harsh decisions. In *R v Cocker* (1989), the defendant suffocated his wife, at her insistence, with a pillow; she had been terminally ill and in much pain. The trial judge denied the defendant any partial defence that would reduce murder to manslaughter. Here, a life sentence may seem a disproportionate punishment.

However, the judge may be inclined to provide a measure of justice by imposing a reduced tariff period; this was shown in *R v Inglis* (2010).

CASE EXAMPLE

R v Inglis (2010)

The defendant killed her son because she believed she was acting in his best interests and did not want him to suffer any further. She was found guilty of murder. The trial judge imposed a nine-year tariff period, reduced on appeal to five years.

Lord Judge said:

'Mercy killing is murder. Until Parliament decides otherwise, the law recognises a distinction between the withdrawal of treatment supporting life, which may be lawful, and the active termination of life, which is unlawful.'

However, the law is gradually moving in line with society's general view on the issue, as can be seen in the Mavis Eccleston case (see Internet research below). Cases such as this show that, perhaps, justice is better served by allowing judges and magistrates to pass the

Internet research

Research the Mavis Eccleston case by visiting this webpage:

www.bbc.co.uk/news/uk-england-stoke-staffordshire-49743727

sentence they feel to be most appropriate, rather than have a mandatory fixed sentence.

Contract law

Formation of contract

In *Reveille Independent LLC v Anotech International (UK) Ltd* (2016), the court had to consider if a contract had come into existence between commercial parties when they were apparently still in negotiation. In examining the rules on offer and acceptance by conduct, the court was keen to preserve certainty and give due attention to what it considered to be the reasonable expectations of honest, sensible business people. This was stressed in order to achieve justice in these business situations.

Exclusion clauses

Parties to a contract may try to limit their liability by relying upon exclusion clauses. The traditional rule of *caveat emptor* (let the buyer beware) can work against the interests of the weaker bargaining party or where there is a pre-printed standard form of contract. The courts try to achieve a more just result.

CASE EXAMPLES

Olley v Marlborough Court Hotel (1949)

An exclusion clause was invalid as it had not been brought to Mrs Olley's attention when she booked in at reception.

Spurling (J) Ltd v Bradshaw (1956)

Lord Denning observed that some exclusion clauses were written in 'regrettably small print', and stated that the more harsh or unusual the term was, the more it needed to be brought to the attention of the person signing it, for example by being 'printed in red ink, with a red hand pointing to it'.

The Unfair Contract Terms Act 1977 restricts the use of exclusion clauses. A person cannot exclude liability for death or personal injury resulting from their negligence, and other exclusion clauses are subjected to the test of reasonableness. This Act aims to prevent those with strong bargaining power from taking unfair advantage

of weaker parties and provide a fairer balance between the bargaining parties.

Further protection is given to consumers by legislation, such as the Consumer Rights Act 2015 which sets out both rights and remedies in consumer transactions.

Penalty clauses

The justice of penalty clauses depends on the view of how far a person can force someone else to comply with what they have promised. European and international law allow a court to modify an excessive penalty in a contract term. Under UK law, the penalty clause is either valid or invalid. In *Cavendish Square Holding BV v Talal El Makdessi* (2015) and *ParkingEye Ltd v Beavis* (2015), the Supreme Court decision widened the previously applied tests in relation to the enforceability of penalty clauses. Lord Hodge stated that:

'The correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract.'

This suggests an idea of justice being applied.

Sometimes, Parliament intervenes to amend the law where the judiciary cannot. In the past, a person could not sue unless they were a party to the contract. However, in *Jackson v Horizon Holidays* (1975), the claimant succeeded in seeking damages for himself and for members of his family after a package holiday failed to match the advertised description, even though only he, and not his family members, had made the contract. This was not too surprising given the law of agency and the doctrine of the undisclosed principal.

In 1999, Parliament passed the Contract (Rights of Third Parties) Act, allowing third parties to make a claim where the contract expressly provided for this, or where the contract purported to confer a benefit on them. These provisions were designed to avoid the obvious injustices caused in cases such as *Tweddle v Atkinson* (1861), and the subterfuges that were necessary to obtain a just result which occurred in *Beswick v Beswick* (1967).

1.7 The role of law in society

The rule of law cannot exist without a transparent legal system. Law attempts to control society through regulation. This requires:

- » a clear set of laws that are freely and easily accessible to all
- » strong enforcement structures, and

- » an independent judiciary, to protect citizens against the arbitrary use of power by the state, individuals or any other organisation.

In 2010, Lord Bingham published *The Rule of Law*, in which he identified the core principle of the rule of law:

'...all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.'

He set out the rule of law through eight principles, which society, the state and the judiciary must embrace:

- 1 The state must abide by both domestic and international law. This means no government has the ability to act at whim.
- 2 People should only be punished for crimes set out by law.
- 3 Questions on the infringement of rights should be subject to the application of law, not discretion.
- 4 The law should be accessible, clear, precise and open to public scrutiny.
- 5 All people should be treated equally.
- 6 There must be respect for human rights.
- 7 Courts must be accessible and affordable, and cases should be heard without excessive delay.
- 8 The means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* disputes which the parties themselves are unable to resolve.

These principles result in certain roles for law in society:

- » To protect people from harm – typically by the mechanisms of the criminal law with respect to harm by other people or by dangerous things such as unsafe machinery or pollution
- » To ensure a common good – by providing facilities for all, such as education and healthcare
- » To settle arguments and disputes – this is the idea of a civil justice system.

These roles result in regulating and controlling society and make a balance between competing interests within society. Much of the balance between different sectors of society is aimed at achieving social control, which may be either informal or formal. Informal social control occurs through:

- » the family
- » peer groups
- » local communities,
- » societal groups.

Formal social control occurs through specific social agencies which have the role of maintaining order in society. This is the criminal justice system, and includes:

- » the police force
- » the judiciary
- » the probation and prison services
- » law makers, i.e.:
 - Parliament, through Acts of Parliament and through delegating its powers to local law makers such as local councils, and
 - the judiciary, in its interpretation and application of the law.

The civil justice system also does this, so that disputes can be settled through formal mechanisms trusted by society.

Social control is important, because without it there would be the likelihood of anarchy. It should protect those less able to protect themselves, such as children, disabled people or those who are ill.

TARGET SKILLS

- 1 Define the meaning of an adversarial legal system.
- 2 Identify Dicey's three elements of the rule of law.
- 3 Assess whether the law provides justice.
- 4 Discuss the relationship between law and morality.

1.8 The importance of fault in civil and criminal law

The principle of causation is relevant in both civil and criminal law. It holds that for there to be liability, the defendant must have caused the loss, damage or injury that is the subject of a claim in law. This will be discussed further in the material on criminal law and negligence later in this book.

While civil law is concerned with weighing the interests of the two parties to an action and providing the most suitable remedy where appropriate, one part, the law of tort, is concerned with civil wrongs. In most areas of tort, liability will only be imposed where a party is at fault.

The award of damages in negligence is compensatory and intended to restore the claimant to their pre-accident position, so far as money can do this. The defendant's fault is linked to the extent of harm that has been caused. However, where the claimant contributes to their own harm or injury, the rules

of contributory negligence apply, as this splits fault between the two parties.

Occasionally exemplary damages may be awarded. Here, the fault is considered so extreme as to go beyond what would normally be awarded, thus showing the importance of fault. In *Treadaway v Chief Constable of West Midlands* (1994), the claimant had been tortured by the police into making a confession to a crime, and subsequently sentenced to 15 years' imprisonment. Exemplary damages of £50 000 were awarded against the police, as they had shown total disregard for the law.

Interestingly, the decision not to prosecute the police for any offence of assault against Treadaway was reviewed, but the police remained protected and there was no proper reflection of the fault of the parties.

However, the principle of vicarious liability can occur without any fault, in both civil and criminal law. In the criminal case of *Harrow London Borough Council v Shah* (1999), it can be argued that the guilty shop owner had no fault, merely responsibility. In civil law, the principle of vicarious liability has a potentially similar effect.

CASE EXAMPLE

Harrow London Borough Council v Shah (1999)

A shop sold an age-restricted item to an underage child. The shop owner did not personally sell the item, but one of his staff did. This was enough to make the defendant shop owner guilty. His arguments that he did not himself sell the item, and that he had given all necessary staff training, were irrelevant. He was strictly liable for the actions of his staff and was therefore convicted.

In contract law, the Consumer Rights Act 2015 includes a fairness test with respect to the enforceability of terms and to consumer notices in contracts. The Act defines 'unfair' terms as those which put consumers at a disadvantage, by limiting their rights or disproportionately increasing their obligations in comparison with a trader's rights and obligations. This balance is made without reference to fault and seems to be made on the basis of shifting liability, arguably to excess, onto the trader to the benefit of the consumer. However, it can be argued that if, for example, goods sold are defective, then the supplier is at fault and should not be permitted to exclude that liability.

STRETCH AND CHALLENGE

'It is permissible to break the law when you passionately believe in a cause.'

Write points for and against this motion.

TEST YOURSELF

- 1 Describe the difference between an adversarial and an inquisitorial legal system.
- 2 Describe the meaning of 'the rule of law'.
- 3 Describe the meaning of justice.
- 4 Assess the relationship between law and morals.
- 5 Assess whether justice is always achieved through use of criminal law.

EXAM-STYLE QUESTIONS

- 1 Describe Dicey's concept of the rule of law.
- 2 Discuss whether law provides justice.

2

Parliamentary law making

Introduction

The main legislative (i.e. law-making) body in the UK is Parliament, which meets in the Palace of Westminster. In a democracy, the view is that laws should only be made by the elected representatives of society, and as such MPs are elected to the UK House of Commons.

Laws passed by Parliament are known as Acts of Parliament or statutes, and this source of law is

usually referred to as statute law. About 60 to 70 Acts are passed each year. In addition to Parliament making law, power can be delegated to government ministers and their departments to make detailed rules and regulations, which supplement Acts of Parliament. These regulations are delegated legislation (see Chapter 3) and are called statutory instruments. This chapter relates to the key concept of power and its limits.

2.1 The legislative process



▲ **Figure 2.1** The Houses of Parliament at Westminster

UK Parliament consists of the House of Commons, the House of Lords and the Queen, all acting together:

- » Members of the House of Commons are elected.
- » Members of the House of Lords are either hereditary peers or appointed life peers.
- » The Queen has to give her assent before a law can become an Act of Parliament.

Members of Parliament (MPs) sit in the House of Commons and represent a political party. They are elected by the public, with the country being divided into constituencies and each of these returning one MP. Under the Fixed-Term Parliaments Act 2011, there must be a general election every five years.

The government of the day is formed by the political party that has a majority of MPs in the House of Commons.

In 2020, the House of Lords consisted of:

- » a maximum of 92 hereditary peers (a title which could be passed down through their family)
- » about 660 life peers (nominated by the prime minister, mostly former politicians who have retired from the House of Commons), who could either support one of the political parties or be an independent 'cross-bencher', and
- » the 26 most senior bishops in the Church of England.

2.1.1 The pre-legislative process: Green Papers and White Papers

If the government is unsure what law to introduce on a topic, it may issue a Green Paper by the minister with responsibility for that matter. This is a consultative document in which the government's view is put forward with proposals for law reform. Interested parties are then invited to send comments to the relevant government department, in order to:

- » consider fully the views of all stakeholders
- » suggest any necessary changes to the government's proposals.

Following this, the government may publish a White Paper with its firm proposals for new law, taking into account the views received during the Green Paper consultation.

If the government has firm views on a topic, it may go straight to issuing a White Paper, so that advance notice of future legislation is given.

Consultation is valuable before any new law is framed, as it allows time for mature consideration. From time to time, governments are criticised for responding in a 'knee-jerk' fashion to incidents or situations and, as a result, rushing through law that has subsequently proved to be unworkable. This occurred with the Dangerous Dogs Act 1991 (see the activity on page 22).

Internet research

Find an example of a recent Green Paper and a recent White Paper issued by the UK government.

Have either of these resulted in legislation being passed?

2.1.2 Bills

The majority of Acts of Parliament are introduced by the government. They are initially drafted by lawyers in the civil service, known as Parliamentary Counsel to the Treasury, and are referred to as Bills. Instructions on what is to be included, and the effect the proposed law is intended to have, are provided by the government department responsible for it.

The Bill has to be drafted so that it represents the government's wishes, while at the same time using correct legal wording so that there will not be any future difficulties in applying it. It must be unambiguous, precise and comprehensive. Achieving all of these is not easy, and there may be unforeseen problems with the language used, as discussed in Chapter 4 on statutory interpretation.

A Bill only becomes an Act of Parliament if it successfully completes all the necessary stages in Parliament. The government sets out a timetable for when it wishes to introduce the draft Bill into Parliament, and these Bills take priority.

Private Members' Bills

Private Members' Bills can also be sponsored by individual MPs. The parliamentary process allows for a ballot during each parliamentary session, in which twenty private members are selected who can take their turn in presenting a Bill to Parliament. The time for debate of Private Members' Bills is limited, so that only the first six or seven members in the ballot have a realistic chance of introducing a Bill on their chosen topic. Relatively few

Private Members' Bills become law, but there have been some important laws passed in this way, such as:

- » the Abortion Act 1967, which legalised abortion in the UK
- » the Marriage Act 1994, which allowed people to marry in any registered place, not only in register offices or religious buildings
- » the Household Waste Recycling Act 2003, which places local authorities under a duty to recycle waste.

Internet research

Using www.legislation.gov.uk, try to find a recent example of a Private Members' Bill which has become law.

Ten-minute rule

Backbenchers (MPs who do not have any official position in the government) can also try to introduce a Bill through the 'ten-minute rule', under which any MP can make a speech of up to ten minutes supporting the introduction of new legislation. This method is rarely successful, unless there is no opposition to the Bill, but some Acts of Parliament have been introduced in this way. An example is the Bail (Amendment) Act 1993, which gave the prosecution the right to appeal against the granting of bail to a defendant. Members of the House of Lords can also introduce Private Members' Bills.

Public and private Bills

A public Bill involves matters of public policy that affect either the whole country or a large section of it. Most government Bills are in this category, for example those which led to the Constitutional Reform Act 2005, the Legal Services Act 2007, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Criminal Justice and Courts Act 2015. Not all Bills are aimed at changing the law for the entire country – some may affect just one, or more, of the devolved countries – Scotland, Wales and Northern Ireland.

Further, some Bills are designed to pass a law that will affect only individual people or corporations. These are called private Bills. An example of a private Bill was the University College London Act 1996, which was passed in order to combine the Royal Free Hospital School of Medicine, the Institute of Neurology and the Institute of Child Health with University College.

▼ Figure 2.2 Key facts about Bills

Key facts	
Type of Bill	Description
Government Bills	These are introduced by the government. They are likely to become law, as government business takes priority in Parliament.
Private Members' Bills	These are introduced by individual members of either the House of Commons or the House of Lords. They rarely become law.
Public Bills	These affect every person and every business in the country.
Private Bills	These only affect individual persons or companies.

2.1.3 The process in Parliament

In order to become an Act of Parliament, a Bill usually has to be passed by both Houses of Parliament, and there is a long and complex process (see Figure 2.3). A Bill may start in either the House of Commons or the House of Lords, with the exception of finance Bills, which must start in the House of Commons. All Bills must go through the stages explained below – this procedure is followed when the Bill is introduced in the House of Commons

First Reading

This is a formal procedure, where the name and main aims of the Bill are read out. Usually, there will be no discussion and no vote.

Second Reading

This is the main debate on the whole Bill, during which MPs deliberate the principles behind the Bill. The debate usually focuses on the main principles rather than smaller details. Those MPs wishing to speak in the debate must catch the Speaker's eye, since the Speaker controls all debates and no one may speak without being called on by the Speaker. At the end of the debate there will be a vote, which is either verbal or formal:

- » A verbal vote involves the Speaker asking the members as a whole how they vote and the members shout out 'Aye' or 'No'. If it is clear that nearly all members are in agreement, either for or against, there is no need for a more formal vote.
- » If the result of a verbal vote is unclear or inconclusive, there will be a formal vote where MPs leave the Chamber and then walk back in through one of two voting doors on either side of the Chamber. There will be two 'tellers' positioned at each of these doors to make a list of the members voting. The tellers count up the number of MPs who voted for and against and publicly declare these numbers to the Speaker. There must be a majority in favour of the Bill for it to progress to the next stages.

Committee Stage

If the Bill passes the Second Reading, the Committee Stage then examines each clause in detail. This is undertaken by a standing committee of 16–50 MPs, chosen specifically for that Bill. The MPs on the committee are usually those with a special interest in, or knowledge of, the subject of the Bill. For finance Bills, the whole House sits in committee. During this stage, amendments to various words or clauses in the Bill may be voted on and passed.

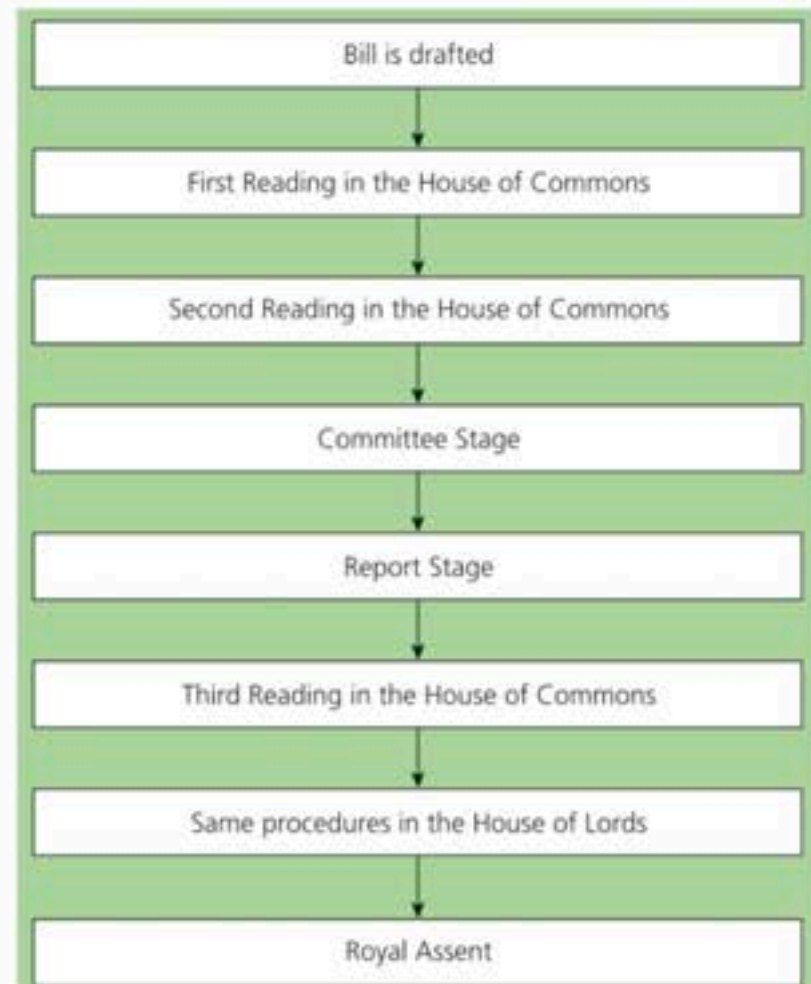
Report Stage

The Report Stage is where the committee reports back to the House on any amendments to the Bill. Amendments are debated in the House and either accepted or rejected, and further amendments can be added.

If there were no amendments, there will not be a Report Stage – instead the Bill will continue straight to the Third Reading.

Third Reading

This is the final vote on the Bill. It is almost a formality, since a Bill that has passed through all the stages above is unlikely to fail at this late stage. There is usually no debate or vote.



▲ **Figure 2.3** The passage of a Bill through Parliament, starting in the House of Commons

Internet research

Go to www.parliament.uk/bills

This page lists the Bills currently before Parliament.

Click on any Bill to see which stage of the parliamentary process it has reached. It will also usually give the next part of the process with a date, if one has been fixed.

The House of Lords

If the Bill started in the House of Commons, it now passes to the House of Lords, where it goes through similar stages to those in the House of Commons.

If the House of Lords makes amendments to the Bill, it will go back to the House of Commons for it to consider those amendments. If the House of Commons does not accept an amendment made by the House of Lords, then that amendment will go back to the House of Lords for reconsideration.

If the House of Lords insists on the amendment, it will be sent back to the House of Commons. This can result in some amendments being sent from one House to the other several times. This is known as 'ping-pong'.

If the Bill started in the House of Lords, at this stage it then passes to the House of Commons for consideration.

By the end of this procedure, the Bill should have been fully agreed by both Houses.

The Parliament Acts 1911 and 1949

The power of the House of Lords to reject a Bill is limited by the Parliament Acts 1911 and 1949. These allow a Bill to become law even if the House of Lords rejects it, provided that the Bill is reintroduced into the House of Commons in the next session of Parliament and passes all the stages again there.

The principle behind the Parliament Acts is that the House of Lords is not an elected body, and its function is to refine and add to the law rather than oppose the will of the democratically elected House of Commons. In fact, there have only been four occasions when this procedure has been used to bypass the House of Lords after it voted against a Bill:

- » the War Crimes Act 1991
- » the European Parliamentary Elections Act 1999

- » the Sexual Offences (Amendment) Act 2000
- » the Hunting Act 2004.

Royal Assent

The final stage is where the monarch formally gives approval to the Bill and it then becomes an Act of Parliament. This is now a formality and, under the Royal Assent Act 1967, the monarch will not even have the text of the Bills to which she is assenting; she will only have the short title. The last time a monarch refused assent was in 1707, when Queen Anne refused to assent to the Scottish Militia Bill.

Commencement of an Act

Following Royal Assent, the Act of Parliament comes into force on midnight of that day, unless another date has been set. However, there has been a growing trend for Acts of Parliament not to be implemented immediately. Instead, the Act itself states the date when it will commence, or it passes responsibility to a government minister to set the commencement date. In this case, the minister will bring the Act into force by issuing a commencement order by delegated legislation (see Chapter 3). Quite often, different sections of an Act are brought into effect at different times. This can cause uncertainty, as it may be difficult to discover which sections of an Act have been brought into force, although nowadays this information is usually on the internet.

Internet research

Research the Wild Animals in Circuses Act 2019 by visiting www.legislation.gov.uk/ukpga/2019/24/introduction, then answer the following questions.

- » What is the purpose of this Act?
- » What is a 'wild animal' according to this Act?
- » To which part of the UK does the Act apply?
- » When does the Act come into force?

▼ Figure 2.4 Key facts on the parliamentary law-making journey

Key facts
A Bill has to pass all three parliamentary stages (Readings in the House of Commons, readings in the House of Lords and Royal Assent) before it can become an Act.
Most Bills are introduced into the House of Commons, where they are debated and receive detailed scrutiny.
The House of Lords will further debate and scrutinise the Bill. It can suggest amendments, which can either be accepted or rejected by the House of Commons.
The will of the House of Commons will eventually prevail, as it has elected representatives.
The Queen's Royal Assent is necessary, but a mere formality, for a Bill to become an Act of Parliament and part of the law of the land.

▼ Figure 2.5 Advantages and disadvantages of law making in Parliament

Advantages of law making in Parliament	Disadvantages of law making in Parliament
• Law is made by elected representatives. This means it is democratic. As there has to be a general election at least once every five years, the electorate can vote out a government if it has not performed as the public expected or introduced promised reforms. • Acts of Parliament can reform whole areas of law in one new Act. An example is the Fraud Act 2006 in criminal law, which abolished all the old offences of deception and fraud and created a newer and, potentially, simpler structure of offences. Judges can only change the law in very small areas, as they can only rule on the point of law in the case they are deciding. • Acts of Parliament can also set broad policies and give the power to others to make detailed regulations, known as delegated legislation (see Chapter 3) This is an advantage because the general structure of a new law is laid down by Parliament but it allows for greater detail than if everything was contained in a single document. • Before a Bill is presented to Parliament, there will often have been consultation on the proposed changes to the law. This allows the government to take into consideration objections to their proposals. Also, as all Bills have to go through the lengthy discussion process in both Houses of Parliament, the new law will have been thoroughly discussed and scrutinised before being brought into force. • Law made by Parliament is certain and cannot be challenged by judges.	• Government and Parliament do not always have the time or inclination to deal with all the reforms that are proposed. This is particularly true of reform of 'lawyers' law', such as areas of criminal law or the law of contract. An example of law that is still awaiting reform is the law on assaults and other non-fatal offences against the person. The Law Commission proposed changes to this area of law in 1993. Reform is needed because the old law dates back to an Act of 1861, which was difficult to understand and does not always cover modern situations. In 1997, the government accepted that there was a need for reform and published a draft Bill the following year. However, this was not put before Parliament and this area of law has still not been reformed. • Even where the government introduces a Bill into Parliament, the process of becoming an Act with all the different readings, committee and report stages can take several months. • The government is in control of the parliamentary timetable and allows very little time for Private Members' Bills. Even when a private member does manage to introduce a Bill, it can be easily voted out by the government as it has the majority of seats in the House of Commons. The result is that very few Private Members' Bills become law. • Acts of Parliament are often long and complicated. This can make them difficult to understand by lawyers and the public. In fact, many of the cases that go to the Supreme Court on appeal are to interpret the words of an Act. • The law can become even more complicated where one Act amends an earlier Act. In this case, it is necessary to consult two or more Acts to find out exactly what the law is. • An Act can come into force as soon as it completes the parliamentary stages. However, in many cases an Act will not come into force until a later date, or over several dates. It may be necessary to consult several documents to find exactly when the relevant part of an Act came into force.

2.2 Parliamentary supremacy (sovereignty)

2.2.1 Definition of parliamentary supremacy

The most widely recognised definition of parliamentary supremacy was given by Dicey in the nineteenth century. He made three main points:

- 1 Parliament can legislate on any subject matter it wants; there are no limits on what it can make laws about. Parliament can also change its own powers. It did this with the Parliament Acts 1911 and 1949, which placed limits on the right of the House of Lords to block a Bill by voting against it.
- 2 No Parliament can be bound by any previous Parliament, nor can a Parliament pass any Act that will

bind a later Parliament. Each new Parliament should be free to make or change whatever laws it wishes.

- 3 No other body has the right to override or set aside an Act of Parliament. This means that an Act of Parliament cannot be contradicted by judges' decisions in court or pieces of delegated legislation.

This rule is applied even where the Act of Parliament may have been made because of incorrect information.

A recent example of the importance of complying with Dicey's principles was the court case concerning the UK leaving the European Union (EU), *R (on the application of Miller and Another) v The Secretary of State for Exiting the European Union* (2016). The government announced that it would trigger Article 50 of the Treaty

on European Union to leave the EU in 2017 without passing an Act of Parliament. The right to do this was challenged and the Supreme Court decided that leaving the EU in this way would effectively overrule the European Communities Act 1972. This could only be done by Parliament passing another Act to give the government the authority to start the process of leaving the EU.

Parliamentary supremacy is also referred to as the sovereignty of Parliament.

2.2.2 Limitations on parliamentary supremacy

There are some limitations on parliamentary supremacy, but these have all been self-imposed by previous Parliaments. The main limitations are through:

- » the effect of the Human Rights Act 1998
- » devolution
- » EU membership.

Effect of the Human Rights Act 1998

The Human Rights Act 1998 states that all Acts of Parliament have to be compatible with the European Convention on Human Rights. It is possible to challenge an Act on the grounds that it does not comply with the Convention. Under s 4 of the Human Rights Act, the courts have the power to declare an Act incompatible with the Convention.

This happened in *H v Mental Health Review Tribunal* (2001). When making an application for release, the Mental Health Act 1983 placed the burden of proof on the patient to show that they no longer needed to be detained. The effect of the Human Rights Act meant that it should be up to the State to justify the continuing detention of such a patient. The court made a declaration in this case that the law was incompatible with the Human Rights Act, and Parliament subsequently changed the law to give effect to the Human Rights Act.

Devolution

The Scotland Act 1998 and the Government of Wales Act 1998 have devolved (handed down) certain powers to the Scottish Parliament and the Welsh Parliament respectively. As a result, each body can make laws on certain matters for its own country, without requiring approval from the Westminster Parliament. This means that Parliament's supremacy has been lost in these areas.

EU membership

In 1973, the UK became a member of the EU. In 2016, the British people voted in a referendum to leave the

EU, and the result of this referendum was given effect on 31 January 2020. One of the reasons given for this result was the loss of sovereignty.

While the UK was a member of the EU, there were limitations on Westminster parliamentary supremacy, as EU law took priority over UK law. Although details of the UK exit were being finalised when this book was published, it seems that by leaving the EU the Westminster Parliament is regaining sovereignty and, in the future, can pass any law it chooses, regardless of compatibility with EU law.

2.3 Influences on Parliament

2.3.1 Political pressure

When there is a general election, all the political parties publish a list of their policies and suggested reforms they would carry out if they were elected as the next government. This is called the party's manifesto, and it is one way in which the party tries to persuade people to vote for it. The manifesto can include policies on issues such as finance, education, transport and law and order.

The party that has the most members elected to the House of Commons then becomes the government. This party then has the whole life of the Parliament (up to five years) to introduce the reforms it promised in its manifesto.

Throughout any session of Parliament, the government has the major say on which new laws are put before Parliament for debate.

The opposition parties in Parliament hold the government to account when it introduces its proposals, to ensure that the manifesto promises are implemented and in the way they have been outlined. They will also try in debates and in parliamentary committees to amend the proposed laws, to ensure they are workable and not too extreme. However, the effect of the Parliament Acts 1911 and 1949 means that the House of Lords cannot block laws passed by the House of Commons indefinitely. Also, the effect of the Salisbury Convention is that the House of Lords cannot block a law passed by the House of Commons which is based on a previous manifesto commitment made by the government.

▼ Figure 2.6 Evaluating the influence of political pressure on Parliament

Advantages of political pressure	Disadvantages of political pressure
- Each political party has its proposals for reform ready and published in a manifesto during an election campaign so that, if it is elected as the government, the electorate know what it wishes to do in future parliamentary sessions to achieve its aims. - If the government has a majority of seats in the House of Commons, virtually every one of its policy proposals will be passed. This can be said to make the law-making process efficient. - The public know before the election what the broad proposals of each political party are, and have a choice as to which set of proposals and law reforms they would wish to see put in place. - Proposed changes to laws will be debated in Parliament and improvements to initial proposals can be suggested. - Members of the House of Lords have expertise in a wide range of topics. Suggestions made by the Lords to alter government proposals carry considerable weight and authority and are generally non-political.	- If a different party is elected in a general election from the previous governing party, it may decide to repeal or alter some of the laws that the previous government passed. This is because its policies are likely to be quite different from the previous government. Such changes can be costly and open to criticism, and can lead to piecemeal reform. - If the government has a large majority of seats in the House of Commons, it can force through its policy proposals. - If the government has only a small majority, it may be difficult or impossible to achieve changes to the law or manifesto commitments. - Suggestions to alter or improve the proposals made by experts in the House of Lords do not have to be accepted by the House of Commons or the government. - If a crisis occurs, such as the COVID-19 pandemic, the government's focus will be to take measures to deal with that crisis, which may differ from its manifesto commitments.

2.3.2 Public opinion

Public opinion on an issue may be reflected through the media, particularly social media, and pressure groups. Also, an individual may ask their MP to raise an issue in Parliament or with a government minister or department.

In 2015, a system of online petitions was set up for individuals to have their concerns heard. They enable members of the public to petition the House of Commons and press for action from the government. They have to ask for a specific action and should be about an issue for which the government or the House of Commons is responsible. A petition has to be supported by at least six people before it is published on the petitions site for other people to sign. It will stay open on the petitions website for six months. Then the Petitions Committee will be able to decide to do any of the following:

- » ask for more information in writing or from the petitioner in person
- » ask another parliamentary committee to look into the topic
- » put forward the issue for debate in Parliament if a threshold of 100 000 signatures is achieved.

Where there is strong public opinion about a change to the law, the government may bow to such opinion. This is more likely towards the end of a term of government, when a general election is imminent and the government wants to remain popular. An example of this influence was in 2007, when strict laws against smoking in public places were introduced because of public opinion supported by medical opinion.

ACTIVITY

Draft a petition on a subject that interests you.

▼ Figure 2.7 Evaluating the influence of public opinion on Parliament

Advantages of public opinion	Disadvantages of public opinion
- An individual may express their opinion to an MP or through an online petition. The government may support a campaign to change the law. - An individual may be successful in bringing their campaign to a wider audience if they can interest the media to publicise the campaign.	- The public could be ill-informed on an issue and make unreasonable opinions or unworkable demands of the government. - The government may decide to sacrifice its popularity and not act on, or delay acting on, a petition. - MPs are unlikely to be successful in introducing a Private Members' Bill to act on public opinion.

2.3.3 Pressure groups

Pressure groups are made up of people who have a special interest in a subject or cause, which they try to bring to the attention of the general public and/or the government. This is done by campaigning and lobbying

government ministers or departments responsible for an issue. There are two main types of pressure group: sectional and cause:

- » Sectional pressure groups represent the interests of a particular group of people, often workers' groups or professions. Examples include the Law Society, which represents solicitors' interests, the British Medical Association, which represents doctors, and trade unions, which represent workers in different types of jobs.
- » Cause pressure groups promote a particular cause. Examples include environmental groups such as Greenpeace, animal welfare groups and human rights groups such as Amnesty.

Pressure groups may make the government reconsider certain areas of law. For example, the passing of the Hunting Act 2004, which banned hunting foxes with dogs, was due to the efforts of the League Against Cruel Sports.

Sometimes pressure groups campaign against a proposed change to the law. This was seen when the government tried to restrict the right to trial by jury. Pressure groups such as Justice and Liberty campaigned against this, as they thought the changes infringed the right to a fair trial.

Lobbying

Lobbying means trying to persuade government ministers or individual MPs to support a pressure group's cause. It is named after the practice of members of the public meeting MPs in the lobbies (small hallways) in the entrance to the House of Commons.

If a pressure group is successful in lobbying, it may persuade an MP to ask a question of a government minister. A backbench MP may be persuaded to use the Private Members' Bill session to introduce a Bill supporting a pressure group's cause. However, as has been said, it is very unlikely that a Private Member's Bill will be passed by Parliament, unless there is widespread support for it.

COMMENT

Evaluation of lobbying

Often lobbying by pressure groups takes many months or years to bring about government response or action. However, on occasions, a specific event may lead to a change in the law. This was the case in the aftermath of the Dunblane massacre in 1996, when a gunman entered a school in Scotland and killed 16 children and their teacher. Local families set up a single-issue pressure group called 'Snowdrop' to campaign for the banning of handguns. Their campaign led eventually to the Firearms (Amendment) Act 1997, which banned the private ownership of most handguns. As Snowdrop had achieved their aim and they had no reason to campaign on other issues, the group then disbanded.

▼ **Figure 2.8** Evaluating the influence of pressure groups on Parliament

Advantages of pressure groups	Disadvantages of pressure groups
• There are many pressure groups with different aims and issues. A wide range of issues can be drawn to the attention of government. • Pressure groups often raise important issues. Environmental groups have made the government much more aware of the damage being done to the environment by greenhouse gases and other pollutants. • Pressure groups are experts when representing their members or their cause. They will have experts in their membership, or can employ experts, to argue their cause.	• Pressure groups may seek to impose their ideas, even where the majority of the public do not support their views. When trade unions call strike action involving a public service, this can disrupt the general public. • Sometimes two pressure groups have conflicting interests and campaign for opposing actions. For example, when the ban against fox hunting was considered, the League Against Cruel Sports wanted it banned, but the Countryside Alliance wanted it to be allowed to continue.

2.3.4 Media

The term 'media' means the ways in which information is supplied to the public. It includes television, radio, newspapers, magazines and internet sources.

The media can play a large role in bringing public opinion to the government's attention. Where an issue is given a high profile on television or in newspapers, it brings it to the attention of the public and may add to the weight of public opinion. This is an advantage of a free press; it is able to criticise government policy or demand government action. This can be especially effective in a general election campaign, where every political party is keen to gain public support.

The media can both represent and influence public opinion. Members of the public can make their views known by contacting media sources. Alternatively, media may be used by government and pressure groups to make their views known and attempt to influence public opinion.

There are sometimes media campaigns attempting to change the law:

- » The Snowdrop campaign (referred to above) successfully used the media to campaign for handguns to be banned.

- » When 'dangerous dogs' attacked a number of adults and children, this led to the passing of the Dangerous Dogs Act 1991. This Act was subsequently considered to be a poorly drafted piece of legislation, as it was introduced as a 'knee-jerk reaction' to media publicity (see the activity below).
- » There was reform of the 'double jeopardy' rule, allowing a person to be tried more than once if new evidence comes to light following an acquittal in the first trial. This was introduced by the

Criminal Justice Act 2003 and was due to media campaigns after the suspects accused of killing Stephen Lawrence were acquitted in their first trial, despite strong evidence against them.

Internet research

Find a current example of a newspaper or internet campaign on an issue.

In your view, how likely is the government to introduce legislation as a result of this campaign?

▼ Figure 2.9 Evaluating the influence of the media on Parliament

Advantages of media pressure	Disadvantages of media pressure
- The media can raise awareness of public concern on an issue with the government, for example damage to the environment. - The public and pressure groups can use the media to raise concern about individual incidents, such as the Dunblane massacre and, more recently, terror-related attacks. - The media can inform and raise public awareness, which is essential to encourage the government to form policy, act and legislate. The government is ultimately responsible to the electorate and, especially before an election, will fear losing public support if it is not seen to be responding to an issue of public concern.	- While radio and television channels are required to remain politically neutral, this is not the case with newspapers or social media, which are willing to promote individual views and campaigns. Some newspapers give support to a specific political party and regularly promote its views. - There is no regulation on the expression of views on the internet or on social media. - Newspapers are commercial businesses and may be prepared to sensationalise an issue to expand their readership. This can be seen as part of the media manipulating the news and creating public opinion.

ACTIVITY

Read the following article and answer the questions below.

'Judge reprieves Dempsey, the harmless pit bull

A High Court judge, who reprieved a pit bull terrier from death row yesterday, savaged the Dangerous Dogs Act 1991 which he said would have sent a "perfectly inoffensive animal to the gas chamber".

Dempsey, dubbed Britain's most expensive dog after a long legal battle to save her, will be returned to her overjoyed owner after Lord Justice Staughton and Mr Justice Rougier quashed a destruction order by Ealing Magistrates' Court in 1992.

Dempsey's only crime was being the wrong kind of dog, Judge Rougier said. Magistrates sentenced her to be destroyed after the nephew of her owner, Dianne Fanneran, took her muzzle off in public when she became ill, and she was spotted by a policeman.

Mr Justice Rougier said:

"It seems to me that, while acknowledging the need to protect the public ... the Dangerous Dogs Act

bears all the hallmarks of an ill-thought-out piece of legislation, no doubt drafted in response to another pressure group."

The Act was rushed through in 1991 by the then Home Secretary, Kenneth Baker, after pit bull terriers attacked a man in Lincoln and a six-year-old girl in Bradford. It requires them to be put down unless they are neutered, tattooed, microchipped, registered, muzzled and kept on a lead in public.'

Taken from an article by Clare Dyer in The Guardian, 23 November 1995

Questions

- 1 Why was the Dangerous Dogs Act 1991 passed?
- 2 Why was Dempsey in breach of the Act?
- 3 What did Mr Justice Rougier say about the Act?
- 4 How might this problem with the Act have been avoided by the government when formulating the legislation?

TARGET SKILLS

- 1 Identify the parliamentary stages of an Act of Parliament.
- 2 Name an Act of Parliament that has been passed as a result of a Law Commission recommendation.
- 3 Analyse why the will of the House of Commons always prevails over that of the House of Lords.
- 4 Evaluate the advantages and disadvantages of law making by Parliament.

2.4 The role and composition of the Law Commission

This full-time body was set up in 1965 by the Law Commissions Act. It consists of a chairman, a High Court judge, and four other Law Commissioners who are experts in certain areas of law. There are also researchers and draftsmen, who prepare proposed Bills. The role of the Commission is to consider areas of law that are believed to be in need of reform. This role is set out in s 3 of the Law Commissions Act, which states:

'It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.'

2.4.1 How the Law Commission works

Topics may be referred to the Law Commission by the government, or it may itself select areas of law in need of reform. It first researches the area of law thought to be in need of reform. It then publishes a consultation paper, seeking views on possible reform from lawyers, academics and anyone with an interest in the area under investigation. The consultation paper will suggest options for reform.

Following responses to the consultation paper, the Commission will then draw up proposals for reform presented in a researched report. There will often be a draft Bill attached to the report, which can be considered by Parliament.

2.4.2 Repeal of existing law

There are many old, unnecessary and irrelevant statutes still in existence. In order to deal with these, the Law Commission prepares a Repeals Bill for Parliament to consider. By 2015, there had been 19 Statute Law

(Repeals) Acts, and the whole of 3000 old Acts have been repealed.

This 'tidying-up' of the statute book helps to make the law more accessible.

Internet research

Look at the Law Commission's website (www.lawcom.gov.uk) and find the areas of law that it is currently researching.

2.4.3 Consolidation

In some areas of law, there are a number of statutes, each of which sets out a small part of the total law. The aim of consolidation is to draw all the existing provisions together in one Act to make the law more accessible. The Law Commission produces about five Consolidation Bills each year.

However, consolidation is not always successful. For example, sentencing practice and procedure was originally consolidated in the Powers of Criminal Courts (Sentencing) Act 2000. Within a few months, it was changed by the Criminal Justice and Court Services Act 2000, which renamed some of the community penalties and also created new powers of sentencing. In 2003, the Criminal Justice Act made further changes. Finally, in 2012, the Legal Aid, Sentencing and Punishment of Offenders Act made further changes still. So, the current law on sentencing practice and procedure is contained in four different Acts!

2.4.4 Codification

This involves bringing together all the law on a topic, both statutory and judicial precedent, into one single law.

The Law Commission continues to press for a Sentencing Code, so that all the law is in one document instead of all the Acts referred to above. This would make the law more accessible and understandable, and give consistency and certainty.

2.4.5 Success of the Law Commission

Although the Law Commission has not achieved its original idea of codification, it has been successful in some areas of law. After it was established, about 85 per cent of its proposals were enacted by Parliament. These included the Unfair Contract Terms Act 1977, the Supply of Goods and Services Act 1982 and the Occupiers' Liability Act 1984.

Subsequently, only about 50 per cent of its suggestions have become law, due to lack of parliamentary time and lack of interest by Parliament in technical law reform. Its annual report of 2017–18 showed that there were

12 reports awaiting response from the government, who also rejected about one in six of the Law Commission's reports. However, some important reforms have been passed in recent years, for example:

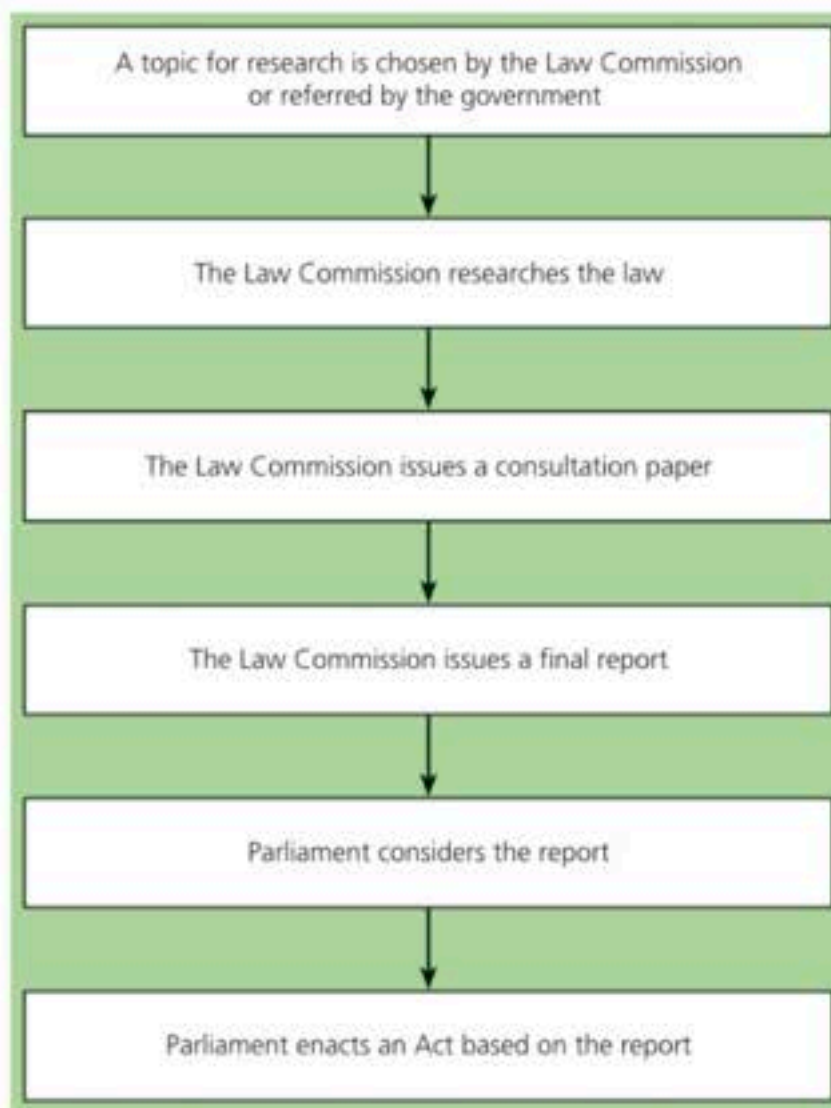
- » The Fraud Act 2006 simplified the law on fraud.
- » The Corporate Manslaughter and Corporate Homicide Act 2007 made corporations and organisations criminally liable for deaths caused by their working practices.

- » The Criminal Justice and Courts Act 2015 included reform of contempt by jurors and the creation of new offences of juror misconduct in relation to using the internet.

Figure 2.10 shows the advantages and disadvantages of the Law Commission.

▼ Figure 2.10 Evaluating the Law Commission

Advantages of the Law Commission	Disadvantages of the Law Commission
• Areas of law are researched by legal experts. • The Law Commission is politically independent. • Its recommendations are based on thorough research. • Draft Bills are prepared and presented to Parliament. • If Parliament accepts a recommendation to codify an area of law, it becomes easier for lawyers and the public to find and understand. • Many old, irrelevant laws are removed from the statute book.	• There has been a failure of Parliament to implement its reforms. Parliament has to wait for the government to accept a report and act on it. • Parliament tends to concentrate on debates on broad policy areas, such as health and education, rather than on 'purely' legal issues. • The Law Commission recommended reforms to the criminal law on non-fatal offences in 1993, and to the civil law of negligence in 1998, but neither area of law has been changed. • The government is not bound to consult the Law Commission before bringing any changes in the law to Parliament; for example, it was not consulted on changes to sentencing practice and procedure.



▲ Figure 2.11 How the Law Commission works

STRETCH AND CHALLENGE

In response to the COVID-19 pandemic, the UK government introduced the Coronavirus Act 2020, in order to keep the general population safe.

Research the issues involved at the time of the passing of the Act in March 2020 and write a report on the effects of the Act. The report could cover the effects of the rules or any of their constitutional or practical implications.

TEST YOURSELF

- 1 Describe the purpose of Green and White Papers.
- 2 Describe the parliamentary stages of a government Bill.
- 3 Describe Dicey's principles of parliamentary supremacy (sovereignty).
- 4 Assess the work of pressure groups as an influence on law making.
- 5 Assess the work of the Law Commission as an influence on law making.

EXAM-STYLE QUESTIONS

- 1 Describe the legislative procedure in the House of Commons.
- 2 Assess the role of Parliament in the law-making process.

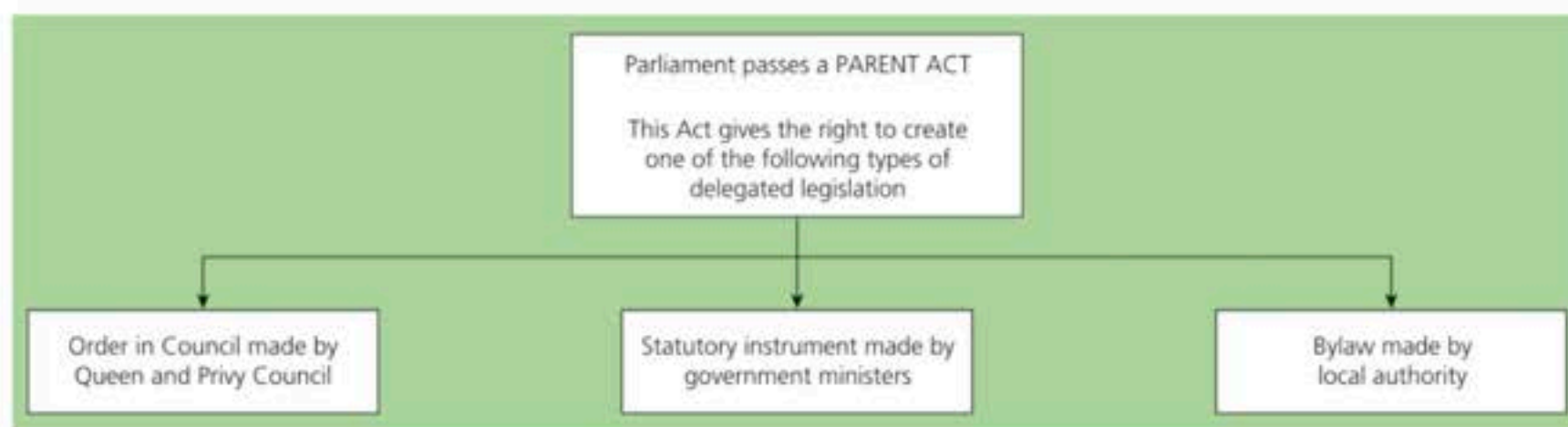
3

Delegated legislation

Introduction

As well as Parliament directly making laws through Acts of Parliament, other people or bodies can be given the power by Parliament to create laws. This can include the Privy Council, government ministers, local authorities and certain companies. Law created in this way is known as delegated legislation.

As the power to make law is given to unelected people or bodies, there are various checks and controls made on the making and operation of delegated legislation.



▲ Figure 3.1 Types of delegated legislation

3.1 Types of delegated legislation

Delegated legislation is law made by some person or body other than Parliament, but with the authority of Parliament. That authority is usually laid down in a 'parent' Act of Parliament, known as an enabling Act, which creates the framework of the law and then delegates power to others to make more detailed law in the area. An example of an enabling Act is the Police and Criminal Evidence Act 1984, which gives authority to make Codes of Practice for the use of police powers (see Chapter 9).

3.1.1 Orders in Council

The Queen and the Privy Council have the authority to make Orders in Council. The Privy Council is made up of the prime minister and other leading members of the government. This type of delegated legislation effectively allows the government to make legislation

without it having to be debated or voted on in Parliament. Orders in Council can be made on a wide range of matters, especially:

- » transferring responsibility between government departments; for example, when the Ministry of Justice was created, the powers of the previous Department of Constitutional Affairs and some of the powers of the Home Office were transferred to this new ministry
- » bringing Acts (or parts of Acts) of Parliament into force
- » making law in emergencies under the Civil Contingencies Act 2004.

Orders in Council can also be used to make other types of law. For example, in 2003 an Order in Council was used to alter the Misuse of Drugs Act 1971, to downgrade cannabis to a Class C drug. Five years later, the government decided that it had been a mistake, and another Order in Council was issued upgrading cannabis back to a Class B drug.

2008 No. 3130

DANGEROUS DRUGS**The Misuse of Drugs Act 1971 (Amendment) Order 2008**

Made 10th December 2008

Coming into force 26th January 2009

At the Court at Buckingham Palace, the 10th day of December 2008

Present,

The Queen's Most Excellent Majesty in Council

In accordance with section 2(5) of the Misuse of Drugs Act 1971(1) a draft of this Order has been laid before Parliament after consultation with the Advisory Council on the Misuse of Drugs and approved by a resolution of each House of Parliament.

Accordingly, Her Majesty, in exercise of the powers conferred upon Her by sections 2(2) and 2(4) of that Act, is pleased, by and with the advice of Her Privy Council, to order as follows:

Citation, commencement and revocation

1.—(1) This Order may be cited as the Misuse of Drugs Act 1971 (Amendment) Order 2008 and shall come into force on 26th January 2009.

(2) The Misuse of Drugs Act 1971 (Modification) (No. 2) Order 2003(2) is revoked.

Amendments to the Misuse of Drugs Act 1971

2.—(1) Schedule 2 to the Misuse of Drugs Act 1971 (which specifies the drugs which are subject to control under that Act) is amended as follows.

(2) In Part 2 (Class B drugs)—

(a) in paragraph 1(a), after, 'Amphetamine' insert—

'Cannabinol

Cannabinol derivative

Cannabis and cannabis resin';

(b) after paragraph 2 insert—

'2A. Any ester or ether of cannabinol or of a cannabinol derivative.'; and

(c) in paragraph 3, for 'or 2' substitute '2 or 2A'.

(3) In Part 3 (Class C drugs) the following words are repealed —

(a) in paragraph 1(a), 'Cannabinol', 'Cannabinol derivatives' and 'Cannabis and cannabis resin'; and

(b) in paragraph 1(d), 'or of cannabinol or a cannabinol derivative'.

Judith Simpson

Clerk of the Privy Council

▲ **Figure 3.2** The Order in Council upgrading cannabis to a Class B drug

There must be an enabling Act allowing the Privy Council to make an Order in Council. As can be seen in Figure 3.2, the enabling Act for the change of category of cannabis was the Misuse of Drugs Act 1971.

Internet research

Look up recent Orders in Council on the Privy Council website at www.privacy-council.org.uk. On the homepage, click on Privy Council, then click on Privy Council Meetings. You should now see a series of dates on which meetings took place. Click on any of these dates and you should see a list of Orders in Council made at that meeting. Look to see which enabling Acts have allowed the orders to be made. The enabling Act is usually given on the left-hand side of the list of orders.

3.1.2 Statutory instruments

The term 'statutory instruments' refers to rules and regulations made by government ministers. Ministers in government departments can be given authority to make regulations. Each department deals with a different area of policy, and the minister in charge can make rules and regulations in respect of the matters it deals with. So, the Minister for Work and Pensions will be able to make regulations on work-related matters, such as health and safety at work, while the Minister for Transport is able to deal with road traffic regulations.

Statutory instruments can be very short, covering one point, such as making the annual change to the minimum wage. However, other statutory instruments may be very long, with detailed regulations that were

too complex to include in an Act of Parliament. The following are examples of statutory instruments that include a lot of detail:

- » The Chemicals (Hazard Information and Packaging for Supply) Regulations 2009 were made by the Minister for Work and Pensions, under powers given in the European Communities Act 1972 and the Health and Safety at Work etc. Act 1974.
- » Police codes of practice in relation to powers such as stop and search, arrest and detention were made by the Lord Chancellor and Secretary of State for Justice, under powers given by the Police and Criminal Evidence Act 1984.

The use of statutory instruments is a major method of law making. In 2014, 3481 statutory instruments were made, but in 2019 the number was only 1410.

STATUTORY INSTRUMENTS		
2020 No. 105		
CIVIL AVIATION		
The Air Navigation (Restriction of Flying) (Streatham) (Emergency) Regulations 2020		
Made - - - - at 2.40 p.m. on 2nd February 2020		
Coming into force - - - - with immediate effect		
The Secretary of State for a reason affecting the public interest deems it necessary to restrict flying in the area specified in the Schedule by reason of an emergency having arisen in that area.		
The Secretary of State makes the following Regulations in exercise of the powers conferred by article 239 of the Air Navigation Order 2016(a).		
Citation and commencement		
1. These Regulations may be cited as the Air Navigation (Restriction of Flying) (Streatham) (Emergency) Regulations 2020 and come into force with immediate effect.		
Restricted airspace		
2. No aircraft is to fly below 2,500 feet above mean sea level over the area specified in Column 1 of the Schedule, being an area bounded by a circle of the radius specified in Column 2 and centred on the position specified in Column 3.		
3. These Regulations do not apply to any aircraft flying in accordance with directions given by the Metropolitan Police Service.		
Signed by authority of the Secretary of State for Transport		
At 2.40 p.m. on 2nd February 2020		Carole Lovstrom Grade 6 Department for Transport
SCHEDULE		
Table 1	Regulation 2	
Column 1	Column 2	Column 3
Specified area	Radius of circle	Position of centre of circle (latitude and longitude)
Streatham	2 nautical miles	512527N 0000721W
(a) S.I. 2016/765, to which there are amendments not relevant to these Regulations.		
EXPLANATORY NOTE		
(This note is not part of the Regulations)		
These Regulations impose restrictions of an emergency nature on flying in the area specified in the Schedule. They are intended to be of temporary duration and will be revoked as soon as the emergency in question has passed.		

▲ Figure 3.3 The Air Navigation (Restriction of Flying) (Streatham) (Emergency) Regulations 2020

Internet research

Look up the most recent statutory instrument for changing the national minimum wage.

- » Who signed the most recent change?
- » Under what authority was the change made – what was the enabling Act?
- » What are the old and new amounts of the national minimum wage?

3.1.3 Bylaws

These can be made by local authorities to cover matters within their own area; a county council can pass

bylaws affecting a whole county, while a district or town council can only make bylaws for its district or town. Many local bylaws involve traffic control, such as parking restrictions. Other bylaws may be made for regulating behaviour, such as banning drinking in public places or banning people from riding bicycles in a local park. Bylaws can also be made by public corporations and certain companies, for matters within their jurisdiction that involve the public. This means that bodies such as the British Airports Authority and railway companies can enforce rules about public behaviour on or around their premises.

ACTIVITY

Look at the following two sources and answer the questions below.

Source A

STATUTORY INSTRUMENTS

2020 No. 447

PUBLIC HEALTH, ENGLAND

The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020

Made 21st April 2020

Laid before Parliament at 12.30 p.m. on 22nd April 2020

Coming into force at 11.00 a.m. on 22nd April 2020

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 (1).

These Regulations are made in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England.

The Secretary of State considers that the restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve, which is a public health response to that threat.

In accordance with section 45R of that Act the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament.

Citation and commencement

1. These Regulations may be cited as the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 and come into force at 11.00 a.m. on 22nd April 2020

[Source: www.legislation.gov.uk/uksi/2020/447/introduction/made]

Source B

Bylaws made under section 164 of the Public Health Act 1875, section 15 of the Open Spaces Act 1906 and sections 12 and 15 of the Open Spaces Act 1906 by the Bristol City Council

- No person shall without the consent of the Council erect a tent or use a vehicle, caravan or any other structure for the purpose of camping.
- No person shall light a fire or place, throw or drop a lighted match or any other thing likely to cause a fire.
- No person shall ride a cycle in the ground in such a manner as to cause danger or reasonable fear of injury to any other person.
- No person shall drive, chip or pitch a hard golf ball except on a golf course.
- No person shall except in case of emergency or with the consent of the Council take off from or land in the ground in an aircraft, helicopter, hang glider or hot air balloon.

Questions

- 1 What type of delegated legislation is Source A?
- 2 Which enabling Act allowed this delegated legislation to be made?
- 3 Which government minister was responsible for making this legislation?
- 4 Will Parliament have seen and debated Source A before it comes into force?
- 5 Which type of delegated legislation is Source B referring to?
- 6 Which body made the order referred to in Source B?
- 7 Who will enforce the order?
- 8 Will Parliament have seen and debated the Order before it came into force?

▼ Figure 3.4 Key facts on delegated legislation

Key facts	
Where Parliament delegates or gives power to a person or body outside Parliament to make law	
Orders in Council	Where the Privy Council is given power to make an Order in Council, e.g. to make law in emergencies and to transfer power between government departments
Statutory instruments	Where government ministers are given power to make detailed rules and regulations to supplement Acts of Parliament
Bylaws	Where local authorities and providers of essential services are given power to make laws covering their local area, in the area of their responsibility

3.2 The Legislative and Regulatory Reform Act 2006

In addition to specific Acts giving ministers powers to make statutory instruments, the Legislative and Regulatory Reform Act 2006 gives ministers power to make any provision by order, if it will remove or reduce a 'burden' resulting from legislation. For this purpose, a burden is defined as:

- » a financial cost
- » an administrative inconvenience
- » an obstacle to efficiency, productivity or profitability
- » a sanction that affects the carrying on of any lawful activity.

Any minister making a statutory instrument under the powers of this Act must consult various people and organisations, such as:

- » organisations which are representative of interest substantially affected by the proposals, for example the Confederation of British Industry if the change affects businesses in general
- » the Welsh Parliament for matters concerning Wales
- » the Law Commission, where appropriate.

Orders made under this Act must be laid before Parliament to be considered by one of the following procedures:

- the negative resolution procedure, or
- the affirmative resolution procedure, or
- the super-affirmative resolution procedure.

Under this last point, the minister must have regard to:

- » any representations made, or
- » any resolution of either House of Parliament, or
- » any recommendation by a committee of either House that is asked to report on the draft order.

This procedure gives Parliament more control over delegated legislation made under the Legislative and Regulatory Reform Act 2006. It is important that this is done, as the Act gives ministers very wide powers to amend Acts of Parliament without detailed debate in Parliament.

3.3 Parliamentary controls on delegated legislation

Parliament has the initial control on delegated legislation, as the enabling Act will set the boundaries within which the delegated legislation is to be made; for example, the Act will state which government minister can make the regulations. It will also state the type of laws to be made and whether they can be made for the whole country or only for certain places. The Act can also set out whether the government department must consult other people before making the regulations.

Parliament also retains control over the delegated legislation, as it can repeal the powers in the enabling Act at any time. If it does this, then the right to make further regulations will cease.

There is a Delegated Powers Scrutiny Committee in the House of Lords, which considers whether the provisions of any Bills delegate legislative power inappropriately. It reports its findings to the House of Lords before the Committee Stage of the Bill, but has no power to amend Bills.

It is sensible that checks are made before an Act is passed, and on what powers are proposed to be delegated. If the powers in the original enabling Act are appropriate, then any delegated legislation is more likely to be properly drawn up.

There need to be checks in Parliament to make sure that the powers are being used properly. In addition to the powers under the Legislative and Regulatory Reform Act 2006, Parliament has the following ways of checking the actual delegated legislation.

3.3.1 Pre-drafting consultation

Before publication, the government department can consult with all interested parties and can take their views into account when drafting the regulations, but it is not bound to do so.

3.3.2 Scrutiny Committee

A more effective check is the existence of a Joint Select Committee on Statutory Instruments, usually called the Scrutiny Committee. This committee reviews all statutory instruments and, where necessary, will draw the attention of both Houses of Parliament to points that need further consideration. However, the review is a technical one and not based on policy. The main grounds for referring a statutory instrument back to the Houses of Parliament are that it:

- » imposes a tax or charge – this is because only an elected body has such a right
- » appears to have retrospective effect that was not provided for by the enabling Act
- » appears to have gone beyond the powers given under the enabling Act, or makes some unusual or unexpected use of those powers
- » is unclear or defective in some way.

The Scrutiny Committee can only review on these grounds and it has to report back its findings; it has no power to alter any statutory instrument.

3.3.3 Affirmative resolutions

A small number of statutory instruments will be subject to an affirmative resolution. This means that the statutory instrument will not become law unless specifically approved by Parliament. It will have to be debated in Parliament before it can operate.

The need to pass an affirmative resolution will be included in the enabling Act; for example, an affirmative resolution is required before new or revised police Codes of Practice under the Police and Criminal Evidence Act 1984 can come into force. One of the disadvantages of this procedure is that Parliament cannot amend the statutory instrument; it can only be approved, annulled or withdrawn by the government minister.

3.3.4 Negative resolutions

Most other statutory instruments will be subject to a negative resolution, which means that the relevant statutory instrument will be law unless rejected by Parliament within 40 days. The main problem with this procedure is that, in view of the number of statutory instruments issued, very few will be looked at in Parliament.

3.3.5 Questioning

Individual ministers may be questioned by MPs in Parliament on the work of their departments, and this can include questions about proposed regulations.

3.4 Court controls on delegated legislation

Delegated legislation can be challenged in court on the grounds that it is *ultra vires* ('beyond the powers').

3.4.1 Judicial review and locus standi

Any action to challenge will be taken in the Queen's Bench Division of the High Court. It can only be taken by a person or body with *locus standi* or an interest in the proceedings. This will usually be a person or body affected by a decision, or someone on their behalf.

Locus standi will be decided as a preliminary matter, before the main issues in the case are considered. If it is decided that the delegated legislation is *ultra vires*, it has gone beyond the powers that Parliament granted in the enabling Act. Any delegated legislation that is ruled to be *ultra vires* is void and not effective.

There are two types of *ultra vires*: procedural and substantive. Also, the court may declare a decision to be unreasonable and therefore *ultra vires*.

▼ Figure 3.5 Parliamentary controls on delegated legislation

Key facts	
Parliamentary control	Description
Pre-drafting consultation	Where a government department consults interested parties, whose views can be taken into account
Scrutiny Committee	Body that checks all statutory instruments after they have been brought into force, to ensure they have been properly made and are within the power of the government minister
Affirmative resolution procedure	Where Parliament agrees before the statutory instrument comes into force that it can be made
Negative resolution procedure	Where the statutory instrument comes into force subject to Parliament voting against its effect within 40 days; this is the most common form of control
Questioning	Where government ministers are questioned in the main chamber and in committee about a statutory instrument that has been brought into force and for which they are responsible

3.4.2 Procedural *ultra vires*

This is concerned with how the delegated legislation is made and if any required procedures have been correctly followed. Any piece of delegated legislation made without following the correct procedure will be *ultra vires* and void.

In *Agricultural Horticultural and Forestry Training Board v Aylesbury Mushrooms Ltd* (1972), the Minister of Labour had to consult:

'... any organisation ... appearing to him to be representative of substantial numbers of employers engaging in the activity concerned.'

His failure to consult the Mushroom Growers' Association, which represented about 85 per cent of all mushroom growers, meant that an order establishing a training board was invalid as against mushroom growers. However, it was valid in relation to others affected by the order, such as farmers, as the minister had consulted with the National Farmers' Union.

3.4.3 Substantive *ultra vires*

This is concerned with whether the content of the delegated legislation is within the limits specified in the parent Act. Any delegated legislation beyond those limits will be *ultra vires* and void. This can be illustrated by *R v Home Secretary, ex parte Fire Brigades Union* (1995), where changes made by the Home Secretary to the Criminal Injuries Compensation Scheme were held to have gone beyond the power given in the Criminal Justice Act 1988.

In *R v Secretary of State for Education and Employment, ex parte National Union of Teachers* (2000), it was ruled that a statutory instrument setting conditions for appraisal and access to higher rates of pay for teachers was beyond the powers given in the Education Act 1996. In addition, the procedure used was unfair, as only four days had been allowed for consultation.

▼ Figure 3.6 Judicial controls on delegated legislation

Key facts	
Judicial control	Description
Judicial review and <i>locus standi</i>	Only a person or body affected by, or directly interested in, a decision can take a judicial review action
Procedural <i>ultra vires</i>	Where a piece of delegated legislation is made without following the correct procedure
Substantive <i>ultra vires</i>	Where the content of the delegated legislation is not within the limits specified in the parent Act
Unreasonableness	When a public body makes a decision that no reasonable body would have made

CASE EXAMPLE

Attorney-General v Fulham Corporation (1921)

The parent Act gave the local authority the power to provide public clothes-washing facilities. The authority set up a commercial laundry where their employees washed residents' clothes. This was held to be *ultra vires*, as they had no authority to do so.

3.4.4 Unreasonableness

A piece of delegated legislation or a decision can be declared as 'Wednesbury unreasonable' following the decision in *Associated Provincial Picture Houses v Wednesbury Corporation* (1948).

This can be illustrated by *R (Rogers) v Swindon NHS Trust* (2006), when a woman with early-stage breast cancer was prescribed the drug Herceptin by her doctor. The NHS Trust refused to provide this non-approved drug, because it said that her case was not exceptional. The Trust was unable to show why the drug was prescribed for some patients and not others. Its decision was decided in court to be irrational and unreasonable and void.

In addition to the above, the courts will presume that, unless an enabling Act expressly allows it, there is no power to do any of the following:

- » make unreasonable regulations – in *Strickland v Hayes Borough Council* (1896), a bylaw prohibiting the singing or reciting of any obscene song or ballad and the use of obscene language generally was held to be unreasonable and so *ultra vires*, because it was too widely drawn in that it covered acts done in private as well as those done in public
- » levy taxes
- » allow sub-delegation.

TARGET SKILLS

- 1 Name the three forms of delegated legislation.
- 2 Identify two ways in which delegated legislation can be controlled by Parliament.
- 3 Assess the benefits of the use of delegated legislation.
- 4 Evaluate the advantages and disadvantages of one form of delegated legislation.

COMMENT

Evaluation of delegated legislation

While the principle of review of delegated legislation by judges is sound, there are several obstacles to a person taking such an action. First, it can only be taken by someone, or a body, having an interest in the action – in other words, affected by the action. There is no legal-aid funding available, so paying for lawyers to take an action may be a barrier. Then the only court where an action can be taken is the Queen's Bench Division of the High Court, which has limited capacity to hear a claim.

Reasons for delegated legislation

- 1 Parliament does not have time to consider and debate every small detail of complicated regulations.
- 2 Parliament may not have the necessary technical expertise or knowledge required; for example, health and safety regulations in different industries need expert knowledge. Modern society has become very complicated and technical, so that it is impossible for members of Parliament to have all the knowledge needed to draw up laws on controlling technology, ensuring environmental safety, dealing with a vast array of different industrial problems or operating complex taxation schemes. It is thought that it is better for Parliament to debate the main principles thoroughly, but leave the detail to be filled in by those who have expert knowledge.
- 3 Local bodies can deal with local issues that are of concern to them and can use bylaws to regulate behaviour in certain areas such as parks and beaches.
- 4 Ministers can have the benefit of further consultation before detailed regulations are drawn up. Consultation is particularly important for rules on technical matters, where it is necessary to make sure that the regulations are technically accurate and workable. Some Acts require consultation before regulations are created; for example, before any new or revised police Code of Practice under the Police and Criminal Evidence Act 1984 is issued, there must be consultation with a wide range of people including:
 - persons representing the interests of police authorities
 - the General Council of the Bar, and
 - the Law Society.
- 5 The process of passing an Act of Parliament can take a considerable amount of time and, in an emergency, Parliament may not be able to pass law quickly enough. The Privy Council can meet at short notice and pass necessary emergency rules.
- 6 Delegated legislation can be amended or revoked easily when necessary, so that the law can be kept up to date, and ministers can respond to new or unforeseen situations by amending or updating existing regulations.

▼ **Figure 3.7** Evaluation of delegated legislation

Advantages of delegated legislation	Criticisms of the use of delegated legislation
• Time-saving: delegated legislation is quicker to pass and amend. • Policy over detail: it is better for MPs to focus on wider issues rather than detail. • Speed: delegated legislation allows for a quick response in an emergency, as Parliament might not be sitting. • Expertise: it is better to use technical expertise or local knowledge when making detailed laws for industry or local areas. • Flexibility: delegated legislation can be easily amended or revoked. Acts of Parliament can be brought into force piecemeal. • Controls: there is both parliamentary and judicial help to avoid abuse of power by ministers or others with delegated powers.	• It takes law making away from the democratically elected House of Commons and allows non-elected people to make law. • Sub-delegation: this means that law-making authority is handed down another level. This brings comment that much law is made by unelected civil servants and merely 'rubber-stamped' by the minister of that department. • The large volume of delegated legislation gives rise to criticism since it makes it difficult to discover what the present law is. • Delegated legislation contains obscure wording that can lead to difficulty in understanding the law and requires judges to interpret its meaning.

STRETCH AND CHALLENGE

The Coronavirus Act 2020 gave wide powers to government ministers to introduce secondary (or delegated) legislation for specific reasons, for example imposing quarantine on visitors to England from 8 June 2020.

Research the statutory instruments passed since 17 March 2020 and list all those relevant to the COVID-19 pandemic, their effect and in whose name the instrument was made.

TEST YOURSELF

- 1 Which body makes Orders in Council, and who can sit on this body?
- 2 Who can make statutory instruments, and from where do they get the power to make these regulations?
- 3 Describe two ways judges can control delegated legislation.
- 4 Assess the benefit of using bylaws.
- 5 Assess the reasons for the use of delegated legislation.

EXAM-STYLE QUESTIONS

- 1 Describe three parliamentary controls on delegated legislation.
- 2 Assess the benefit of statutory instruments and Orders in Council.

4

Statutory interpretation

Introduction

Many Acts or statutes are passed by Parliament each year. The meaning of the law in these statutes should be clear, but this is not always achieved. In order to help understand the meaning of a statute, Parliament will include definition clauses which give the meaning of certain words used in that statute; such clauses are called 'interpretation sections'.

For example, in the Theft Act 1968, the definition of 'theft' is given in s 1, and then ss 2–6 define key words in that offence. However, not all words in all Acts are given definitions, and it will then be for judges in cases in court to give meanings to words used by Parliament. When acting in this way, judges use certain rules. This chapter links to the key concept of effectiveness and certainty.

4.1 The common law rules of interpretation

4.1.1 The literal rule

This rule developed in the early nineteenth century and has been the main rule applied ever since then. Using this rule, a judge will give words their plain, ordinary or literal (dictionary) meaning, even if the result is not very sensible. This idea was expressed by Lord Esher in *R v Judge of the City of London Court* (1892) when he said:

'If the words of an act are clear then you must follow them even though they lead to a manifest absurdity.'

The court has nothing to do with the question whether the legislature has committed an absurdity.'

The use of this rule was illustrated in *Whiteley v Chappell* (1868), where the defendant was charged under an Act that made it an offence to impersonate 'any person entitled to vote'. The defendant had pretended to be a person whose name was on the voters' list, but who had died. The court held that the defendant was not guilty, since a dead person is not, in the literal meaning of the words, 'entitled to vote'.

CASE EXAMPLES

London and North Eastern Railway Co. v Berriman (1946)

A railway worker was killed while doing maintenance work, oiling points on a railway line. His widow tried to claim compensation because there had not been a look-out man provided by the railway company, in accordance with a regulation under the Fatal Accidents Act. This stated that a look-out should be provided for men working on or near the railway line 'for the purposes of relaying or repairing' it.

The court took the words 'relaying' and 'repairing' in their literal meaning and said that oiling points was maintaining the line and not relaying or repairing, so that Mrs Berriman's claim failed.

Fisher v Bell (1961)

A shopkeeper had a flick-knife displayed in his shop window with a price tag on it. The Restriction of Offensive Weapons Act 1959 made it an offence to 'offer' such flick-knives for sale. In ordinary contract law, goods on display in shops are not 'offers' in the technical sense but an 'invitation to treat' preparatory to a customer making an offer.

Lord Justice Parker applied the literal rule of statutory interpretation and found that the shopkeeper had committed no offence.

▼ Figure 4.1 Evaluation of the literal rule

Advantages of use of the literal rule	Disadvantages of use of the literal rule
- The rule follows the words that Parliament has used. Since Parliament is the democratic law-making body, it is right that the judges should apply the law exactly as it is written. Using the literal rule to interpret Acts of Parliament prevents unelected judges from making law. - Using the literal rule should make the law more certain, as the law will be interpreted exactly as it is written by Parliament. This makes it easier for lawyers and the public to know what the law is and how judges will interpret it.	- The literal rule assumes every Act will be perfectly drafted. In the Dangerous Dogs Act 1991, Parliament used the word 'type' of dog, whereas it should have used the word 'breed', as there is no such thing as a type of dog. - When the law is drafted, it is not always possible to cover every situation that Parliament intended; see <i>Whiteley v Chappell</i> (1868). - Words may have more than one meaning so that the Act is unclear. - Following the words in an Act exactly can lead to unfair decisions; see <i>London and North Eastern Railway Co. v Berriman</i> (1946). Professor Michael Zander has denounced the literal rule as being mechanical and divorced from the realities of the use of language.

4.1.2 The golden rule

This rule is a modification of the literal rule, as it starts by looking at the literal meaning of words, but the judge is then allowed to avoid an interpretation that would lead to an absurd result. There are two views on how far the golden rule should be used.

Narrow application of the golden rule

In *Jones v DPP* (1962), Lord Reid said:

'It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a

statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond this you cannot go.'

So, under the narrow application of the golden rule, the court may only choose between the possible meanings of a word or phrase. If there is only one meaning, then that must be taken. This narrow view of the golden rule can be seen in practice in *Adler v George* (1964) and *R v Allen* (1872).

CASE EXAMPLES

Adler v George (1964)

The Official Secrets Act 1920 made it an offence to obstruct Her Majesty's Forces 'in the vicinity' of a prohibited place. The defendants had obstructed HM Forces actually in their base – the prohibited place. The defendants argued they were not guilty, as the literal wording of the Act did not apply to anyone 'in' the prohibited place. It only applied to those 'in the vicinity'; that is, outside but close to it.

The Divisional Court found the defendants guilty, as it would be absurd if those causing an obstruction outside the prohibited place were guilty, but anyone inside was not. The words should be read as being 'in or in the vicinity of' the prohibited place.

R v Allen (1872)

The defendant tried to marry again while he was still married. He was charged under s 57 of the Offences Against the Person Act 1861, which makes it an offence for 'whosoever being married shall marry again without the previous marriage being ended'.

The defendant argued that he could not be guilty, as his second 'marriage' was void. The court, using the narrow application of the golden rule, decided that 'shall marry' should be interpreted as going through a ceremony of marriage, so the defendant was guilty. If any other meaning were given to these words, the offence was incapable of being committed.

Wider application of the golden rule

The second, wider, application of the golden rule is where the words have only one clear meaning, but, if that meaning was used, it would lead to a repugnant

situation – a result which should not be allowed. In such a case, a judge will modify the words of a statute to avoid that problem.

An example of the wider approach is *Re Sigsworth* (1935).

CASE EXAMPLE

Re Sigsworth (1935)

A son murdered his mother. The mother had not made a will, so normally her estate would have been inherited by her next of kin, according to the rules set out in the Administration of Estates Act 1925. This meant that the murderer son would have inherited as her 'issue'. There was no ambiguity in

the words of the Act, but the court was not prepared to let a murderer benefit from his crime, so it was held that the literal rule should not apply, and the golden rule would be used to prevent the repugnant situation of the son inheriting. Effectively, the court was writing into the Act that the 'issue' would not be entitled to inherit where they had killed the deceased.

▼ Figure 4.2 Evaluation of the golden rule

Advantages of the golden rule	Disadvantages of the golden rule
- This rule respects the exact words of Parliament except in limited situations. It allows the judge to choose the most sensible meaning; see <i>R v Allen</i> (1872). - It can also provide sensible decisions in cases where the literal rule would lead to a repugnant situation; see <i>Re Sigsworth</i> (1935).	- It is very limited in its use, so it is only used on rare occasions, and it is not always possible to predict when courts will use the golden rule over the literal rule. - Michael Zander has described it as a 'feeble parachute'. In other words, it is an escape route but it cannot do very much.

4.1.3 The mischief rule

This rule gives a judge more discretion when interpreting legislation than the previous two rules. The definition of the rule comes from *Heydon's Case* (1584), where it was said that there were four points the court should consider. These, in the original language of that old case, were:

- » What was the common law before the making of the Act?
- » What was the mischief and defect for which the common law did not provide?
- » What was the remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?
- » What was the true reason of the remedy?

'Then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy.' Under this rule, therefore, the court should look to see what the law was before the Act was passed, in order to discover what gap or 'mischief' the Act was intended to cover. The court should then interpret the Act in such a way that the gap is covered. This is clearly a quite different approach from the literal rule.

One example of the use of the mischief rule was in *Coates v Crown Prosecution Service* (2011), the defendant was charged with an offence under s72 of the Highways Act 1835 of riding a carriage on a footpath by riding a Segway scooter. The meaning of 'motor car' in s185 of the Road Traffic Act 1988 was also considered. It is defined as 'a mechanically propelled vehicle'. The defendant denied that the Segway scooter was 'a mechanically propelled vehicle intended or adapted for use on roads'.

Lord Justice Munby, using the mischief rule, said :

'a motor vehicle is a carriage ... but it does not follow from this that the carriage must be a motor vehicle. Indeed ... something which is not a motor vehicle can nonetheless be a carriage for this purpose.'

It was decided that the Segway scooter was a carriage under s72 and the defendant was guilty.

It can be seen from this that the judge was putting his own interpretation on Parliament's words.

CASE EXAMPLE

Elliot v Grey (1960)

The defendant's car was parked on a road. Its wheels were off the ground as it was suspended jacks and its battery was missing. The defendant was charged with the offence of using an uninsured vehicle on the road contrary to the Road Traffic Act 1930. The defence argued that the car was not being used on the road as it was not able to be driven.

When interpreting the Act, the court applied the mischief rule and decided that the car was being used on the road. It was a hazard to other road users and it needed to be insured in case of an incident or causing an accident. The Act was aimed at ensuring road users were compensated if injured by hazards on the road.

▼ Figure 4.3 Evaluation of the mischief rule

Advantages of the mischief rule	Disadvantages of the mischief rule
- Judges have greater flexibility in decision making as it allows judges to look at the gap in the law that the Act was designed to cover. - It is preferred to the literal and golden rules as it achieves Parliament's intention. - Its use has been recommended by the Law Commission.	- There is a risk of judicial law making as judges are effectively re-writing the words of statutes. - Use of the mischief rule may lead to uncertainty in the law, making legal advice difficult. - It relies on the use of extrinsic aids to meet what is thought to be Parliament's intention.

ACTIVITY

In *Fisher v Bell* (1961), the defendant was a shopkeeper who displayed a flick-knife marked with a price in his shop window; he had not actually sold any. He was charged under s 1(1) of the Restriction of Offensive Weapons Act 1959:

'Any person who manufactures, sells or hires or offers for sale or hire or lends or gives to any other person – (a) any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a "flick-knife"...shall be guilty of an offence.'

The court had to decide whether he was guilty of offering the knife for sale. There is a technical legal meaning of 'offers for sale', under which putting an article in a shop window is not an offer to sell (students of contract law should know this rule!).

Question

Consider the phrase 'offers for sale' and explain how you think the case would have been decided using:

- a the literal rule
- b the golden rule
- c the mischief rule.

COMMENT

Should there be one preferred rule?

It would be helpful if there was one specific method of statutory interpretation that was always used in cases. At the moment, it is entirely up to the individual judge who is hearing the case to use whichever rule or approach they want. Some judges may use the literal rule; other judges may use the mischief rule or the modern purposive approach. This makes it difficult for lawyers to advise on what meaning a court may put on a disputed phrase in an Act of Parliament.

In some instances, a judge may decide to use the literal rule in one case and the mischief rule in another. This happened with Lord Parker, who used

the mischief rule in *Smith v Hughes* (1960) and the literal rule in *Fisher v Bell* (1961). It could be said that a judge decides what result they want in the case and then finds the rule that brings about that result.

In 1969, the Law Commission proposed that Parliament should pass an Act of Parliament that would mean that the mischief rule was to be used in order 'to promote the general legislative purpose'. However, this proposal has been ignored, although Lord Scarman in both 1980 and 1981 introduced a Bill on the matter into the House of Lords. The first time he was forced to drop the proposal; the second time the House of Lords voted for it, but the matter was never taken to the House of Commons.

4.1.4 The purposive approach

There is an argument that even if there were an Act of Parliament, there would still be variations in which rule judges would use. This has been shown in New Zealand, which has a law that encourages interpretation 'as will best ensure the attainment of the object of the Act'. Even though this should mean that this is done in every case, one writer points out that it is sometimes difficult to discover which approach has been used and 'the most that can be said is that some judges at some periods have been fairly consistent in using the approach that they prefer'.

The purposive approach goes beyond the mischief rule, in that the court is not just looking to see what the gap was in the old law; the judges are deciding what they believe Parliament meant to achieve. The champion of this approach in English law was Lord Denning. His attitude towards statutory interpretation was shown when he said in the case of *Magor and St. Mellons v Newport Corporation* (1950):

'We sit here to find out the intention of Parliament and carry it out, and we do this better by filling in the gaps

and making sense of the enactment than by opening it up to destructive analysis.'

However, his attitude was criticised by judges in the House of Lords when they heard the appeal in the case. Lord Simonds called Lord Denning's approach 'a naked usurpation of the legislative function under the thin disguise of interpretation' and pointed out that 'if a gap is disclosed the remedy lies in an amending Act'. Another judge, Lord Scarman, said:

'If Parliament says one thing but means another, it is not, under the historic principles of the common law, for the courts to correct it. The general principle must surely be acceptable in our society. We are to be governed not by Parliament's intentions but by Parliament's enactments.'

This speech shows the problem with the purposive approach. Should the judges refuse to follow the clear words of Parliament? How do they know what Parliament's intentions were?

CASE EXAMPLES***R (Quintavalle) v Secretary of State for Health* (2003)**

The House of Lords decided that organisms created by cell nuclear replacement (CNR) came within the definition of 'embryo' in the Human Fertilisation and Embryology Act 1990. Section 1(1)(a) of this Act

states that 'embryo means a live human embryo where fertilisation is complete'. CNR was not possible in 1990 when the Act was passed, and the problem is that fertilisation is not used in CNR. Lord Bingham said:

'[T]he court's task, within permissible bounds of interpretation, is to give effect to Parliament's purpose ... Parliament could not have intended to distinguish between embryos produced by, or without, fertilisation since it was unaware of the latter possibility.'

It can be seen how this goes beyond the mischief rule. At the time of the Act, Parliament was considering the mischief (or gap in the law) of the risk of the wrong use of embryos created through fertilisation. The Act was aimed at that. Parliament did not know of any gap in relation to CNR embryos, as they had not been invented. As a result, the use of the purposive approach is trying to make sure the purpose of the Act is given effect, whereas the mischief rule only looks at what the gap was in the law at the time Parliament passed the Act.

R v Registrar-General, ex parte Smith (1990)

Section 51(1) of the Adoption Act 1976 states:

'The Registrar-General shall on an application made in the prescribed manner by an adopted person a record of whose birth is kept by the Registrar-General and who has attained the age of 18 years supply to that person ... such information as is necessary to enable that person to obtain a certified copy of the record of his birth.'

Mr Smith wanted information to enable him to obtain his birth certificate. He had been convicted of two murders and was detained in Broadmoor, as he suffered from recurring bouts of psychotic

illness. His application had been made in the correct manner and he was prepared to see a counsellor.

Taking the literal interpretation of the Act, the Registrar-General had to supply him with the information, as the Act used the phrase 'shall ... supply'.

A psychiatrist thought that it was possible he might be hostile towards his natural mother. This posed a difficulty for the court: should it apply the clear meaning of the words in this situation? The judges in the Court of Appeal decided that the case called for the purposive approach, saying that, despite the plain language of the Act, Parliament could not have intended to promote serious crime. So, in view of the possible risk to Mr Smith's natural mother if he discovered her identity, they ruled that the Registrar-General did not have to supply any information.

Jones v Tower Boot Co. (1997)

A young black worker was physically and verbally abused in the workplace by his fellow workers. He sued his employers, arguing that they were vicariously liable for the actions of the workers. It had to be decided whether the workers were acting in the 'course of their employment' under s 32 of the Race Relations Act 1976. The employers argued that the abuse was not part of their job and fell outside the 'course of their employment'.

The Court of Appeal ruled that Parliament's intention when passing the Act was to eliminate discrimination in the workplace, and this would not be achieved by giving a narrow interpretation to the words 'course of employment'. As a result, the employers were held liable.

▼ **Figure 4.4** Evaluation of the purposive approach

Advantages of use of the purposive approach	Disadvantages of use of the purposive approach
• As can be seen from the case examples, justice (or the 'right' result) is achieved in each case. • Judges can take account of new technology introduced after the passing of the Act. • Judges can fill in any gaps in the law left by Parliament or when dealing with new situations.	• It is undemocratic, as judges are interpreting laws. • It may be time consuming to work out what Parliament meant. • Legal advice is difficult, as lawyers will not know until the final judgment whether the judges are prepared to use this approach. • It may be impossible to find Parliament's intention.

4.2 Rules of language

In addition to the four main rules of statutory interpretation, judges have developed rules of language to help make the meaning of words and phrases clear:

- » the *ejusdem generis* rule
- » the express mention of one thing excludes others (*expressio unius exclusio alterius*), and
- » a word is known by the company it keeps (*noscitur a sociis*).

4.2.1 The *ejusdem generis* rule

This rule states that where there is a list of specific words followed by some general words, then the general words are limited to the same kind of items as the specific words. This is easier to understand by looking at cases.

CASE EXAMPLE

Hobbs v CG Robertson Ltd (1970)

A workman injured his eye when brickwork he was removing splintered. He claimed compensation under the Construction (General Provisions) Regulations 1961. These regulations imposed a duty on employers to provide goggles for workmen when 'breaking, cutting, dressing or carving ... stone, concrete, slag or similar material'.

The court held that brick was not 'a similar material'. Brick was not *ejusdem generis* with stone, concrete or slag, as all these materials were hard, so that bits would fly off them when struck with a tool, whereas brick was a soft material. This ruling meant that the workman's claim for compensation failed.

Note that there must be at least two specific words in a list before the general words for this rule to operate. For example, in *Allen v Emmerson* (1944), the court had to interpret the phrase 'theatres and other places of amusement' and decide if it applied to a fairground. As there was only one specific word, 'theatres', it was decided that a funfair did come under the general term 'other places of amusement', even though it was not of the same kind as theatres.

CASE EXAMPLE

Flack v Baldry (1988)

By s 5 of the Firearms Act 1968, as originally enacted, it was an offence 'if a person has in his possession, or purchases or acquires, or manufactures, sells or transfers any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing'. It was decided, using the *ejusdem generis* rule, that electricity discharged from an electric stun gun was covered by the offence as it came within the mischief of the Act.

4.2.2 *Expressio unius exclusio alterius* ('the mention of one thing excludes others')

Where there is a list of specific words which is not followed by general words, then the Act applies only to the items in the list.

CASE EXAMPLE

Tempest v Kilner (1846)

The court had to consider whether the Statute of Frauds 1677 (which required a contract for the sale of 'goods, wares and merchandise' of more than £10 to be evidenced in writing) applied to a contract for the sale of stocks and shares.

The list 'goods, wares and merchandise' was not followed by any general words, so the court held that only contracts for those three types of thing were affected by the statute. Because stocks and shares were not mentioned, they were not caught by the statute.

Another example is *R v The Inhabitants of Sedgley* (1831), where rates could be charged on land, titles and coal mines. Rates could not be charged on any mine other than a coal mine.

4.2.3 *Noscitur a sociis* ('a word is known by the company it keeps')

In this rule, the words must be looked at in context and interpreted accordingly; it involves looking at other words in the same section or other sections of the Act.

CASE EXAMPLE

Inland Revenue Commissioners v Frere (1965)

Words in the same section were important where the section set out rules for 'interest, annuities or other annual interest'. The first use of the word 'interest' on its own could have meant any interest paid, whether daily, monthly or annually. Because of the words 'other annual interest' in the section, it was decided that 'interest' only meant annual interest.

Other sections of an Act were considered by the House of Lords in *Bromley London Borough Council v Greater London Council* (1982).

CASE EXAMPLE

Bromley London Borough Council v Greater London Council (1982)

The issue here was whether the Greater London Council could operate a cheap fare scheme on its transport systems, where the amounts being charged meant that the transport system would run at a loss. The decision in the case revolved around the meaning of the word 'economic'.

The House of Lords looked at the whole Act and, in particular, at another section that imposed a duty to make up any deficit as far as possible. As a result, it decided that 'economic' meant being run on business lines. It ruled that the cheap fares policy was not legal, since it involved deliberately running the transport system at a loss and this was not running it on business lines.

4.3 Intrinsic aids to interpretation

These are not rules as such, but judges can use certain features within the statute to help make the meaning of some words clearer:

- » The **long title** may explain briefly Parliament's intentions.
- » Older statutes usually have a **preamble** that sets out Parliament's purpose in enacting that statute. Modern statutes either do not have a preamble or contain a brief one; for example, the Theft Act 1968 states that it is an Act to modernise the law of theft.
- » Other useful internal aids are any **headings** before a group of sections, and any **schedules** attached to the Act.
- » There are often also **marginal notes** explaining different sections, but these are not generally regarded as giving Parliament's intention as they will have been inserted after the parliamentary debates and are only helpful comments put in by the printer.
- » An unusual approach was taken in the Arbitration Act 1996, where a statement of the principles of the Act is set out in an **interpretative section**, s 2. This is a new development in statutory drafting and one that could both encourage and help the use of the purposive approach.

Internet research

Look up any recent Act of Parliament on www.parliament.uk

Try to find all or any of the internal aids – remember that modern Acts do not necessarily have all these aids written in them.

4.4 Extrinsic aids to interpretation

Extrinsic aids are matters outside the Act which may help a judge explain the meaning of words in an Act. They are:

- » previous Acts of Parliament on the same topic
- » earlier case law – the higher the court, the greater authority the decision (see next chapter on judicial precedent)
- » the historical setting
- » dictionaries of the time the Act was passed.

Originally, there were strict rules that other extrinsic aids should not be considered. However, attitudes have changed and the following can be considered by judges:

- » *Hansard*
- » reports of law reform bodies
- » international treaties.

4.4.1 *Hansard*

Hansard is the official report of what was said in Parliament when an Act was debated.

Until 1993, there was a firm rule that the courts could not look at what was said in parliamentary debates. Some years earlier, Lord Denning had tried to attack this ban in his judgment in *Davis v Johnson* (1979), which involved the interpretation of the Domestic Violence and Matrimonial Proceedings Act 1976. He admitted that he had indeed read *Hansard* before making his decision, saying:

'Some may say ... that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view.'

In the same case, the House of Lords disapproved of this, and Lord Scarman explained its reasons by saying:

'Such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility ... are not always conducive to a clear and unbiased explanation of the meaning of statutory language.'

However, in *Pepper (Inspector of Taxes) v Hart* (1993), the House of Lords relaxed the rule and accepted that *Hansard* could be used in a limited way. This case was unusual in that seven judges heard the appeal, rather than the normal panel of five. These seven judges included the Lord Chancellor, who was the only judge to disagree with the use of *Hansard*. The majority ruled that *Hansard* could be consulted. Lord Browne-Wilkinson said in his judgment:

'The exclusionary rule should be relaxed so as to permit reference to parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear. Further than this I would not at present go.'

CASE EXAMPLE

Pepper (Inspector of Taxes) v Hart (1993)

Teachers at an independent school were having their children educated at a reduced rate, which was a taxable benefit based on the 'cash equivalent' of the reduction. Under s 63 of the Finance Act 1976, 'cash equivalent' could be interpreted as either the additional cost of providing the reduction to the teachers or the average cost of providing the schooling to the public and the teachers.

In its decision, the House of Lords referred to statements made by the Financial Secretary to the Treasury during a parliamentary stage, which showed that the intention was to tax employees on the basis of the additional cost to the employer of providing the concession.

Now, *Hansard* may be considered, but only where the words of the Act are ambiguous or obscure or lead to an absurdity. Even then, *Hansard* should only be used if there was a clear statement by the minister introducing the legislation, which would resolve the ambiguity or absurdity. The Lord Chancellor opposed the use of *Hansard* on practical grounds, pointing out the time and cost it would take to research *Hansard* in every case.

Since 1993, *Hansard* has been referred to in a number of cases, even sometimes when there did not appear to be any ambiguity or absurdity. The Lord Chancellor's predictions on cost have been confirmed by some solicitors, with one estimating that it had added 25 per cent to the bill. On other occasions, it is clear that

Hansard has not been helpful or that the court would have reached the same conclusion in any event.

In *Jackson and Others v Her Majesty's Attorney-General* (2005), the Law Lords again approved the use of *Hansard* as an aid to statutory interpretation. They said:

'In some quarters the *Pepper v Hart* principle is currently under something of a judicial cloud. In part this is due to judicial experience that references to *Hansard* seldom assist. In part this seems also to be due to continuing misunderstanding of the limited role ministerial statements have in this field ... It would be unfortunate if *Pepper v Hart* were now to be sidelined. The *Pepper v Hart* ruling is sound in principle, removing as it did a self-created judicial anomaly. There are occasions when ministerial statements are useful in practice as an interpretive aid, perhaps especially as a confirmatory aid.'

4.4.2 Reports of law reform bodies

As with the use of *Hansard*, it used to be the case that reports by law reform agencies should not be considered by judges. However, this rule was relaxed in the *Black Clawson* case in 1975, when it was accepted that such a report should be looked at to discover the mischief or gap in the law that the legislation based on the report was designed to deal with. After all, a piece of legislation drafted following a law reform report is likely to follow closely the recommendations of the reform body and its reasoning.

4.4.3 International conventions

In *Fothergill v Monarch Airlines Ltd* (1980), the House of Lords decided that the original convention should be considered, as it was possible that in translating and adapting the convention to the legislative process, the true meaning of the original might have been lost. The House of Lords in that same case also held that an English court could consider any preparatory materials or explanatory notes published with an international convention. The reasoning behind this was that other countries allowed the use of such materials, known as *travaux préparatoires*, and it should therefore be allowed in the UK in order to get uniformity in the interpretation of international rules.

CASE EXAMPLE

Laroche v Spirit of Adventure (UK) Ltd (2009)

Several extrinsic aids were considered in this case. The claimant had been injured as the result of a sudden landing of a hot-air balloon in which he was travelling. The meaning of the word 'aircraft' was important. Was a hot-air balloon within the definition of 'aircraft'?

In deciding the case, the Court of Appeal looked at:

- the definition of 'aircraft' in the *Pocket Oxford Dictionary* – 'aeroplane(s), airship(s) and balloon(s)'
- the Air Navigation Order 2000 (a statutory instrument), which supported the view that a hot-air balloon should be regarded as an 'aircraft'
- the fact that English law had to be interpreted in a similar way to international carriage by air, which is ruled by the international Warsaw Convention.

As a result of considering these three extrinsic aids, the court ruled that a hot-air balloon was regarded as an 'aircraft'. This meant that the claim failed, as it had not been brought within the two-year time limit from the accident.

4.5 The impact of EU law and the Human Rights Act 1998 on statutory interpretation

4.5.1 The European approach

The purposive approach is preferred by most European countries when interpreting their own legislation. It is also the approach that has been adopted by the Court of Justice of the European Union in interpreting EU law. This influence of the European preference for the purposive approach has affected English judges in two ways:

- 1 They have accepted that the purposive approach is the correct one to use when dealing with EU law.
- 2 Using the purposive approach for EU law has made judges more accustomed to it, and therefore more likely to apply it to English law. Even though the UK is leaving the EU, judges are likely to continue using the purposive approach, as it has become so well accepted in English law.

4.5.2 The impact of the Human Rights Act 1998

Section 3 of the Human Rights Act 1998 (HRA) says that, as far as it is possible to do so, legislation must be read and given effect in a way which is compatible with the European Convention on Human Rights (ECHR).

This approach applies where one of the Convention rights is in issue, but it does not apply otherwise.

An example of a court taking the HRA into account in their decision was the following case.

CASE EXAMPLE

A and others v Secretary of State for the Home Department (2004)

This case was heard by the House of Lords. Section 23 of the Anti-Terrorism Crime and Security Act 2001 gave the government power to indefinitely detain foreign international terrorist suspects pending the making of a deportation order. It was challenged by nine men being detained.

It held that the indefinite detention of foreign prisoners without trial under this section was incompatible with the European Convention on Human Rights – Article 5 (the right to liberty) and Article 14 (the right of non-discrimination). The court observed that the UK does not have a tradition of detention without trial and the section discriminated between nationals and foreign nationals. As a result of this decision the government had to introduce the Prevention of Terrorism Act 2005 which allowed for suspects of any nationality to be subjected to a control order.

TARGET SKILLS

- 1 Define the literal rule.
- 2 Name three cases in which the literal rule was used.
- 3 Analyse how *Fisher v Bell* (1961) would have been decided using the mischief rule.
- 4 Evaluate the advantages and disadvantages of judges using the mischief rule to interpret the words in a statute.

▼ Figure 4.5 Advantages and disadvantages of the rules and approaches of statutory interpretation

Literal rule	Golden rule	Mischief rule	Purposive approach
Advantages • Follows the wording set by Parliament • Prevents unelected judges making law • Makes the law more certain • Easier to predict how judges will interpret the law	Advantages • Respects the words of Parliament • Allows a judge to choose the most sensible meaning • Avoids the worst problems of the literal rule	Advantages • Deals with the mischief Parliament was trying to address • Fills in a gap in the law • Produces a 'just' result	Advantages • Leads to justice in individual cases • Allows for new developments in technology • Avoids absurd decisions

Literal rule	Golden rule	Mischief rule	Purposive approach
Disadvantages • Not all Acts are perfectly drafted • Words can have more than one meaning • Can lead to unfair or unjust decisions	Disadvantages • Can only be used in limited situations • It is not possible to predict when a judge will use it • It is a 'feeble parachute' (Zander)	Disadvantages • There is a risk of judicial law making • It is not as wide as the Purposive approach • It is limited to looking back at the old law • Can make the law uncertain	Disadvantages • May be difficult to find Parliament's intentions • Allows judicial law-making • Leads to uncertainty in the law

▼ Figure 4.6 Key facts on statutory interpretation

Key facts		
	Brief definition	Case examples
Literal approach	Approaching problems of statutory interpretation by taking words at their face value	<i>London and North Eastern Railway Co. v Berriman</i> (1946)
Purposive approach	Looking at the reasons why a law was passed and interpreting the law accordingly	<i>R v Registrar-General, ex parte Smith</i> (1990)
The three 'rules'		
Literal rule	Words given their ordinary, plain, grammatical meaning	<i>Whiteley v Chappell</i> (1868)
Golden rule	Avoids absurd or repugnant meanings	<i>Adler v George</i> (1964)
Mischief rule	Looks at the gap in the law and interprets the words to advance the remedy	<i>Coates v Crown Prosecution Service</i> (2011)
Rules of language		
<i>Ejusdem generis</i>	General words that follow a list are limited to the same kind	<i>Hobbs v CG Robertson Ltd</i> (1970)
<i>Expressio unius exclusio alterius</i>	The express mention of one thing excludes others	<i>Tempest v Kilner</i> (1846)
<i>Noscitur a sociis</i>	A word is known by the company it keeps	<i>Inland Revenue Commissioners v Frere</i> (1965)
Aids to finding Parliament's intention	• Intrinsic – within the Act • Extrinsic – outside the Act, e.g. <i>Hansard</i> OR • Law Commission reports	• <i>Pepper (Inspector of Taxes) v Hart</i> (1993) • <i>Black Clawson Case</i> (1975)

TEST YOURSELF

- 1 Explain one advantage and one disadvantage of using the literal rule.
- 2 Define the golden rule and give a case in which it was used.
- 3 Define the mischief rule and give a case in which it was used.
- 4 Explain one advantage and one disadvantage of using the mischief rule.
- 5 Define the purposive approach and give a case in which it was used.

STRETCH AND CHALLENGE

Around 70 per cent of the work of the Supreme Court relates to interpreting the wording and meaning of Acts of Parliament.

Write speeches for the following debate motion:

'The time and work of the Supreme Court would be better served by ruling on legal issues rather than interpreting the words of Acts of Parliament.'

EXAM-STYLE QUESTIONS

- 1 Describe the use of the literal rule by judges.
- 2 Assess the role of judges in statutory interpretation.

5

Judicial precedent

Introduction

Judicial precedent is where decisions of judges create law for future judges to follow. This source of law is also known as case law. Decisions of judges were historically very important to the development of the common law.

Judicial precedent remains a major source of law today. The level of the court making the decision is important when considering whether other judges have to follow it. This chapter links to the key concept of power and its limits.

5.1 The doctrine of judicial precedent

The long-established English system of judicial precedent is based on the Latin maxim *stare decisis et non quita movere* (usually shortened to *stare decisis*), which loosely translated means: 'stand by what has been decided and do not unsettle the established'.

Judges are able to make decisions in court, either to interpret parliamentary law or to decide a rule where there is no parliamentary law. These decisions, when reported, can be looked at by other judges in later cases. If the later case uses similar rules, then a judge in the later case can follow the earlier decision. This supports the idea of fairness and provides certainty in the law.

5.2 Ratio decidendi, obiter dicta and law reporting

5.2.1 Ratio decidendi

Precedent can only operate if the legal reasons for a past decision are known. Therefore, at the end of a case there will be a judgment – a speech made by the judge giving the decision and, more importantly, explaining the legal reasons for that decision.

In a judgment, the judge is likely to give a summary of the facts of the case, review the arguments put by the advocates in the case, and then explain the principles of law being used to come to the decision. These principles are the important part of the judgment and are known as the *ratio decidendi*, which means 'the reason for deciding'. This is what creates a precedent for judges to follow in future cases. Sir Rupert Cross defined the *ratio decidendi* as:

'... any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion.'

In appeal cases, where there is a particularly important or complicated point of law, more than one judge may want to explain the legal reasoning on the point. This can cause problems in later cases, as each judge may have had a different reason for the decision, so there will be more than one *ratio decidendi*. It will be for lawyers and judges in later cases to choose which *ratio decidendi* they prefer.

5.2.2 Obiter dicta

The remainder of the judgment is called *obiter dicta* ('other things said'), and judges in future cases do not have to follow it.

Sometimes, a judge will speculate on what the decision would have been if the facts of the case had been different. This hypothetical situation is part of the *obiter dicta* and the legal reasoning put forward may be considered in future cases, although, as with all *obiter* statements, it is not a binding precedent.

A major problem when looking at a past judgment is to divide the *ratio decidendi* from the *obiter dicta*, as the judgment is usually in a continuous form, without any headings specifying what is meant to be part of the *ratio decidendi* and what is not. Lawyers and judges will make their own decisions as to what is the *ratio* and what are the *obiter*.

5.2.3 Law reporting

To allow judges to follow past decisions, there must be an accurate record of what those decisions were. Written reports of judges' decisions have existed since

the thirteenth century, and from 1535 to 1865 decisions were reported by individuals who made a business of selling their reports to lawyers.

However, the quality of reporting varied enormously. Since 1865, when the Incorporated Council of Law Reporting was set up, reporting has been controlled by the courts, who made reports more accurate, with judgments usually noted word for word. The accuracy of reporting has been a factor in the development of the strict doctrine of precedent. This series of reports still exists and carries great authority, but there are other series of reports which also carry authority.

The different series of reports is shown below. In addition, all judgments from the High Court and the appeal courts are reported on the internet. Some series of reports are free, but there are also subscription services. All or any of these series can be quoted in court, either in submissions by lawyers or by judges giving their judgments.

▼ Figure 5.1 ICLR law reports

ICLR reports	
Case reference	Court report
Ch	Chancery Division of the High Court
QBD	Queen's Bench Division of the High Court
FD	Family Division of the High Court
EWHC	High Court (any Division)
EWCA	Civil Division of the Court of Appeal
EWCA Crim	Criminal Division of the Court of Appeal
UKSC	Supreme Court
Main subscription reporting services	
All ER	All England Law Reports
WLR	Weekly Law Reports

5.3 Binding, original and persuasive precedents

5.3.1 Binding precedent

This is a precedent from an earlier case that must be followed if the decision was made by a court that is senior to (or in some cases the same level as) the court hearing the later case. (For levels of court, see the court hierarchy section below).

5.3.2 Original precedent

If the point of law in a case has never been decided before, then whatever the judge decides will form a new precedent for future cases to follow; that is, it is an original precedent. As there are no past cases for

the judge to base his or her decision on, previous cases that are the closest in principle will be considered with similar rules used. This way of arriving at a judgment is called 'reasoning by analogy'.

Some legal commentators used to have the view that the judge is only declaring what the law is (that is, the law has always been there, but it is the first time a judge has had to decide it). This supports the view that judges do not create law; they merely declare what it has always been. The opposite view is that it is accepted that judges do have a law-making role in these situations – when a new point has to be decided, the judge is creating new law.

CASE EXAMPLE

Urquhart and Others v Tate Modern (2020)

Residents of apartments adjacent to the Tate Modern museum alleged that the enjoyment of their premises was being interfered with, as visitors to the museum looked into their homes. The Court of Appeal had to decide whether the alleged intrusion amounted to a nuisance in law and set a precedent. No claimant had ever been successful in such a claim, and the court declared that overlooking could never be considered a nuisance, stating:

'... it would be preferable to leave it to Parliament to formulate any further laws that are perceived to be necessary to deal with overlooking rather than to extend the law of private nuisance.'

5.3.3 Persuasive precedent

This is a precedent that is not binding on the court, but the judge may consider it and decide that it is a correct principle, and be persuaded that it should be followed. Persuasive precedent can come from a number of sources, such as:

- » Courts lower in the hierarchy. An example can be seen in *R v R* (1991), where the House of Lords (now the Supreme Court) agreed with and followed the same reasoning as the Court of Appeal in deciding that a man could be guilty of raping his wife. In this case, the judgment of the Court of Appeal was persuasive and the House of Lords decided to follow it.
- » Decisions of the Judicial Committee of the Privy Council. This court is not part of the court hierarchy in England and Wales and so its decisions are not binding, but, since many of its judges are also members of the Supreme Court, their judgments are treated with respect and may often be followed.

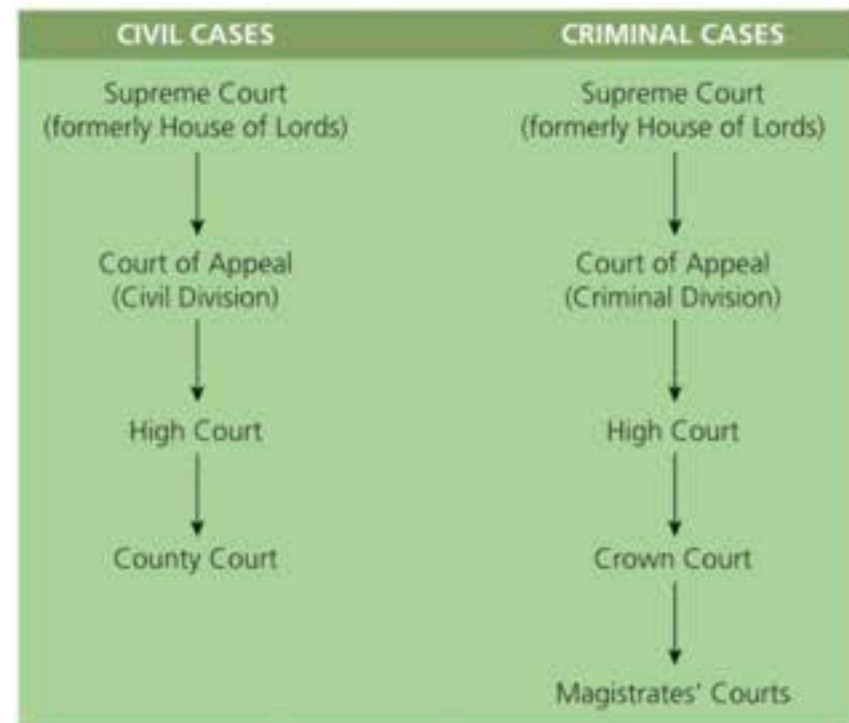
An example of this can be seen in the law on remoteness of damages in the law of negligence in tort and the decision made by the Privy Council in the case of *The Wagon Mound (No. 1)* (1961). In later cases, courts in England and Wales followed this decision. This means that law made as a result of a case from another country can have an effect on the law in England and Wales.

- » Statements made *obiter dicta*. This is seen in the law on duress as a defence to a criminal charge, where the House of Lords in *R v Howe* (1987) ruled that duress could not be a defence to a charge of murder. In the judgment, the Lords also commented, as an *obiter* statement, that duress would not be available as a defence to someone charged with attempted murder. When, later, in *R v Gotts* (1992) a defendant charged with attempted murder tried to argue that he could use the defence of duress, the *obiter* statement from *Howe* was followed as persuasive precedent by the Court of Appeal.
- » A dissenting judgment. Where a case has been decided by a majority of judges (for example two to one in the Court of Appeal), the judge who disagreed will also have explained their reasons for reaching that decision. If that case goes on appeal to the Supreme Court, or if there is a later case on the same point that goes to the Supreme Court, it is possible that the Supreme Court may prefer the dissenting judgment and decide the case in the same way. The dissenting judgment has persuaded them to follow it.
- » Decisions of courts in other countries. This is especially so where the other country uses the same ideas of common law as in the English system. This applies to Commonwealth countries, such as Canada, Australia and New Zealand.

5.4 The hierarchy of the courts

In England and Wales, the courts operate a rigid doctrine of judicial precedent, which has the effect that:

- » every court is bound to follow any decision made by a court above it in the hierarchy, and
- » in general, appellate courts (courts that hear appeals) are bound by their own past decisions.



▲ Figure 5.2 Cascade model of judicial precedent operating in the hierarchy of the courts

▼ Figure 5.3 Court hierarchy and judicial precedent

Key facts		
Court	Courts bound by it	Courts it must follow
Supreme Court	All lower courts	–
Court of Appeal	High Court County Court Crown Court Magistrates' Court	Supreme Court
High Court	County Court Magistrates' Court	Supreme Court Court of Appeal
Crown Court	Possibly Magistrates' Court	Supreme Court Court of Appeal
County Courts and Magistrates' Courts do not create precedent and are bound by all higher courts.		

Note that until October 2009, the senior court in the UK legal system was the House of Lords. This court was then abolished and replaced by the Supreme Court. The lower courts have to follow decisions of the Supreme Court, and also decisions by the House of Lords that have not been changed by the Supreme Court.

5.4.1 Appellate courts

Appellate courts are those that only hear appeals from lower courts. They include the Supreme Court, the Court of Appeal and Divisional Courts. The appellate courts do not hear any original trials. Quite often, an appeal will be about a point of law. This allows the appellate courts to decide the law, and this is why they are much more important than courts of first instance when it comes to creating precedent.

Supreme Court

The most senior court in the UK is the Supreme Court, and its decisions bind all other lower courts in the English legal system. The Supreme Court is not bound by its own past decisions, although it will generally follow them. This point is discussed in detail below.

Court of Appeal

At the next level down in the hierarchy is the Court of Appeal, which has two divisions – Civil and Criminal. Both divisions of the Court of Appeal are always bound to follow decisions of the Supreme Court. In addition, they must usually follow past decisions of their own, although there are some limited exceptions to this rule, and the Court of Appeal (Criminal Division) is more flexible where the point involves the liberty of the subject. The position of the two divisions is discussed in detail below.

Divisional Courts

The three Divisional Courts (Queen's Bench, Chancery and Family) are bound by decisions of the Supreme Court and the Court of Appeal. In addition, the Divisional Courts are bound by their own past decisions, although they operate similar exceptions to those operated by the Court of Appeal.

5.4.2 Courts of first instance

This term means any court where the original trial of a case is held. Courts of first instance rarely create precedent. They must follow the decisions of the appellate courts above them in the hierarchy.

High Court

Judges in this court are bound by decisions of all the courts above it in the hierarchy and, in turn, their decisions bind the lower courts. High Court judges do not have to follow each other's decisions but will usually do so.

Inferior courts

These are the Crown Court, the County Court and the Magistrates' Court. They are bound to follow decisions by all higher courts and it is unlikely that a decision by an inferior court can create precedent. The one exception is that a ruling on a point of law by a judge in the Crown Court technically creates precedent for the Magistrates' Court. However, since such rulings are rarely recorded in law reports, this is of little practical effect.

5.5 The Supreme Court and use of the Practice Statement

5.5.1 House of Lords/Supreme Court

Until October 2009, the senior court in the UK legal system was the House of Lords. This court was abolished and replaced by the Supreme Court. Cases decided before October 2009 are still referred to as being decided by the House of Lords.

The main debate about the Supreme Court (and previously the House of Lords) is the extent to which it should follow its own past decisions. In *London Street Tramways v London County Council* (1898), the House of Lords held that certainty in the law was more important than the possibility of individual hardship being caused through having to follow a past decision, and it regarded itself as being completely bound by its own past decisions unless they had been made *per incuriam* (that is, 'in error'). In the middle of the twentieth century, this approach was not felt to be satisfactory, as the law could not alter to meet changing social conditions and opinions, nor could any possible 'wrong' decisions be changed except by statute. It was appreciated that the final court of appeal should have greater flexibility in its decision making.

5.5.2 The Practice Statement

In 1966, the Lord Chancellor issued a Practice Statement announcing a change to the rule in *London Street Tramways v London County Council*:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that the rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

They propose, therefore, to modify their present practice and while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.'

Use of the Practice Statement

The Practice Statement allowed the House of Lords to change the law when it believed that an earlier case was wrongly decided. It had the flexibility to refuse to follow an earlier case when 'it appeared right to do so'. This phrase is vague and there was little guidance when the House of Lords might overrule a previous decision.

The first case in which the Practice Statement was used was *Conway v Rimmer* (1968) on a technical point on discovery of documents. The first major use did not occur until 1972 in *British Railways Board v Herrington*, which involved the law on the duty of care owed to a child trespasser. The earlier case of *Addie v Dumbreck* (1929) had decided that an occupier of land would only owe a duty of care for injuries to a child trespasser if those injuries had been caused deliberately or recklessly. In *British Railways Board v Herrington*, the Lords held that social and physical conditions had changed since 1929, and the law should also change, allowing the injured child trespasser's claim.

Internet research

In *British Railways Board v Herrington* (1972), the House of Lords completely changed the previous law about occupier's liability to child trespassers.

Look up this case on the internet and read about what happened in more detail.

There was reluctance in the House of Lords to use the Practice Statement, as illustrated by the case of *Jones v Secretary of State for Social Services* (1972), which involved the interpretation of the National Insurance (Industrial Injuries) Act 1946. Four of the seven judges regarded the earlier decision in *Re Dowling* (1967) as being wrong. Despite this, the Lords refused to overrule that earlier case, preferring to keep to the idea that certainty was the most important feature of precedent.

The same approach was taken in *Kneller (Publishing, Printing and Promotions) Ltd v DPP* (1973), when Lord Reid said:

'Our change of practice is no longer regarding previous decisions of this House as absolutely binding does not

mean that whenever we think a previous precedent was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act.'

From the mid-1970s onwards, the House of Lords showed a little more willingness to make use of the Practice Statement. For example, in *Miliangos v George Frank (Textiles) Ltd* (1976), the House of Lords used the Practice Statement to overrule a previous judgment that damages could be awarded only in sterling. Later, in *Murphy v Brentwood District Council* (1990), the House of Lords overruled the decision in *Anns v Merton London Borough Council* (1977), regarding the test for negligence in the law of tort. *Pepper (Inspector of Taxes) v Hart* (1993) (see Chapter 4 on statutory interpretation) is also an example.

The Practice Statement in criminal law

The Practice Statement stressed that criminal law needs to be certain and the Supreme Court does not often use it in criminal cases. When it is used, there is a recognition that an error may have been made previously and the most important thing is to put the law right. Where the Practice Statement is used to overrule a previous decision, that past case is then effectively ignored. The law is now that which is set out in the new case.

CASE EXAMPLE

R v R and G (2003)

The House of Lords used the Practice Statement to overrule the earlier decision of *R v Caldwell* (1982) on the offence of criminal damage. In *Caldwell*, the House of Lords had ruled that recklessness included the situation where the defendant had not realised the risk of their actions causing damage, but an ordinary careful person would have realised there was a risk (an objective test).

In *R v R and G*, it was held that this was the wrong test to use. The Law Lords overruled *Caldwell* and held that a defendant is only reckless if they realise that there is a risk of damage and go ahead and take that risk (a subjective test). This case showed the House of Lords as being prepared to use the Practice Statement where it thought it 'right to do so'.

The Supreme Court's relationship to the Practice Statement

From October 2009, the Constitutional Reform Act 2005 transferred the House of Lords' powers to the Supreme Court. Initially, it was not clear if this included the use of the Practice Statement. In *Austin v London Borough of Southwark* (2010), which was about tenancy law, the

Supreme Court confirmed that the power to use the Practice Statement had been transferred to it. However, the court did not use the Practice Statement in *Austin* to depart from an earlier decision. The court took the view that certainty in tenancy law was important and

they quoted from the judgment in *Kneller (Publishing, Printing and Promotions) Ltd v DPP* (1973) – seen previously. The case of *Austin* firmly established that the Practice Statement applies to the Supreme Court.

ACTIVITY

Read the following passage, which comes from an extra explanatory note that was given to the press when the Practice Statement was issued, and answer the questions below.

'The statement is one of great importance, although it should not be supposed that there will frequently be cases in which the House thinks it right not to follow their own precedent. An example of a case in which the House might think it right to depart from a precedent is where they consider that the earlier decision was influenced by the existence of conditions which no longer prevail, and that in modern conditions the law ought to be different.

One consequence of this change is of major importance. The relaxation of the rule of judicial precedent will enable the House of Lords to pay greater attention to judicial decisions reached in the superior courts of the Commonwealth,

where they differ from earlier decisions of the House of Lords. That could be of great help in the development of our own law. The superior courts of many other countries are not rigidly bound by their own decisions and the change in the practice of the House of Lords will bring us more into line with them.'

Questions

- 1 Why was the Practice Statement of great importance?
- 2 Does the note suggest that the Practice Statement was likely to be used often?
- 3 Do you agree that 'in modern conditions the law ought to be different'? Give reasons and examples to support your answer.
- 4 Why would the House of Lords have wanted to consider decisions from Commonwealth countries? What authority do such decisions have in the English legal system?

5.6 The Court of Appeal and the exceptions in *Young v Bristol Aeroplane Co. Ltd* (1944)

As already stated, the Court of Appeal has two divisions, the Civil Division and the Criminal Division. The rules for departing from precedent are not quite the same in these two divisions.

5.6.1 Decisions of courts above it

Both divisions of the Court of Appeal are bound by decisions of the Supreme Court. This is true even though there were attempts in the past, mainly by Lord Denning, to argue that the Court of Appeal should not be bound by the House of Lords (now the Supreme Court).

In *Broome v Cassell and Co. Ltd* (1971), Lord Denning refused to follow the earlier decision of the House of Lords in *Rookes v Barnard* (1964), when exemplary damages could be awarded in tort.

Again, in the cases of *Schorsch Meier GmbH v Henning* (1975) and *Miliangos v George Frank (Textiles) Ltd* (1976), the Court of Appeal refused to follow a decision of the House of Lords in *Re United Railways of Havana and Regla Warehouses Ltd* (1961), which said that damages could only be awarded in sterling (English money). Lord Denning's argument for refusing to follow the House of Lords' decision was that the economic climate of the world had changed, and sterling was no longer a stable currency; there were some situations in which justice could be done only by awarding damages in another currency.

The case of *Schorsch Meier GmbH v Henning* was not appealed to the House of Lords, but *Miliangos v George Frank (Textiles) Ltd* was appealed, where it was pointed out that the Court of Appeal had no right to ignore or overrule decisions of the House of Lords.

The more unusual feature of *Miliangos* was that the House of Lords then used the Practice Statement to overrule its own previous decision in *Re United Railways of Havana and Regla Warehouses Ltd*.

COMMENT

Should the Court of Appeal have to follow Supreme Court/House of Lords decisions?

The main argument in favour of the Court of Appeal being able to ignore Supreme Court/House of Lords decisions is that very few cases reach the Supreme Court, so that if there is an error in the law it may take years before a suitable case is appealed all the way to the Supreme Court.

The cases of *Schorsch Meier* and *Miliangos* illustrate the potential for injustice if there is no appeal to the Supreme Court. What would have happened if the Court of Appeal in *Schorsch Meier* had decided that it had to follow the House of Lords' decision in *Havana Railways*? It is quite possible that the later case of *Miliangos* would not have even been appealed to the Court of Appeal. After all, why waste money on an appeal when there have been previous cases in both the Court of Appeal and the House of Lords ruling on that point of law? The law would have been regarded as fixed and it might never have been changed.

Another argument for allowing the Court of Appeal to disregard decisions by the Supreme Court is that of cost. All appeals are expensive, so it would be cheaper if there was only an appeal to the Court of Appeal without the need for an appeal to the Supreme Court. However, it is probable that the losing party would want to challenge the decision of the Court of Appeal. This would mean that there

would still be two appeal hearings with all the associated costs.

On the other hand, if the Court of Appeal could overrule the Supreme Court, the system of precedent would break down and the law would become uncertain. There would be two conflicting precedents for lower courts to choose from. This would make it difficult for the judge in the lower court. It would also make the law so uncertain that it would be difficult for lawyers to advise clients on the law. However, since the case of *Miliangos*, there has been no further challenge by the Court of Appeal to this basic idea in the system of judicial precedent that lower courts must follow decisions of courts above them in the hierarchy.

Another argument for keeping the present system, where the Court of Appeal must follow decisions of the Supreme Court, is that a special appeal system already exists to avoid going to the Court of Appeal. This is the 'leapfrog' appeal from the High Court direct to the Supreme Court. It can be used where the trial judge is bound by a previous decision of the Supreme Court or where the Court of Appeal is bound by a previous decision of its own. This means that there only has to be one appeal, which saves costs. However, the leapfrog procedure can only be used where the case involves a point of law of general public importance, so not all cases can use it.

5.6.2 Human rights cases

One area of law where the Court of Appeal need not follow the decisions of the House of Lords/Supreme Court is in human rights cases. Section 2(1)(a) of the Human Rights Act 1998 states that courts must take into account any judgment or decision of the European Court of Human Rights. In *Re Medicaments (No. 2)*, *Director General of Fair-Trading v Proprietary Association of Great Britain* (2001), the Court of Appeal refused to follow the decision of the House of Lords in *R v Gough* (1993), because it was slightly different from decisions of the European Court of Human Rights.

5.6.3 The Court of Appeal and its own decisions

The first rule is that decisions by one division of the Court of Appeal will not bind the other division. However, within each division, previous decisions are normally binding on later decisions, especially for the Civil Division.

5.6.4 Young's Case

This rule comes from the case of *Young v Bristol Aeroplane Co. Ltd* (1944), and the only exceptions

allowing the Court of Appeal to depart from a previous decision are as follows:

- » Where there are conflicting decisions in past Court of Appeal cases, the court can choose which it will follow and which it will reject.
- » Where there is a decision of the now Supreme Court that effectively overrules a Court of Appeal decision, the Court of Appeal must follow the decision of the Supreme Court.
- » Where the decision was made *per incuriam* (that is, carelessly or by mistake), because a relevant Act of Parliament or other regulation has not been considered by the court, the Court of Appeal may depart from a previous decision.

The Civil Division of the Court of Appeal under Lord Denning tried to challenge the rule in *Young's Case*, claiming that as it had made the earlier decision, it could change it. As Lord Denning said in *Gallie v Lee* (1969): 'It was a self-imposed limitation and we who imposed it can also remove it.' This view was not shared by the other judges in the Court of Appeal, as shown by the statement of Russell LJ in the same case when he said:

'The availability of the House of Lords to correct errors in the Court of Appeal makes it, in my view, unnecessary for the court to depart from its existing discipline.'

However, in *Davis v Johnson* (1979), the Court of Appeal refused to follow a decision made only days earlier regarding the interpretation of the Domestic Violence and Matrimonial Proceedings Act 1976. The case went to the House of Lords on appeal, where the Law Lords, despite agreeing with the actual interpretation of the law, ruled that the Court of Appeal had to follow its own previous decisions and said that they 'expressly, unequivocally and unanimously reaffirmed the rule in *Young v Bristol Aeroplane*'.

Since this case, and perhaps more especially since the retirement of Lord Denning, the Court of Appeal has not challenged the rule in *Young's Case*, though it has made some use of the *per incuriam* exception allowed by *Young's Case*.

5.6.5 *Per incuriam*

In *Williams v Fawcett* (1986), the Court of Appeal refused to follow previous decisions of its own because these had been based on a misunderstanding of the County Court rules dealing with the procedure for committing to prison those who break court undertakings.

In *Rickards v Rickards* (1989), the court refused to follow a case it had decided in 1981. This was because, in the previous case, it had misunderstood the effect of a House of Lords decision. Even though the court did not follow its own previous decision, Lord Donaldson said that it would only be in 'rare and exceptional cases' that the Court of Appeal would be justified in refusing to follow a previous decision. *Rickards v Rickards* was considered a 'rare and exceptional' case because the mistake was over the critical point of whether the court had power to hear that particular type of case. Also, it was very unlikely that the case would be appealed to the House of Lords.

In *R v Cooper* (2011), the Court of Appeal appears to have extended the scope of the *per incuriam* exception. The narrow or traditional view of *per incuriam* is that it is used only where the earlier court had failed to take into account all the relevant legislative provisions and/or case authorities. *R v Cooper* involved the procedure to be followed in the Crown Court when barring a convicted individual from working with children or vulnerable adults. A new system was being brought in under the Safeguarding Vulnerable Groups Act 2006 and it was not clear what procedure should be followed. The Court of Appeal overruled an earlier decision of its own, on the basis that not all the material considerations had been placed before the earlier court. This appears to be wider than failure to take into account all relevant legislation and cases.

COMMENT

Should the Court of Appeal be able to overrule its own past decisions?

In *Davis v Johnson* (1979), Lord Diplock in the House of Lords set out the reasons why the Court of Appeal should not be able to overrule its own previous decisions. He pointed out first why a final appeal court (such as the Supreme Court) needs more flexibility, when he said:

'In an appellate court of last resort a balance must be struck between the need on the one side for legal certainty resulting from the binding effect of previous decisions and on the other side the avoidance of undue restriction on the proper development of law.'

He then went on to point out that for an intermediate appellate court (such as the Court of Appeal), the development of the law can take place by appeals to the final court of appeal. So, certainty of the law is more important in an intermediate appeal court.

Also, an intermediate appeal court will have a much bigger workload and far more judges than a final appellate court. If it were not bound by its past decisions, the law could become more complex, with different panels of judges in the intermediate appeal court frequently changing the law.

5.6.6 *The Court of Appeal (Criminal Division)*

The Criminal Division, as well as using the exceptions from *Young's Case*, can also refuse to follow a past decision of its own if the law has been 'misapplied or misunderstood'. This extra exception arises because in criminal cases people's liberty is involved.

This idea was recognised in *R v Taylor* (1950) and *R v Gould* (1968). Also, in *R v Spencer* (1985), the judges said that there should not in general be any difference in the way that precedent was followed in the Criminal Division and in the Civil Division:

'... save that we must remember that we may be dealing with the liberty of the subject and if a departure from authority is necessary in the interests of justice to an appellant, then this court should not shrink from so acting.'

In *R v Simpson* (2003), the Court of Appeal (Criminal Division), a five-judge panel, overruled an earlier decision made by a three-judge panel on the basis that the law had been misunderstood or misapplied. The case stressed that there was discretion available to a five-judge constitution of the court to decide that a previous decision of the Court of Appeal (Criminal Division) should not be treated as binding. This led to the assumption that a five-judge panel always had the discretion to depart from earlier decisions of a three-judge panel.

▼ Figure 5.4 The Court of Appeal and the doctrine of precedent

Key facts	
General rules for the Court of Appeal	Comment
Bound by the Supreme Court	- This is because the Supreme Court/House of Lords is above the Court of Appeal in the court hierarchy; it is also necessary for certainty in the law. - The Court of Appeal tried to challenge this rule in <i>Broome v Cassell and Co. Ltd</i> (1971) and <i>Miliangos</i> (1976), but the House of Lords rejected the challenge.
Bound by its own past decisions	This was decided by the Court of Appeal in <i>Young's Case</i> (1944), although there are minor exceptions (see below); in <i>Davis v Johnson</i> (1979), the Court of Appeal tried to challenge this rule, but the House of Lords confirmed that the Court of Appeal had to follow its own previous decisions.
Exceptions	Comment
Exceptions in <i>Young's Case</i>	The Court of Appeal need not follow its own previous decisions where: - there are conflicting past cases - there is a Supreme Court/House of Lords decision that effectively overrules the Court of Appeal decision - the decision was made <i>per incuriam</i> (in error).
Limitation of <i>per incuriam</i>	This is only used in 'rare and exceptional' cases (<i>Rickards v Rickards</i> (1989)) but was widened slightly in <i>R v Cooper</i> (2011) to include where all material considerations had not been placed before the court.
Special exception for the Criminal Division	This occurs where the law has been 'misapplied or misunderstood' (<i>R v Gould</i> (1968)). There is no need to follow the Court of Justice of the European Union.

However, in *R v Magro* (2010), the Court of Appeal itself pointed out that *Simpson* had not given it the right to overrule a three-judge panel where that decision had been made after full argument and close analysis of the relevant legislative provisions. In particular, an earlier case should not be overruled when the consequences of doing so would be to the disadvantage of the defendant.

5.7 Avoidance techniques

5.7.1 Overruling

This is where a court, in a later case, states that the precedent, or legal rule, decided in an earlier case is wrong. Overruling may occur when a higher court changes a decision made in an earlier case by a lower court, for example the Supreme Court overruling a decision of the Court of Appeal. As seen above, it can also happen when the Supreme Court uses the Practice Statement to overrule a past decision of its own.

CASE EXAMPLE

Pepper (Inspector of Taxes) v Hart (1993)

The House of Lords ruled that *Hansard* (the record of what is said in Parliament) could be consulted when trying to decide what certain words in an Act of Parliament meant. This decision overruled the earlier decision in *Davis v Johnson* (1979), when the House of Lords had held that it could not consult *Hansard*.

5.7.2 Reversing

This is where a court higher in the hierarchy, in an appeal, overturns the decision of a lower court on appeal in the same case. For example, the Court of Appeal may disagree with a ruling of the High Court and come to a different view of the law. In this situation, it reverses the decision made by the High Court. The decision of the appeal court will then be substituted for that of the lower court.

5.7.3 Distinguishing

This is a method that can be used by a judge to avoid following a past decision, which would otherwise have to be followed. It means that the judge finds that the material facts of the present case are sufficiently different to allow a distinction to be drawn between the present case and the previous precedent, so that the precedent in the previous case is not binding.

An example of distinguishing is in the tort cases of *Rylands v Fletcher* 1868 which was distinguished in *Read v Lyons* 1947. In *Rylands v Fletcher* (explained in detail in Chapter 44.1.1) a defendant who brings onto their land something that is likely to cause damage if it escapes, is liable for the damage it causes when it does escape. In *Read v Lyons* (explained in detail in Chapter 44.2.4) a worker was injured in an explosion in a factory. The court distinguished *Rylands v Fletcher* because there was no escape of a dangerous thing, even though all the other elements of the tort were present, and the claim failed.

Two other examples of distinguishing are the cases of *Balfour v Balfour* (1919) and *Merritt v Merritt* (1970). Both cases involved a wife making a claim against her husband for breach of contract:

- » In *Balfour*, it was decided that the wife's claim could not succeed because there was no intention to create legal relations; there was merely a domestic arrangement between a husband and wife. As a result, there was no legally binding contract.

- » In *Merritt*, a different decision was reached and the Court of Appeal distinguished the otherwise binding decision of *Balfour*. Although the parties were husband and wife, their agreement was made in writing, and after they had separated. This was different from *Balfour's* case, as the agreement was meant as a legally enforceable contract.

▼ Figure 5.5 Evaluation of judicial precedent

Advantages of judicial precedent	Disadvantages of judicial precedent
• Certainty: because judges follow past decisions, people know what the law is and how it is likely to be applied in their case. • Consistency and fairness in the law: it is seen as just and fair that similar cases should be decided in a similar way. • Precision: as the principles of law are set out in actual cases, the law becomes very precise. • Flexibility: there is room for the law to change with society, as the Supreme Court can use the Practice Statement to overrule past cases that may not reflect current trends. • Time saving: precedent can be considered a useful time-saving device. • Filling gaps: where there is no statute law on a topic, judges are able to fill gaps to ensure the law is not at a standstill.	• Rigidity: following decisions of higher courts can make the law too inflexible, so that previous bad decisions may be perpetuated. • Complexity: with nearly half a million reported cases, it may not be easy to find all the relevant case law. The judgments themselves may be very long with no clear distinction between comments and the reasons for the decision; see <i>Dodd's Case</i> (1973). • Illogical distinctions: the use of distinguishing to avoid past decisions can lead to 'hair-splitting', so that some areas of the law have become very complex. • Slowness of growth: reform of the law is not possible unless a case comes before the courts to be decided.

TARGET SKILLS

- 1 Name the three main elements of judicial precedent.
- 2 Identify two case examples when the 1966 Practice Statement has been used to overrule a previous decision.
- 3 Analyse the power of the Court of Appeal to depart from a binding precedent.
- 4 Evaluate the advantages and disadvantages of judicial precedent.

STRETCH AND CHALLENGE

In *Robinson v Chief Constable of West Yorkshire* (2018), the Supreme Court changed the law on establishing a duty of care in negligence. Write a report on how it was able to do this.

TEST YOURSELF

- 1 Describe what is meant by *ratio decidendi* and *obiter dicta*.
- 2 Explain what is meant by 'original precedent' and 'binding precedent'.
- 3 Explain what is meant by 'distinguishing'. Which courts can distinguish a decision of a higher court?
- 4 Describe one civil case and one criminal case where the Practice Statement has been used to overrule an earlier decision.
- 5 Assess the contribution of judicial precedent to the development of either civil or criminal law.

EXAM-STYLE QUESTIONS

- 1 Describe when the Court of Appeal can depart from a precedent in civil cases.
- 2 Discuss the disadvantages of judicial precedent.

6

Civil courts and civil process

Introduction

It is important to understand the differences between civil cases and criminal cases.

Civil cases cover a wide range of matters, so there cannot be a specific definition that covers all of them. However, a basic definition for a civil case or

claim is to say that they arise when an individual or a business believes that their rights have been infringed in some way. These rights may be in contract law, the law of tort, family law, employment law or company law. This chapter links to the key concept of justice, fairness and morality.

6.1 Role and jurisdiction of the civil courts

6.1.1 County Court

There are about 150 County Courts around the country which can try civil cases up to certain financial limits. The main types of cases heard in this court are:

- » claims in contract and tort
- » all cases for the recovery of land, such as by a landlord from a tenant or by a lender where the householder has failed to pay the mortgage
- » disputes over partnerships, trusts and inheritance up to a value of £350 000
- » divorce and family and financial disputes arising from the breakdown of a relationship.

The County Court can deal with small claims, fast-track and multi-track cases, and its workload is much greater than the High Court. In 2018, just over two million cases were started in the County Courts, the vast majority of which were claims for money.

Small claims hearings are informal and held in private. Only the parties and the District Judge will be present. Lawyers are not encouraged and legal arguments are kept to a minimum.

Except for small claims, cases will nearly always be heard in open court by a single judge, usually a Circuit Judge, and members of the public are entitled to attend. The whole hearing is formal and many claimants and defendants will be represented, usually by a solicitor but sometimes by a barrister. However, as many litigants are unable to pay legal fees, it is becoming increasingly common for litigants to represent themselves. There is a financial limit on cases heard in the County Court, depending on the track the case is allocated to (see Figure 6.5 below).

6.1.2 High Court

The High Court is based at the Royal Courts of Justice in London but also has judges sitting at a number of towns and cities throughout England and Wales. It has the power to hear any civil case of unlimited value and where the case is too complicated to be heard in the County Court. It has three Divisions, each of which specialises in hearing certain types of case. These divisions are the Queen's Bench Division, the Chancery Division and the Family Division.



▲ Figure 6.1 The Royal Courts of Justice

Queen's Bench Division

The President of the Queen's Bench Division is the Lord Chief Justice, and there are over 70 judges sitting in this Division. It normally deals with contract and tort cases where the amount claimed is over £100 000 and the issues are complex. The exceptions are personal injury cases, where it can deal with cases where the claim is over £50 000, and defamation cases. Only multi-track cases are dealt with in the High Court. Usually cases are tried by a single judge.

Cases in the High Court are formal, expensive and can take a long time to come to trial.

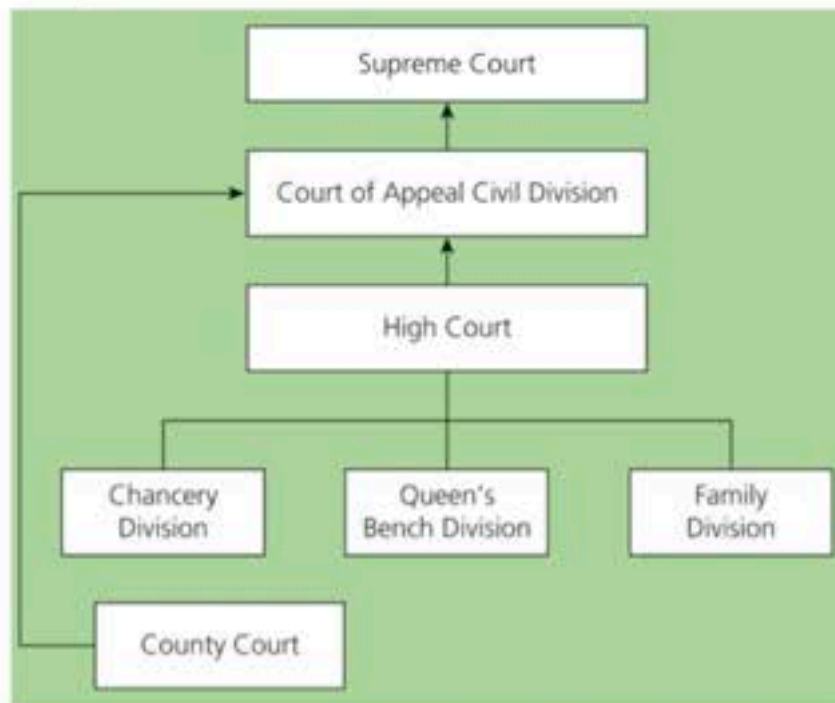
Chancery Division

The Chancellor of the High Court is the head of the Division. There are about 14 High Court Judges assigned to the Division. The main business of this Division involves disputes concerned with matters such as insolvency (for both companies and individuals), the enforcement of mortgages, disputes relating to trust property, copyright and patents, intellectual property matters and contested probate actions. There is also a special Companies Court in the Division, which deals mainly with winding up companies. Cases are heard by a single judge.

The same comments of cost and delay that apply to the Queen's Bench Division apply equally to cases heard in the Chancery Division.

Family Division

The Crime and Courts Act 2013 created a single Family Court, to deal with all family cases. This includes divorce, custody of children and maintenance. The judges come from all levels of the judiciary: magistrates who are on the family panel, District Judges, Circuit Judges and High Court Judges who are assigned to the Family Division.



▲ Figure 6.2 Hierarchy of the civil courts

6.1.3 Court of Appeal (Civil Division)

This is the main appellate court for civil cases and it is headed by the Master of the Rolls. It hears appeals from cases originally tried in all three divisions of the High Court and the County Court for multi-track cases.

Permission to appeal is required in most cases. It can be granted by the lower court where the decision was made

or by the Court of Appeal. Permission to appeal will only be granted where the court considers that an appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard.

If the appeal is heard in the Court of Appeal, it will usually be heard by three judges. The grounds of an appeal can be on an error of law by the trial judge, liability and/or the amount of damages awarded.

6.1.4 Supreme Court

This is the final civil court of appeal. It hears appeals from the Court of Appeal and, on occasion, direct from the High Court under the 'leapfrog' provisions. Appeals are heard by the Justices of the Supreme Court. They have to sit as an uneven number panel, so there can be three, five, seven or even nine judges sitting to hear an appeal.

Again, permission to appeal is required, which can be given by either the Supreme Court or the lower court. The number of appeals heard by the Supreme Court is small, usually about 70 cases per year involving civil law, with about half of these involving a question of statutory interpretation. The grounds of an appeal have to be based on an error of law by the trial judge or the Court of Appeal. The Supreme Court will not rule on the amount of damages awarded.

ACTIVITY

Advise the people in the following situations.

- 1 Imran has bought an HD television costing £370 from a local electrical superstore. He finds that HD pictures do not work, but the store refuses to replace the television or to refund the purchase price to Imran. He wishes to claim against the store. Advise him in which court to start a case and how he should go about this. Also explain to him the way in which the case will be dealt with if the store defends the claim and there is a hearing.
- 2 Thomas has been badly injured at work and alleges that the injuries were the result of his employer's failure to take proper safety precautions. He has been advised that his claim is likely to be worth £200,000. Advise him as to which court or courts could hear his case.
- 3 Sarah has supplied goods worth £70,000 to a manufacturing company which now disputes that it ordered the goods and states that it does not owe her any money. Advise her which court she should use to claim her money.

6.2 The Woolf reforms

The present system of civil justice is based on reforms recommended by Lord Woolf in his report *Access to Justice* (1996).

Lord Woolf stated that a civil justice system should:

- » be just in the results it delivers
- » be fair in the way it treats litigants
- » offer appropriate procedures at a reasonable cost
- » deal with cases at a reasonable speed
- » be understandable to those who use it
- » provide as much certainty as the nature of particular cases allows
- » be effective, adequately resourced and organised.

The report found that virtually none of these points was being achieved in the civil courts, and criticised the system for being unequal, expensive, slow, uncertain and complicated. The report contained 303

recommendations. The most important ones proposed were as follows:

- » extending the value of small claims from the then limit of £1000 (the present level is £10 000)
- » providing a fast track for straightforward cases of moderate value (the present limits are £10 000 to £25 000)
- » providing a multi-track for larger claims (now over £25 000)
- » encouraging the use of alternative dispute resolution (ADR)
- » giving judges more responsibility for managing cases
- » making greater use of information technology
- » simplifying documents and procedures and having a single set of rules governing proceedings in both the High Court and the County Court
- » having shorter timetables for cases to reach court and for lengths of trials.

6.2.1 Effect of the Woolf reforms

▼ Figure 6.3 Evaluation of the Woolf reforms

Advantages of Woolf reforms	Disadvantages of Woolf reforms
• The culture of litigation has changed for the better, with greater co-operation between the parties. • There has been an increased rate of settlement in cases. • Judges are now taking a more active role in managing cases. • There is less delay.	• The main problem of cost still remains. In 2011, the government in their consultation paper, <i>Solving Disputes in the County Court</i> pointed out that: – It was 15 years since the Woolf Report and the system had not kept pace with the 'major economic and social shifts that have taken place since'. It believed that the system needed to focus more on dispute resolution and debt recovery, rather than the ideals of 'justice'. – The costs of taking a case to court are often more than the amount claimed. The ideal is that disputes 'should be resolved in the most appropriate forum, so that processes and costs are commensurate with the complexity of the issues involved'.

6.2.2 The Civil Procedure Rules

As a result of the Woolf Report, new Civil Procedure Rules were introduced in 1999, with an overriding objective to enable the courts to deal with cases justly and at proportionate cost. This means that courts should try to:

- » ensure that parties are on an equal footing
- » save expense
- » deal with cases in a way that is proportionate to the amount being claimed, the importance of the case (for example is there a major point of law involved?) and the complexity of the case
- » ensure that the case is dealt with quickly and fairly

- » allocate an appropriate share of the court's resources (so smaller claims do not take up more time than they justify).

Judges have more control over proceedings than previously. They can set timetables and make sure that the parties do not drag out a case unnecessarily.

Rule 1.4 of the Civil Procedure Rules explains that as well as fixing timetables, 'active case management' by judges includes:

- » identifying the issues at an early stage
- » deciding which issues need investigation and trial.

▼ Figure 6.4 The Woolf reforms

Key facts	
Aspects of Woolf reform	Description
Courts dealing with civil cases	- County Court - High Court
Different tracks for claims	- Small claims - Fast track - Multi-track
Problems of civil cases	- Cost - Delay - Complexity
Woolf reforms	- Encourage use of ADR - Simpler forms and language - Increased small claims limit - Created fast track for claims of moderate value - Created multi-track for larger claims - Judges responsible for case management - Strict timetables
Advantages of Woolf reforms	- More co-operation between parties - More cases settled - Judges actively managing cases - Cases, especially small claims and fast track, heard more quickly
Disadvantage of Woolf reforms	Costs too high and may be more than the amount claimed

6.2.3 Applying the rules in court

Case management has led to the issues in cases being identified more quickly, so that more cases are settled without the need for a trial. Use of ADR has been encouraged, as the courts will make a costs order against those who unreasonably refuse to attempt ADR.

Judges apply strict timetables. For example, in *Vinos v Marks and Spencer plc* (2000), the claimant's solicitors had issued a claim just within the time limit and had told the defendant's insurers that they had done so. However, they were nine days late in serving that claim on the defendant. The claim was struck out by the court because of this delay.

6.3 Pre-trial procedures

6.3.1 Starting a court case

People should regard a court case as a last resort and should try to resolve a civil problem without going to court.

Initially, when a dispute arises, some form of negotiation should take place either by meeting the other person or writing to the other person setting out the complaint. Many cases should be resolved at this stage by the other party agreeing to refund money, change goods or pay the debt or claim.

6.3.2 Legal advice

If there is no settlement, then the aggrieved person must decide whether they are prepared to take the matter further by getting legal advice and the lawyer writing to the other person. This may lead to a 'bargaining' situation, where contact takes place between the parties and eventually a compromise is reached.

However, if, after all this, the other side refuses to compromise, or even negotiate, then the aggrieved person must decide if the matter is worth pursuing any further. This may involve starting a court case, or using one of the alternative forms of dispute resolution, also known as ADR (see Chapter 7).

6.3.3 Going to court

Taking a case to court can be expensive and complicated, even if it is decided to 'do it yourself' and not use a lawyer. The following issues should be considered:

- » Is there a valid claim based on a legal issue?
- » Does the person or business against whom action is being taken have enough money, or insurance cover, to make them worth suing?
- » Are the issues complicated? If so, will a lawyer be needed? Is there good evidence in support of the claim? Is the person claiming prepared to spend time pursuing the claim?
- » Is ADR a better option?
- » Is the person taking the case prepared to pay an initial court fee and prepared to pay the other side's costs if the claim is lost?
- » In tort cases, will a lawyer be prepared to take the claim on a 'no win, no fee' basis?

6.3.4 Filing a claim

If it is decided to pursue a court case, a claim form (N1) has to be filed, which sets out:

- » the claimant's name and address for the sending of court documents
- » the defendant's name and address where the claim form is to be sent to
- » what is being claimed, for example an amount of money in damages or another remedy such as an injunction
- » the grounds for making the claim, showing the relevant law.

The claim form must be filed at a court office, or online, and an initial fee paid. The court will then serve the claim on the defendant.

6.4 Allocation of cases

When the decision is made to go to court, it has to be decided which court to use – the County Court (including the Small Claims' Court) or the High Court. Where the claim is for £100 000 or less, the case must be started in the County Court, except that a personal injury claim over £50 000 can be started in the High Court.

Where a court claim is issued and then defended, it has to be allocated to a track. The decision on which track should be used is made by a District Judge in the County Court or a Master (a procedural judge) in the High Court.

▼ **Figure 6.5** Summary of where cases are likely to be held according to the value of the claim

Value of the claim	Court and track in which the case will usually be tried
Under £10 000	County Court small claims procedure
£10 000 to £25 000	County Court fast track procedure
£25 000 to £100 000	County Court multi-track procedure
Over £100 000	High Court

To help the judge consider to which track a claim should be allocated, both parties are sent an allocation questionnaire.

6.4.1 Small claims track

This is a relatively cheap and simple way of making a claim for a small amount of money; otherwise the costs of the action could be far more than the amount in dispute.

Claimants are encouraged to take their own case, so that costs are kept low. The use of lawyers is

▼ **Figure 6.6** Evaluation of the small claims track

Advantages of using small claims track	Disadvantages of small claims track
• The cost of issuing a claim is low. • The loser will not have to pay the other person's legal costs. • Claimants do not have to use lawyers, but are encouraged to take the case themselves. • The procedure is quicker and simpler than for other tracks. • In the hearing, the District Judge should help the parties to explain their case.	• Legal funding for paying for a lawyer is not available, though it may be possible in a tort claim to fund the case through a 'no win, no fee' arrangement. • Where the other side is a business, it is more likely to use a lawyer. This can put an unrepresented litigant at a disadvantage. • Research has shown that District Judges are not always helpful to unrepresented litigants. • Even if the case is won, it does not mean that the claimant will recover their awarded money from the defendant. Only about 60% of successful claimants actually receive all the money awarded by the court.

discouraged, as the winner cannot claim legal costs from the losing party.

District Judges are encouraged to be more inquisitorial. If the parties agree, it is possible to have a paper trial where there are no witnesses. Instead, both sides set out their points on paper. The judge reads these and also any supporting paperwork and makes the decision on the paper evidence.

6.4.2 Fast track cases

Claims between £10 000 and £25 000 are dealt with as fast track cases. Personal injury cases and housing cases over £1000 and up to £25 000 are also dealt with as fast track cases.

Following completion of an allocation questionnaire, a District Judge decides whether the case is suitable for the fast track. If so, a strict timetable will be set for pre-trial matters. This is aimed at preventing one or both sides from wasting time and running up unnecessary costs. Once a case is set down for hearing, the aim is to have the case heard within 30 weeks. This timetable has considerably reduced delays for this type of claim.

The trial will usually be heard by a Circuit Judge in open court with a more formal procedure. In order to speed up the trial, the hearing will be limited to a maximum of one day and the number of expert witnesses will be restricted.

6.4.3 Multi-track cases

Claims for more than £25 000 are usually allocated to the multi-track. If the case was started in a County Court, then it is likely to be tried there, though it can be sent to the High Court if the claim is for over £100 000 or there are complicated issues of law involved.

The case will be heard by a Circuit Judge, who will 'manage' the case from the moment it is allocated to the multi-track route. The judge can set timetables. It is even possible to ask the parties to try an alternative method of dispute resolution in an effort to prevent waste of costs.

Internet research

Mikel, a keen footballer, suffered serious leg injuries in a car accident caused by Ralph's bad driving. He is unable to work for four months, losing £10 000 in wages. He is told he can claim against Ralph for the lost wages, £15 000 for loss of enjoyment as he will not be able to play football again, and £40 000 for pain and suffering due to the accident.

Download an N1 claim form from www.gov.uk/government/publications/form-n1-claim-form-cpr-part-7 and complete the details in order for his claim to be issued.

6.5 Appeals

The appellate courts are courts that hear appeals from lower courts. The main appellate courts are the Court of Appeal (Civil Division) and the Supreme Court.

An appeal can be made in a civil case against liability and/or the award – usually the amount of damages ordered to be paid. An appeal court can:

- » confirm or alter the initial decision on liability
- » confirm, increase or decrease the amount of damages.

6.5.1 Appeals from a County Court hearing

- » For fast-track cases decided by a Circuit Judge, an appeal is heard by a High Court Judge.
- » For final decisions in multi-track cases heard in the County Court, the right of appeal is to the High Court.

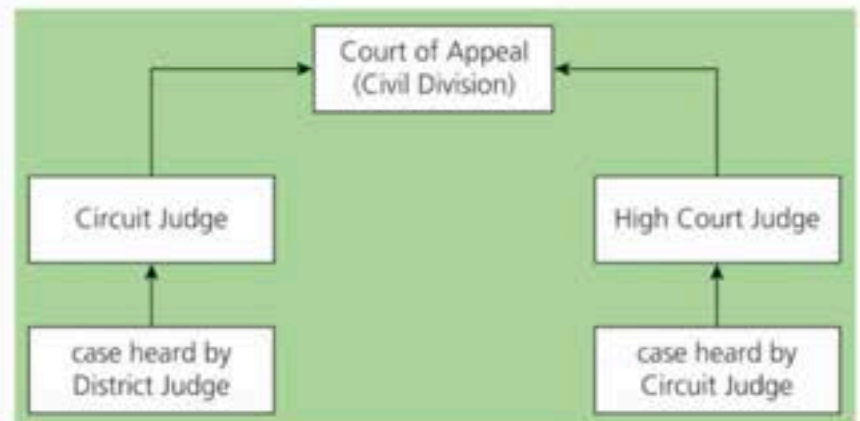
6.5.2 Appeals from a High Court hearing

From a decision in the High Court, an appeal usually goes to the Court of Appeal (Civil Division), but in rare cases there may be a 'leapfrog' appeal direct to the Supreme Court.

Such an appeal must involve an issue that is of national importance or raises issues of sufficient importance to warrant the leapfrog, or the benefit of going straight to the Supreme Court must outweigh the benefit of the case being considered by the Court of Appeal.

TARGET SKILLS

- 1 Name the civil trial and appeal courts.
- 2 Identify who hears trials in each of the civil courts.
- 3 Assess the effect of the Woolf reforms on civil court procedures.
- 4 Evaluate the advantages and disadvantages of an individual claimant taking a claim in the civil courts.



▲ Figure 6.7 Appeal routes from the County Court



▲ Figure 6.8 Appeal routes from the High Court

STRETCH AND CHALLENGE

Glenda tells you that she has been badly injured in an accident caused by Daniel. He admitted he was at fault at the time but now refuses to pay her any compensation. She understands that she can take court action, but she is worried about the idea of using the civil courts.

Write a note for her setting out the points for and against using the civil courts to claim her compensation.

▼ Figure 6.9 Advantages and disadvantages of the civil courts

Advantages	Disadvantages
• The process is fair – everyone is treated alike • The judge is impartial • The judge is a legal expert • Decisions can be enforced through the courts • Appeals are possible against liability and amount of damages awarded • Help with funding may be available in certain cases – very limited legal aid or no win no fee arrangements	• Cost of taking proceedings including loser paying the winner's costs • Delay due to procedures and waiting for hearings • Process is complex usually needing specialist lawyers • Uncertainty of outcome until a final decision is made • Confrontational process, partly due to use of lawyers and having to 'win' or lose the case

TEST YOURSELF

- 1 Describe how a civil claim for damages can be taken in:
 - the County Court
 - the High Court.
- 2 Assess the advantages and two disadvantages for an individual claimant using the small claims procedure.
- 3 Describe the tracking system for a civil claim for damages.
- 4 Describe the grounds on which an appeal in a civil claim can be taken and the procedure for such an appeal.
- 5 Assess the effect of the Woolf reforms on the civil justice system.

EXAM-STYLE QUESTIONS

- 1 Describe the tracking system of civil court claims.
- 2 Discuss the difficulties an individual claimant may encounter when pursuing a high-value civil court claim.

7

Alternative methods of dispute resolution

Introduction

Using the courts to resolve a dispute can be costly in terms of both money and time. It can also be traumatic for the individuals involved and may not lead to the most satisfactory outcome. It is not surprising, therefore, that more and more people and businesses are seeking other methods of resolving their disputes.

Alternative methods are referred to generally as 'ADR', which stands for 'alternative dispute resolution', and include any method of resolving a dispute without using the courts. There are many different methods, ranging from informal negotiations between the parties to a comparatively formal commercial arbitration hearing. This chapter links to the key concept of effectiveness and certainty.

7.1 Negotiation, conciliation and mediation**7.1.1 Negotiation**

Anyone who has a dispute with another person can always try to resolve it by negotiating directly with them. This can be done by talking face to face, by talking over the phone, by letters or by email exchange. It has the advantage of being completely private, and is also the quickest and cheapest method of settling a dispute.

If the parties cannot come to an agreement, they may decide to take the step of instructing solicitors, and those solicitors will usually try, in the first place, to reach a settlement. In fact, even when court proceedings have been started, the lawyers for the parties will often continue to negotiate on behalf of their clients, and this is reflected in the high number of cases which are settled out of court.

Once lawyers are involved, there will be a cost element – clearly, the longer negotiations go on, the higher the costs will be.

One of the worrying aspects is the number of cases that drag on for years, only to end in an agreed settlement literally 'at the door of the court' on the morning that the trial is due to start. It is this situation that other ADR methods and, in particular, the Woolf reforms try to avoid. When agreement has been reached, it is best for the terms of the agreement to be written down and signed by or on behalf of both parties, so there is no future misunderstanding.

7.1.2 Conciliation

Conciliation can take place before court proceedings have been started or at any stage up until trial. It

involves a neutral trained person (the conciliator) who helps the parties reach a compromise solution.

The role of a conciliator is to consult with each party and see how much common ground there is between them. They will explore the position with each party, looking at their needs and identifying the issues.

The main difference between mediation and conciliation is that the conciliator will play an active role in the process and will be expected to suggest grounds for compromise and the possible basis for a settlement.

Conciliation is carried out in private. The parties may meet face to face for the conciliation, or they may prefer the conciliator to meet with each side privately and then convey each party's wishes to the other side. Companies who are used to negotiating contracts with each other are most likely to benefit from this approach.

An advantage of conciliation is that the outcome need not be a strictly legal one that sticks to the letter of the law. It is more likely to be based on commercial common sense and compromise. The method will also make it easier for businesses to continue to work with each other in the future, and it may include agreements about the conduct of future business between the parties. This is something that cannot happen if the court gives judgment, as the court is only concerned with the present dispute.

Conciliation avoids the adversarial conflict of the courtroom and the winner/loser result of court proceedings – it has been said that with conciliation, everyone wins. However, conciliation does not always lead to a resolution and if the issue is not resolved, either party can still start or continue a court case.

7.1.3 Mediation

This is a process where a neutral trained mediator helps the parties to reach a compromise solution. The role

of a mediator is to consult each party and see how much common ground there is between them. They will explore the position with each party, looking at their needs and carrying offers between them, while keeping confidentiality.

A mediator will not usually tell the parties their own views of the merits of the dispute; it is part of the role to act as a 'facilitator', so that an agreement is reached by the parties themselves. However, a mediator can be asked for an opinion of the merits, and in this case the mediation becomes more of an evaluation exercise, which again aims at ending the dispute.

Mediation is only suitable if there is some hope that the parties can co-operate. Businesses who are used to negotiating contracts with each other are most likely to benefit from this approach. Mediation can also take different forms, and the parties can choose the exact method they want. The important point about mediation is that the parties are in control: they make the decisions.

The process of mediation is similar to that of conciliation but a conciliator will take a more active role in helping the parties to see each other's positions and suggesting grounds for compromise.

Formalised settlement conference

This is one formal method of mediation. It involves a 'mini-trial', where each side presents its case to a panel composed of a decision-making executive from each party in the dispute and a neutral party. Once all the submissions have been made, the executives, with the help of the neutral adviser, will evaluate the two sides' positions and try to come to an agreement. If the executives cannot agree, the neutral adviser will act as a mediator between them.

Even if the whole matter is not resolved, this type of procedure may be able to narrow down the issues so that if the case does go to court, it will not take so long to resolve.

An advantage of mediation and mini-trials is that the decision needs not be a strictly legal one sticking to the letter of the law. It is more likely to be based on commercial common sense and compromise. The method will also make it easier for the parties to continue to do business with each other in the future. It may include agreements about the conduct of future arrangements between the parties, which is something that cannot happen if the court gives judgment. The process again avoids the adversarial conflict of the court room.

Mediation services

There are a growing number of commercial mediation services. One of the main ones is the Centre for Dispute Resolution, which was set up in London in 1991. It has many important companies as members. Businesses

say that using the centre to resolve disputes can save several thousands of pounds in court costs. The typical cost of a mediator is about £1000 to £1500 a day, which compares favourably with potential litigation costs. These can be very high, even up to more than £1 million in major commercial cases.

There are also mediation services aimed at resolving smaller disputes, for example those between neighbours. An example of such a service is West Kent Mediation. This offers a free service that will try to help resolve disagreements between neighbours arising from matters such as noise, car parking, dogs or boundary fence disputes. The service is run by trained volunteers who will not take sides or make judgements on the rights and wrongs of an issue. They will usually visit the party who has made the complaint to hear their side of the matter, then, if that party agrees, ask to visit the other person and get their point of view. Finally, if both parties are willing, the mediator arranges a meeting between them in a neutral place. The parties are in control and can withdraw from the mediation process at any time.

Online dispute resolution (ODR) is gaining popularity in view of the number of transactions completed over the internet. There are an increasing number of websites offering this, for example www.startmediation.co.uk and www.mediateuk.co.uk/online-mediation.

Internet research

What are the benefits of online, rather than face-to-face, dispute resolution?

Visit a site such as www.resolutionpeople.co.uk/online-mediation-rise-in-popularity and prepare a short report summarising the benefits of the ODR system.

7.2 Arbitration

Arbitration is another way of resolving a dispute without the need for a court case. It is governed by the Arbitration Act 1996. Section 1 sets out the principles behind it:

- (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

Arbitration is the voluntary submission by the parties of their dispute to the judgment of some person other than a judge. The initial agreement will usually be in writing, and indeed the Arbitration Act 1996 applies only to written arbitration agreements. The precise way in which the arbitration is carried out is left almost entirely to the parties' agreement.

7.2.1 The agreement to arbitrate

Arbitration is becoming increasingly popular in commercial cases. The agreement to go to arbitration can be made by the parties at any time. It can be before a dispute arises or when the dispute becomes apparent. Many commercial contracts include what is called a *Scott v Avery* clause, where the original contract sets out that in the event of a dispute it will be settled by arbitration. Alternatively, an agreement to go to arbitration can also be made after the dispute arises.

D Complaints

3. Disputes arising out of, or in connection with, this contract which cannot be amicably settled may (if you so wish) be referred to arbitration under a special scheme devised by arrangement with the Association of British Travel Agents (ABTA) but administered independently by the Chartered Institute of Arbitrators. The scheme provides for a simple and inexpensive method of Arbitration on documents alone, with restricted liability on you in respect of costs. The scheme does not apply to claims greater than £1500 per person or £7500 per booking form or to claims which are solely or mainly in respect of physical injury or illness or the consequences of such injury or illness. If you elect to use the scheme, written notice requesting arbitration must be made within nine months after the scheduled date of return from holiday.

▲ Figure 7.1 A *Scott v Avery* clause in a package-holiday contract

Figure 7.1 shows a sample *Scott v Avery* clause in the small print of a package-holiday contract. Where a contract contains such a clause, the Arbitration Act 1996 states that the court will normally refuse to deal with any dispute; the matter must go to arbitration as set out in the contract.

In a consumer contract, the rules are different where the amount falls within the small claims track. In this case, the consumer may choose whether to abide by the agreement to go to private arbitration, or whether to insist that the case be heard in the small claims track.

7.2.2 The arbitrator

Section 15 of the Arbitration Act 1996 states that the parties are free to agree on the number of arbitrators, so that a panel of two or three may be used or there may be a sole arbitrator. If the parties cannot agree on a number, then the Act provides that only one arbitrator should be appointed.

The Act also states that the parties are free to agree on the procedure for appointing an arbitrator. In fact, most

agreements will either name an arbitrator or provide a method of choosing one, and in commercial contracts it is often provided that the president of the appropriate trade organisation will appoint the arbitrator. There is also the Institute of Arbitrators, which provides trained arbitrators for major disputes.

In many cases, the arbitrator will be someone who has expertise in the particular field involved in the dispute, but if the dispute involves a point of law the parties may decide to appoint a lawyer. If there is no agreement on whom to appoint and in what way, then, as a last resort, the court can be asked to appoint an appropriate arbitrator.

7.2.3 The arbitration hearing

The actual procedure is left to the agreement of the parties in each case, so that there are many forms of hearing.

In some cases, the parties may opt for a 'paper' arbitration, where the two sides put all the points they wish to raise into writing and submit this, together with any relevant documents, to the arbitrator. A decision will be made based solely on the documents.

Alternatively, the parties may send all the documents to the arbitrator, but before a decision is made both parties will attend a hearing at which they can make oral submissions to support their case.

Where necessary, witnesses can be called to give evidence. If witnesses are called, the Arbitration Act 1996 allows for the use of court procedures to ensure the attendance of those witnesses.

The date, time and place of the arbitration hearing are all matters for the parties to decide in consultation with the arbitrator. This gives a great degree of flexibility to the proceedings; the parties can choose what is most convenient for all the people concerned.

7.2.4 The award

The decision made by the arbitrator is called an award and is binding on the parties. It can even be enforced through the courts, if necessary. The award is usually final, though it can be challenged in the courts on the grounds of serious irregularity in the proceedings or on a point of law.

ACTIVITY

Find an arbitration clause in a consumer contract, for example for a package holiday or insurance for your mobile phone.

Who will the arbitrator be? How will any hearing be conducted?

▼ Figure 7.2 Evaluating arbitration

Advantages of arbitration	Disadvantages of arbitration
• The parties may choose their own arbitrator, and can therefore decide whether the matter is best dealt with by a technical expert, a lawyer or a professional arbitrator. • An expert in a particular field can be appointed, saving the expense of calling expert witnesses and the time that would be used in explaining all the technicalities to a judge. • The hearing time and place can be arranged to suit parties. • The actual procedure used is flexible and the parties can choose that which is most suited to the situation; this will usually result in a more informal hearing than in court. • The hearing will be in private and there will be no publicity. • The dispute will be resolved more quickly than through a court hearing. • Arbitration proceedings are usually much cheaper than going to court and there is no necessity to instruct lawyers. • The award is normally final and can be enforced through the courts.	• The parties may not be on an equal footing as regards their ability to present their case – such as an individual against a large company. No funding is available for individuals. • An unexpected legal point may arise in the case that is not suitable for decision by a non-lawyer arbitrator. • The fees of a professional arbitrator may be expensive. • It will also be expensive if the parties opt for a formal hearing, with witnesses giving evidence and lawyers representing both sides. • Rights of appeal are limited. • The delays for using a commercial or international arbitrator may be nearly as great as those in the courts.

TARGET SKILLS

- 1 Define the meaning of a *Scott v Avery* clause and state where it can be found.
- 2 Identify the role played by a mediator in dispute resolution.
- 3 Analyse the benefits of using arbitration rather than taking a civil court case.
- 4 Discuss the advantages and disadvantages of using alternative dispute resolution.

▼ Figure 7.3 Comparing different methods of ADR

Key facts	
Method of dispute resolution	Who makes the decision?
Negotiation	The parties themselves
Conciliation	The parties, with the help of a neutral conciliator who plays an active role
Mediation	The parties, with the help of a neutral mediator
Arbitration	The arbitrator

▼ Figure 7.4 Advantages and disadvantages of different methods of ADR

	Advantages	Disadvantages
Negotiation	• Quick and straightforward • No cost • Parties in control	• Parties may be unwilling to negotiate • Involving lawyers can be expensive • It may fail requiring court action as a last resort
Conciliation	• Cheaper than a court case • Parties have some control • Can include agreements about future business	• Conciliator may force a resolution • May not lead to settlement • Not always binding

	Advantages	Disadvantages
Mediation	• Cheaper than a court case • Parties in control • Can include agreements about future business	• May not lead to settlement • Not binding • One party may not engage in process
Arbitration	• Cheaper than a court case • Decision is final and binding • Decision can be enforced in the courts	• More expensive than other forms of ADR • Can be formal • Not suitable if a point of law is involved

STRETCH AND CHALLENGE

Sharon has heard that 'alternative dispute resolution' is an alternative to taking a civil court case, but she knows nothing about it.

Write notes for her about the different types of ADR and the types of cases they each deal with.

EXAM-STYLE QUESTIONS

- 1 Describe the process of arbitration.
- 2 Discuss the disadvantages of using ADR as a means of dispute resolution.

TEST YOURSELF

- 1 Explain two advantages and two disadvantages of using negotiation to resolve a dispute.
- 2 Explain two advantages of using conciliation rather than taking a court case.
- 3 Explain two advantages of using mediation as a form of ADR.
- 4 Explain two disadvantages of using mediation as a form of ADR.
- 5 Explain two disadvantages of using arbitration to resolve a dispute.

8

Criminal courts and criminal process

Introduction

The two courts that hear trials of criminal cases are the Magistrates' Court and the Crown Court. Which court is used for the trial is decided by the category of crime involved in the charge:

- ★ The least serious summary offences can only be tried at the Magistrates' Court.
- ★ The most serious indictable offences can only be tried at the Crown Court.
- ★ Triable-either-way offences may be tried at either court.

If a defendant pleads guilty to the charge against them, a sentence will be imposed. Where the accused pleads not guilty, there will be a trial to decide if the accused is guilty or not guilty; the burden of proof is

on the prosecution, who must prove the case beyond reasonable doubt.

The form of the trial is adversarial, with prosecution and defence presenting their cases and cross-examining each other's witnesses, while the role of the judge or magistrates is effectively that of referee, overseeing the trial and making sure that legal rules are followed correctly. The judge or magistrates cannot investigate the case, nor ask to see additional witnesses. Guilt will be decided by a District Judge or lay magistrates in the Magistrates' Court, and by a jury in the Crown Court. If a guilty verdict is reached, a sentence will be imposed. This chapter links to the key concept of effectiveness and certainty.

8.1 Role and jurisdiction of the criminal courts

8.1.1 Magistrates' Court

There are about 160 Magistrates' Courts in England and Wales. They were established as local courts, so there used to be a Magistrates' Court in most towns, while big cities used to have several courts. However, there has been a severe closure programme and there are now often large distances between each court. They deal with cases that have a connection with their geographical area.

Cases are heard by magistrates, who may either be legally qualified District Judges or non-legally qualified lay justices (see Chapter 12 for further details on lay magistrates). There is also a legally qualified clerk attached to each court, to give advice on the law to the lay magistrates.

Magistrates' Courts have the following jurisdiction:

- 1 To try all summary cases
- 2 To try any triable-either-way cases that can be dealt with in the Magistrates' Court
- 3 To deal with the first hearing of all indictable offences; these cases are then immediately sent to the Crown Court

- 4 To deal with all preliminary matters connected to criminal cases, such as issuing warrants for arrest and deciding bail applications
- 5 To try cases in the Youth Court where the defendants are aged 10–17 inclusive.

The first two categories account for about 97 per cent of all criminal cases.

8.1.2 Crown Court

The Crown Court sits in about 84 different locations throughout England and Wales and deals with all indictable, or serious, offences. It also deals with any triable-either-way offences that are sent for trial from the Magistrates' Court.

All pre-trial matters in cases at the Crown Court are heard by a judge alone. Also, where a defendant pleads guilty, the sentence is decided by a judge sitting alone. However, when a defendant pleads not guilty, a jury is used to decide the verdict.

The judge will control the court, rule on relevant issues of law, direct the jury on the law and evidence and, if the defendant is found guilty, impose a sentence.

▼ Figure 8.1 The parties to a criminal case

Key facts	
Party	Description
Prosecution	The Crown Prosecution Service (CPS) initially advises the police on what offence to charge. Lawyers work for this service. They may direct the police on what evidence is required. It will be for the police to obtain the evidence. Once the case comes to court, it presents the case and tries to prove the defendant guilty beyond reasonable doubt.
Defendant	This is the person charged with a criminal offence. They do not have to disprove the prosecution case but to cast sufficient doubt on it.

8.2 Classification of criminal offences

8.2.1 Summary offences

These are the least serious criminal offences and have to be tried in the Magistrates' Courts. They are subdivided into offences of different 'levels' – level 1 being the lowest and level 5 the highest. The use of levels allows a maximum fine to be set for each level, which is increased in line with inflation from time to time. The current maximum fines are:

- » level 1: £200
- » level 2: £500
- » level 3: £1000
- » level 4: £2500
- » level 5: unlimited.

Examples of summary offences include driving while disqualified, common assault, being drunk and disorderly in a public place and theft, including shoplifting, where the value of the goods stolen is less than £200.

8.2.2 Triable-either-way offences

These offences can be tried in either the Magistrates' Court or the Crown Court. Triable-either-way offences include assault causing actual bodily harm, theft and burglary. However, burglary of a dwelling when violence or threats of violence are used is an indictable offence.

If it is decided that the case will be dealt with in the Magistrates' Court, then the procedure is the same as for trial of a summary offence. The only difference is that, if the defendant is guilty, the magistrates have the power to send the defendant to the Crown Court for sentencing. The magistrates can only do this if they think that their powers of sentencing are not sufficient.

If the case is tried in the Crown Court, the trial will proceed in the same way as an indictable offence. If the defendant pleads, or is found, guilty, the judge can impose any sentence up to the maximum for that offence.

8.2.3 Indictable offences

These are the most serious offences and can only be tried in the Crown Court.

The first preliminary hearing to establish the defendant's identity will take place in the Magistrates' Court. Following this, all matters relating to the offence will take place in the Crown Court. If the defendant pleads not guilty, a jury will decide guilt or innocence after hearing all the evidence. If the defendant pleads guilty, the judge will impose a sentence.

The judge, when sentencing, can impose any sentence up to the maximum which is set by the Act that imposes the offence. Examples of indictable offences include murder, manslaughter and robbery.

8.3 Pre-trial processes

8.3.1 Summary offences

At the start of any case, the clerk of the court will check the defendant's name and address. The defendant is then asked to plead guilty or not guilty. Over 90 per cent of defendants in the Magistrates' Court plead guilty. The process is then concerned with establishing an appropriate penalty for the case.

Guilty plea

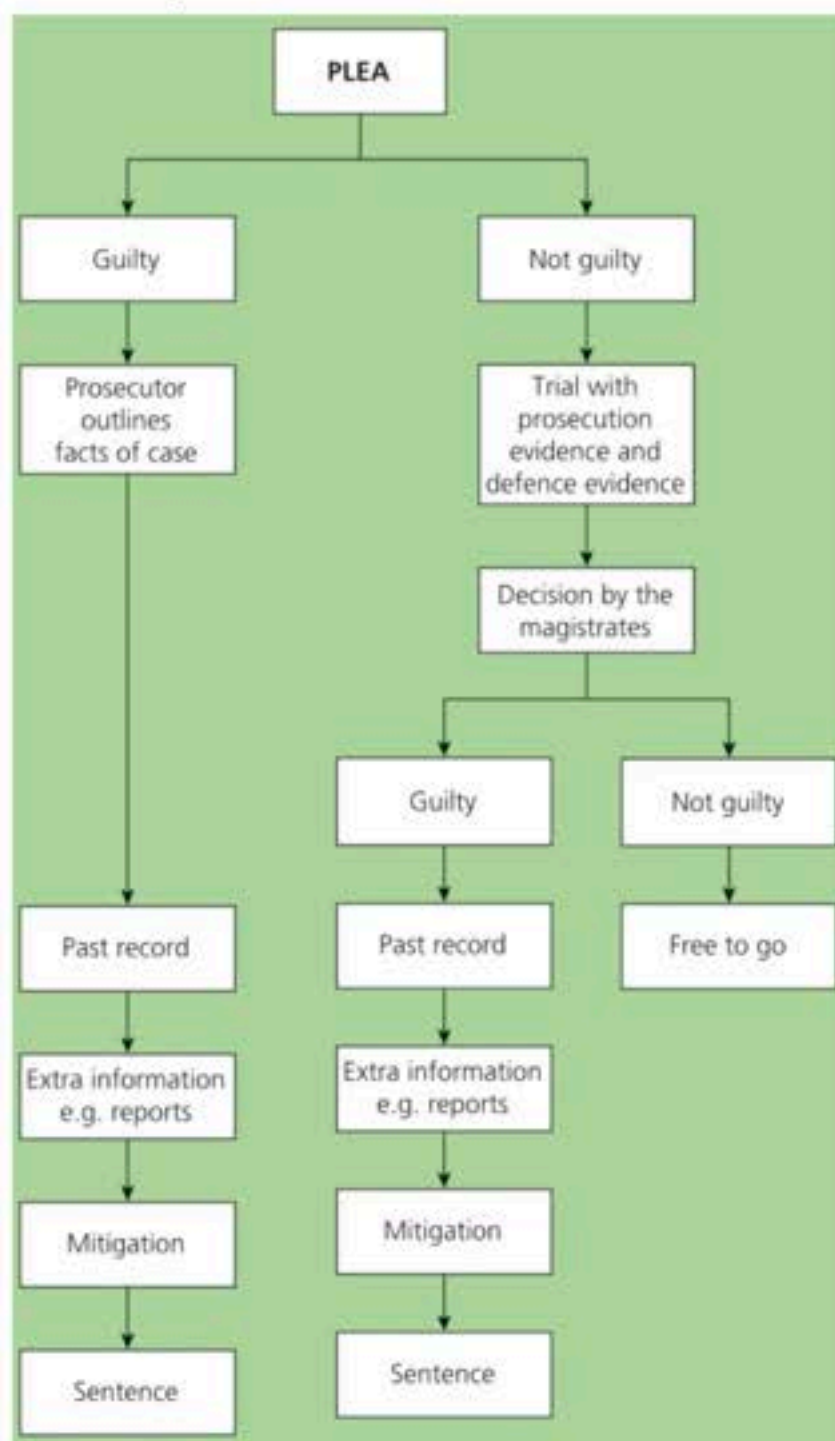
The usual sequence of events is as follows:

- 1 The Crown Prosecutor will give the court an outline of the facts of the case.

▼ Figure 8.2 Categories of criminal offences

Key facts	
Type of offence	Description
Summary offences	The least serious offences that are tried in the Magistrates' Court
Triable-either-way offences	More serious offences which can be tried in either the Magistrates' Court or the Crown Court – usually at the option of the defendant
Indictable offences	The most serious offences which have to be tried in the Crown Court

- 2 The defendant is asked to agree with those facts. If they are not agreed, the magistrates may have to hold an inquiry, called a Newton hearing, to establish the facts.
- 3 The defendant's past record of convictions, if any, is given to the court.
- 4 Other information about the defendant's background (residential, relationship and especially financial) is given to the court.
- 5 Any relevant reports are considered by the magistrates; these may include a pre-sentence report prepared by a probation officer and/or a medical report on the defendant's mental health.
- 6 The defendant or any defence lawyer can then explain any matter that might persuade the magistrates to give a lenient sentence. This is called making a speech in mitigation.
- 7 The magistrates decide the sentence.



▲ **Figure 8.3** Proceedings for a summary offence in the Magistrates' Court

Not guilty plea

When a defendant pleads not guilty, the procedure is longer, as both prosecution and defence can produce evidence to the court.

Since the burden of proof is on the prosecution, it will begin the case – usually by making a short speech outlining what the case is about and what it hopes to prove. Prosecution witnesses will then be called to give evidence, and the prosecutor will question each to establish what they saw and heard. This is called the examination in chief.

After the prosecution finishes the examination in chief of a witness, the defence can then cross-examine that witness to test their evidence and try to show that it is not reliable. The prosecution may also produce relevant exhibits, such as property found in the possession of the defendant or documents that help establish their case.

At the end of the prosecution case, the defence can submit to the magistrates that there is no case to answer and that the case should be dismissed at this point. If the magistrates consider there is a case to answer, the defence can give their evidence to the court. The defendant will usually give evidence, though there is no necessity to do so. However, since the Criminal Justice and Public Order Act 1994, the magistrates can draw their own conclusions from the fact that the accused stays silent.

If the defendant does give evidence, cross-examination by the prosecutor can take place. The defence can call witnesses and produce any evidence that it believes will help to disprove the prosecution's case. Once all the evidence has been given, the defence has the right to make a speech pointing out the weaknesses of the case to the magistrates and try to persuade them to acquit the defendant. Further speeches are not usually allowed, unless there is a point of law to be argued.

The magistrates then decide if the defendant is guilty or not guilty. If they convict, they will then hear about any past criminal record and may also look at reports and hear a speech in mitigation from the defence. They will then pass sentence.

If the magistrates dismiss the case, the defendant is free to go and cannot usually be tried for that offence again.

▼ **Figure 8.4** Proof in criminal cases

Key facts	
Proof	Description
The burden of proof	This is on the prosecution to show that each and every aspect of the allegation is proved.
Beyond reasonable doubt	This is the level of proof that the prosecution must show that the defendant is guilty. It is a high standard, as the consequences of a guilty verdict are severe.

8.3.2 Triable-either-way offences

As set out in Section 8.2.2 above, these offences can be tried in either the Magistrates' Court or the Crown Court.

Magistrates' Court trial

If it is decided that the case will be dealt with in the Magistrates' Court, then the procedure will be the same as for summary offences. The only difference is that, if the defendant is guilty, the magistrates have the power to send the defendant to the Crown Court for sentencing.

Committal for sentence

If a trial takes place in the Magistrates' Court and the defendant is found guilty, the magistrates can commit the defendant for sentence to the Crown Court. However, this will only happen if, at the end of a case, having heard the defendant's past record, they feel that their powers of punishment are not sufficient. The magistrates must be of the opinion that the offence, or the combination of offences, is so serious that a greater punishment than they have power to inflict should be imposed. In cases of violent or sexual offences, the magistrates may commit for sentence if they think that a long sentence of imprisonment is necessary to protect the public from serious harm.

Crown Court trial

Where the defendant elects for trial at the Crown Court, the magistrates must officially send the case to the Crown Court. For triable-either-way offences, magistrates

will hold a plea before venue and, if the defendant pleads not guilty, a mode-of-trial hearing. If, at this hearing, it is decided that the case is to be tried in the Crown Court, the magistrates will then transfer the case accordingly.

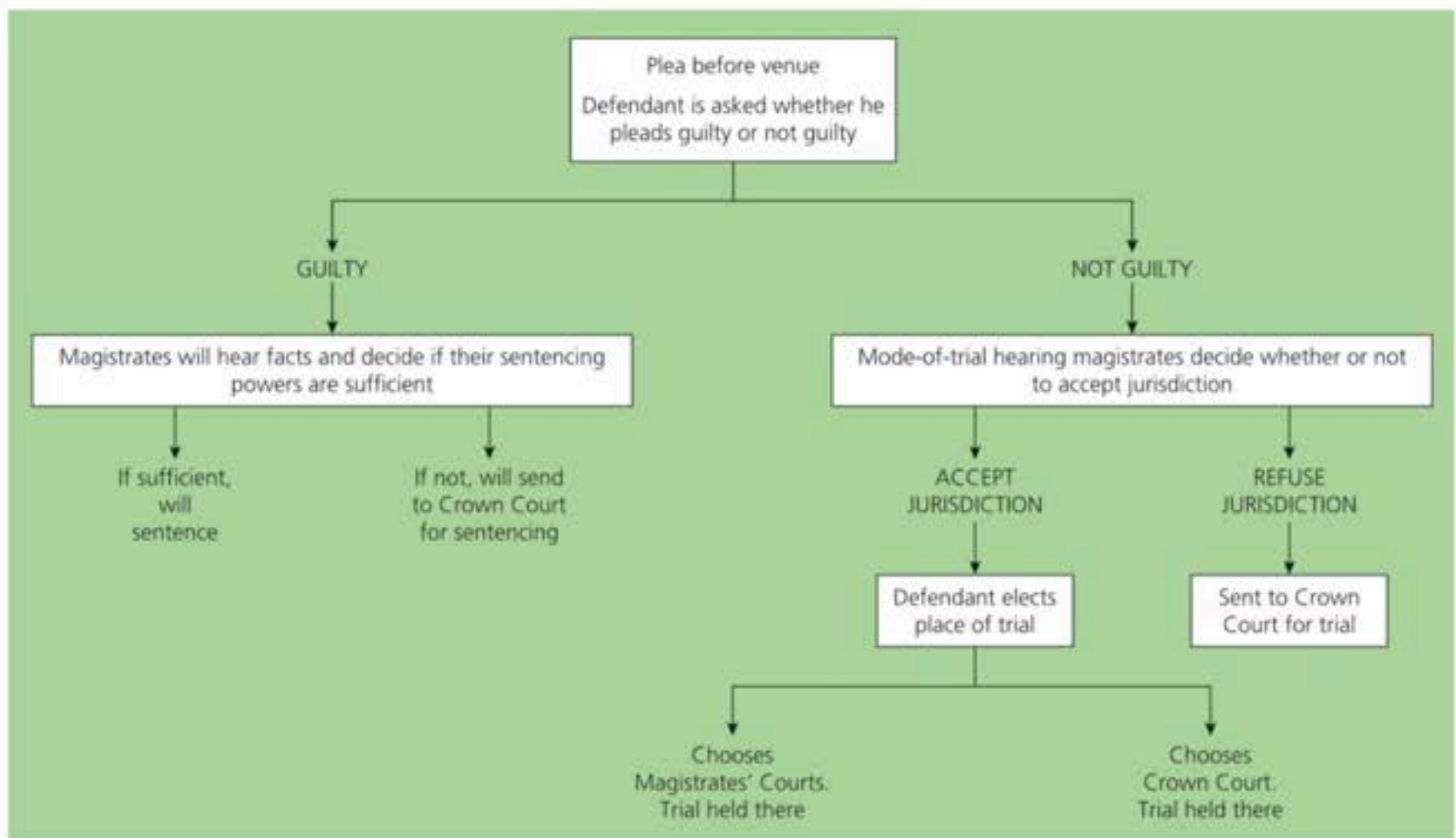
8.3.3 Indictable offences

These are the most serious offences and have to be dealt with in the Crown Court. The defendant will be produced to the Magistrates' Court at the first opportunity after charge for their identity to be confirmed and bail or custody to be decided. It is likely that for most indictable offences, the accused will be remanded in custody. Under s 51 of the Crime and Disorder Act 1998, a defendant charged with an indictable offence will be transferred to the Crown Court immediately from this first hearing.

All subsequent pre-trial matters are heard by a Crown Court judge alone. Where the defendant pleads guilty, the sentence is dealt with by a judge alone. When a defendant pleads not guilty, a jury is used to decide guilt or innocence. The Criminal Procedure Rules deal with all aspects of criminal cases, and their overriding objective is that 'criminal cases be dealt with justly'.

Plea and Trial Preparation Hearing (PTPH)

This takes place at the Crown Court as soon as possible after the case has been sent there from the Magistrates' Court. An effective PTPH will:



▲ Figure 8.5 Procedure for triable-either-way offences

- » arraign the defendant (take the defendant's plea), unless there is good reason not to set the trial date
- » identify, so far as can be determined at that stage, the issues for trial
- » provide a timetable for the necessary pre-trial preparation and give appropriate directions for an effective trial
- » make provision for any Further Case Management Hearing (FCMH) that may be required, to take place at the time when it can have maximum effectiveness.

The indictment

This document will be prepared before trial and formally sets out the charges against the defendant. Although the defendant will have been sent for trial charged with specific crimes, the indictment can be drawn up for any offence that the witness statements reveal. In more complicated cases, the indictment may have several counts (charges), each relating to a different offence.

Disclosure by prosecution and defence

Both the prosecution and defence have to make certain points known to the other before trial. The prosecution must set out all the evidence it proposes to use at the trial. It must also disclose previously undisclosed material:

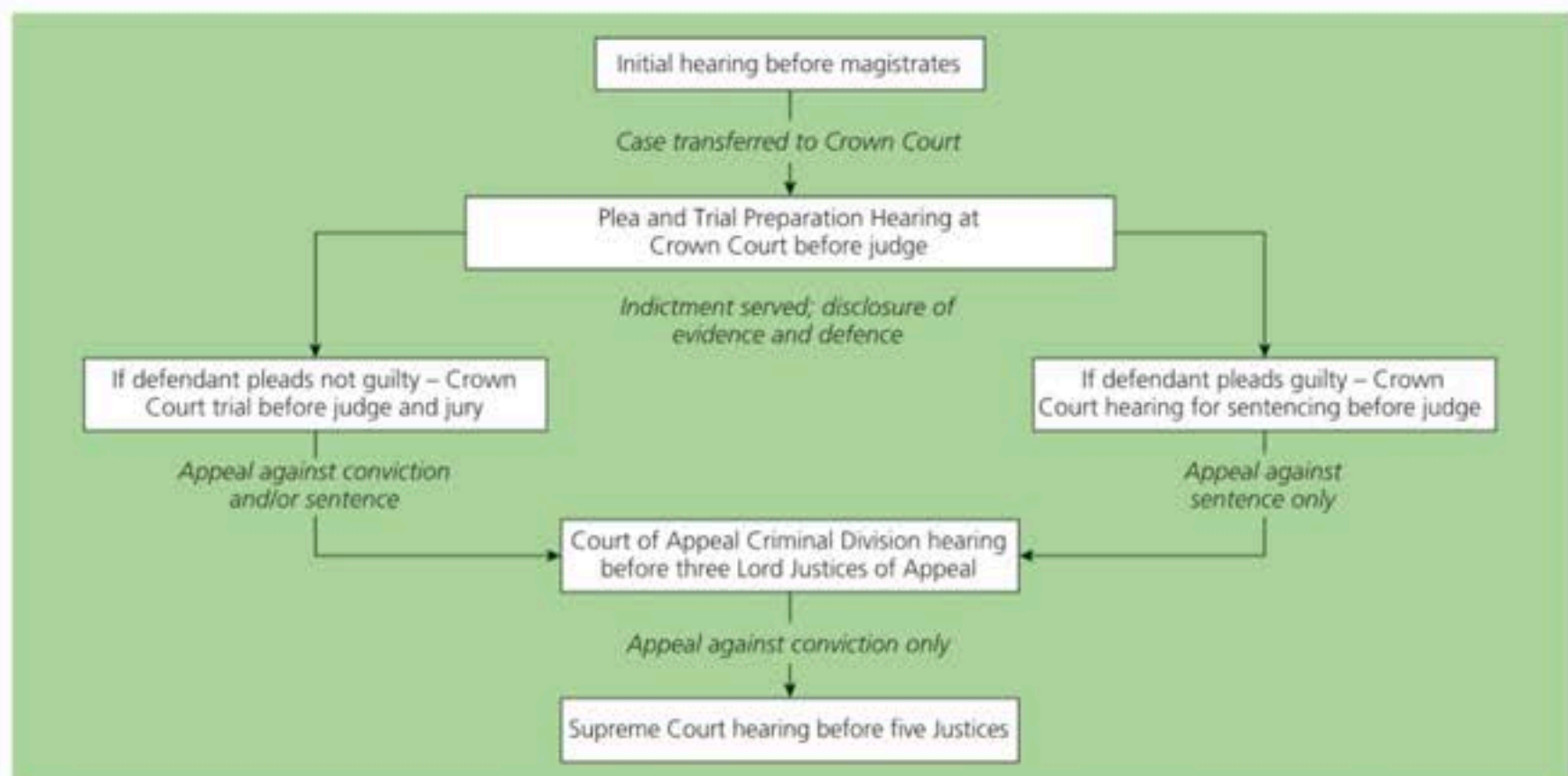
'... which in the prosecutor's opinion might reasonably be considered capable of undermining the case for the prosecution against the accused.'

The defence must give a written statement to the prosecution that includes:

- » the nature of the accused's defence, including any legal defences intended to be relied on
- » any matters of fact on which issue is taken with the prosecution
- » any point of law to be argued, and the case authority in support
- » any alibi, and the witnesses to support that alibi (this information allows the prosecution to run police checks on the alibi witnesses).

▼ **Figure 8.6** Advantages and disadvantages of courts hearing triable either way offences

	Advantages	Disadvantages
Magistrates Court	• Trial taking place in (relatively) local court • Less chance of publicity • Case will be heard quickly • Shorter trial • Lower sentencing powers of magistrates • Greater chance of bail being granted before trial	• Less likelihood of legal representation • Less ability to argue a defence or challenge witnesses • Greater chance of being found guilty • Less chance of appealing against conviction and/or sentence
Crown Court	• Greater chance of acquittal by jury or judicial direction • Greater chance of prosecution accepting plea to lower charge • Greater chance of witnesses not attending • Defence to charge can be fully argued • Greater chance of receiving legal aid • Chance of appeal against conviction and/or sentence	• Takes longer for case to reach court • Greater chance of publicity • May not be tried locally • Sentencing powers of judge are greater • Likely to need legal advice and representation • Longer trials may involve greater expense • Lower chance of being granted bail before trial



▲ **Figure 8.7** Indictable offence procedure

8.4 Appeals

8.4.1 Appeals from the Magistrates' Court to the Crown Court

This is the normal route of appeal and is only available to the defence.

If the defendant pleaded guilty at the Magistrates' Court, then an appeal can only be made against sentence.

The Crown Court can confirm the sentence or they can increase or decrease it. However, any increase can only be up to the magistrates' maximum powers for the case.

If the defendant pleaded not guilty and is convicted, then an appeal can be made against conviction and/or sentence.

8.4.2 Case-stated appeals

These are appeals on a point of law that go to the Queen's Bench Divisional Court, either directly from the Magistrates' Court or following an appeal to the Crown Court. Both the prosecution and the defence can use this appeal route.

The magistrates (or the Crown Court) are asked to state the case by setting out their findings of fact and their decision. The appeal is then argued on the basis of what the law is on those facts; no witnesses are called. The appeal is usually heard by a panel of two or three judges and will be on the basis that the magistrates came to the wrong decision because they made a mistake about the law. The Divisional Court may confirm, vary or reverse the decision, or send the case back for the magistrates to implement the decision on the law. There are usually fewer than 100 case-stated appeals made each year. There is a possibility of a further appeal to the Supreme Court (formerly the House of Lords).

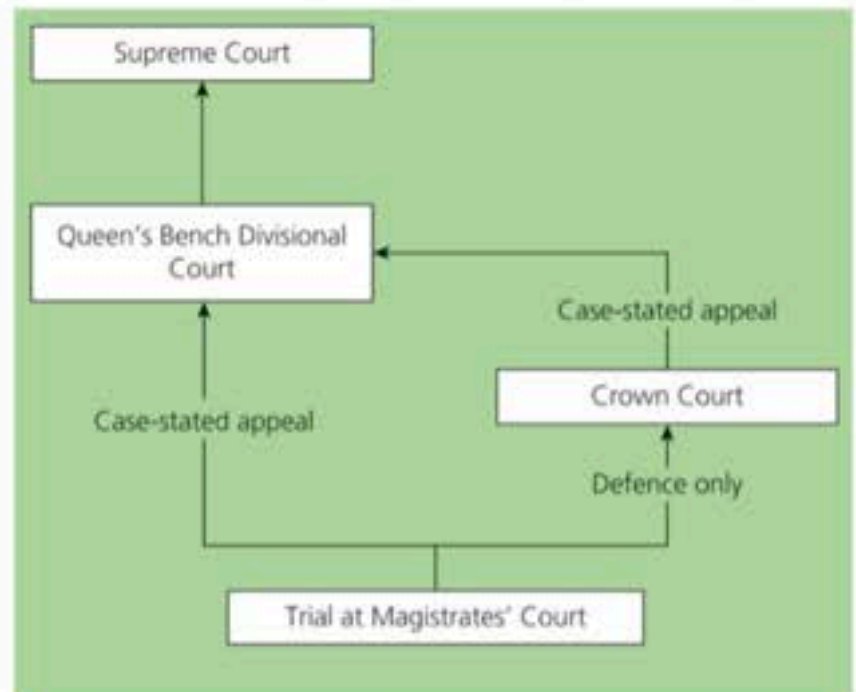
CASE EXAMPLE

C v DPP (1994)

A 13-year-old boy had been convicted in the Magistrates' Court of the offence of interfering with a motorcycle with intent to commit theft or to take and drive away without consent. An appeal by case stated concerned a legal point about the presumption of criminal responsibility of children between the ages of 10 and 14. Until this case, it had been accepted that such a child could only be convicted if the prosecution proved that the child knew they were doing wrong. The Divisional Court held that times had changed and that children were more mature and the rule was not needed.

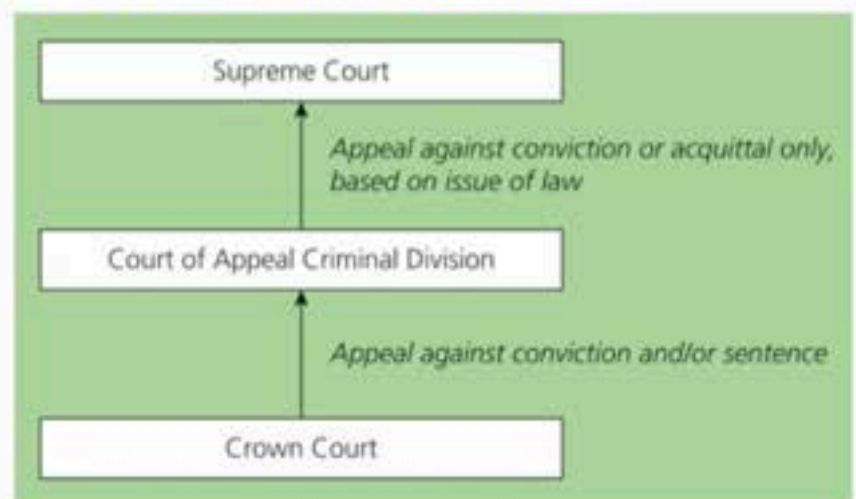
The case was further appealed to the House of Lords who overruled the Divisional Court, holding that the law was still that a child of this age was presumed

not to know they were doing wrong, and therefore not to have the necessary intention for any criminal offence. The original conviction was confirmed.



▲ Figure 8.8 Appeal routes from the Magistrates' Court

8.4.3 Appeals from the Crown Court



▲ Figure 8.9 Routes of Appeal from a Crown Court trial

- » Appeals by the defendant: a defendant can appeal against conviction and/or sentence to the Court of Appeal (Criminal Division).
- » Leave to appeal: the Criminal Appeal Act 1995 requires that the defendant must obtain leave to appeal, so that cases without merit are filtered out and the court's time is saved.
- » The Criminal Appeal Act 1995: this simplified the grounds under which the Court of Appeal can allow an appeal: 'if they think that the conviction is unsafe'. There is a broad interpretation of 'unsafe' after the incorporation of the European Convention on Human Rights; a conviction is now held to be 'unsafe' where the defendant has been denied a fair trial.
- » New evidence: this must appear to be capable of belief and afford a ground for an appeal. It is considered alongside whether it would have been admissible at the trial and why it was not produced at that trial.

8.4.4 Court of Appeal's powers

The Court of Appeal can:

- » allow a defendant's appeal and quash a conviction, or
- » vary the conviction to that of a lesser offence of which the defendant could have been convicted, and/or
- » decrease, but not increase, any sentence imposed
- » dismiss the appeal
- » order that there should be a retrial of the case in front of a new jury.

Appeals by the prosecution

The prosecution has limited rights to appeal against an acquittal as follows:

- 1 Where the acquittal was the result of the jury being 'nobbled'. This is where one or more jurors are bribed or threatened by associates of the defendant.
- 2 Where there is new and compelling evidence of the acquitted person's guilt, and it is in the public interest for the defendant to be retried. This power is given by the Criminal Justice Act 2003 and it is only available for some 30 serious offences, including murder, manslaughter, rape and terrorism offences. It is known as 'double jeopardy', since the defendant is being tried twice for the same offence. The Director of Public Prosecutions has to consent to the reopening of investigations in the case.

CASE EXAMPLE

Stephen Lawrence

In 2011, two defendants who had been previously acquitted of the murder of black teenager Stephen Lawrence were retried using the double-jeopardy rules and convicted some 19 years after the murder. Part of the new evidence was a DNA match with Stephen's blood, found on the clothing of one of the defendants. This evidence became available due to improved DNA testing techniques.

CASE EXAMPLE

Michael Weir

Michael Weir was jailed for life for the murders of two pensioners in a case that broke new legal ground. He was convicted 20 years after the killings in a unique double-jeopardy case. His original murder conviction was thrown out on appeal on a technicality when prosecutors were late filing legal papers, despite DNA evidence from a glove found at the scene linking him to one of the attacks. By 2018, new DNA evidence linking him to both murders had been discovered. Weir was the first defendant to be found guilty of the same murder twice.

Referring a point of law

Following an acquittal, under s 36 of the Criminal Justice Act 1972 the Attorney-General can refer a point of law to the Court of Appeal, in order to get a ruling on the law. The decision by the Court of Appeal on that point of law does not affect the acquittal, but it does create a precedent for any future case involving the same point of law.

Against sentence

Also under s 36 of the Criminal Justice Act 1988, the Attorney-General can apply for leave to refer an unduly lenient sentence to the Court of Appeal.

Cases are brought to the Attorney-General's attention by the Crown Prosecution Service. It is also possible for a member of the public to contact the Attorney-General's office, if they feel that the original sentence was unduly lenient.

Further appeals

Both the prosecution and the defence may appeal from the Court of Appeal to the Supreme Court, but it is necessary to have the case certified as involving a point of law of general public importance, and to get leave to appeal, either from the Supreme Court or from the Court of Appeal. An appeal can only be made against conviction or acquittal. There are very few criminal appeals heard by the Supreme Court, usually fewer than 20 each year.

The Criminal Cases Review Commission

This review body was established by the Criminal Appeal Act 1995. It has the power to investigate possible miscarriages of justice (including summary offences) and to refer cases back to the courts. In order for the commission to be able to refer a case, there must normally have already been an appeal to the Court of Appeal, although the commission has the discretion to refer a case where 'there are exceptional circumstances'.

8.5 Police bail: PACE 1984 and the Criminal Justice and Public Order Act 1994

8.5.1 Bail

An important pre-trial matter to be decided in every criminal case is whether the accused should stay in custody while awaiting trial or whether bail should be granted. A person can be released on bail at any point after being arrested by the police.

Being given bail means that the person is allowed to be at liberty until the next stage in the case. The right to liberty is a human right and the right to bail is therefore part of that right. This means that even for serious offences, bail must be available in suitable

cases. However, in some situations the public needs to be protected from a potentially dangerous person. In such circumstances, the right to bail is restricted.

8.5.2 Police powers to grant bail

The police may release a suspect on bail before any charge is brought, while further inquiries are made. This means that a suspect is released from police custody and conditions can be imposed (see below). The police can also give bail to an accused who has been charged with an offence. In this case, the accused is bailed to appear at a Magistrates' Court on a set date. The decision on whether to grant bail is made by the custody officer under s 38 PACE as amended by the Criminal Justice and Public Order Act 1994.

The custody officer can refuse bail if the suspect's name and address cannot be discovered, or if there is a doubt as to whether the name and address given are genuine. Apart from this, the normal principles apply as to when bail should be granted. These are set out in the Bail Act 1976. If a suspect, or accused, granted bail by the police fails to surrender to that bail (that is, attend the next stage of the case), the police are given the right to arrest them and they will be charged with an offence.

8.5.3 Conditional bail

The Criminal Justice and Public Order Act 1994 gave the police the power to impose conditions on a grant of bail. The types of conditions include:

- » living at a certain address
- » surrendering a passport
- » reporting at regular intervals to the police station
- » getting another person to stand surety.

These conditions can only be imposed in order to make sure that the suspect:

- » surrenders to bail
- » does not commit an offence while on bail
- » does not interfere with witnesses
- » does not interfere in any other way with the course of justice.

8.5.4 No police bail

Where, having charged an offender with a crime, the police are not prepared to allow bail, they must bring the accused in front of the Magistrates' Court at the first possible opportunity. If (as usually happens) the magistrates cannot deal with the whole case at that first hearing, they must then make the decision as to whether the accused should be given bail or remanded in custody. The question as to whether bail should be given can also be considered by a court at any later stage of the criminal proceedings.

8.5.5 Release under investigation (RUI)

In theory, there is no time limit on police bail to enable the police to continue their enquiries and before deciding whether to charge the suspect. Concern has been expressed at the length of some police investigations and the need for suspects to continue to observe bail conditions.

In addition to bail, the RUI procedure has been introduced, which is less formal than bail, and limited or no conditions are imposed. This allows the police to continue their investigations and to recall a suspect when a decision can be made as to a charge or no charge.

Internet research

Visit the following webpage and answer the questions that follow.

www.legalcheek.com/2019/06/the-real-reason-why-fewer-people-are-being-charged-with-offences

- 1 Why was RUI introduced in 2017?
- 2 Why might the police need a lot of time to investigate a suspect's alleged involvement in a crime?
- 3 What does being under RUI mean from the suspect's point of view?
- 4 What issues with RUI are highlighted by the article?

8.6 Bail from the court: the Bail Act 1976

Section 4 of the Bail Act 1976 gives a general right to an accused to be granted bail. However, the court need not grant an accused bail if it is satisfied that there are substantial grounds for believing that the accused, if released on bail, would:

- » fail to surrender to custody, or
- » commit an offence while on bail, or
- » interfere with witnesses or otherwise obstruct the course of justice.

The court can also refuse bail if it is satisfied that the accused should be kept in custody for their own protection.

If bail is granted by a court and the accused fails to appear when directed to do so, a warrant can be issued by the court for the accused's arrest. On arrest, the accused will be brought before the court and dealt with straight away for failing to appear. The court will have to consider whether the accused should be held in custody pending trial of the substantive offence, or, less likely, granted bail.

When an accused is granted bail, the prosecution has the right to appeal to a judge in the Crown Court against the decision.

In deciding whether to grant bail, the court will consider various factors, including the:

- » nature and seriousness of the offence (and the probable method of dealing with it)
- » character, antecedents (that is, past record), associations and community ties of the accused
- » accused's past bail record (if any)
- » strength of the evidence against the accused.

Where there is no real prospect that an accused aged 18 or over will be given a custodial sentence if convicted, bail must be granted under a new s 5A of the Bail Act 1976, enacted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

If an accused is charged with an offence that is not punishable by imprisonment, bail can only be refused if the accused has previously failed to surrender to bail

and there are grounds for believing that they will not surrender on this occasion.

A court can make conditions for the granting of bail. These are similar to conditions that can be set by the police and may include the surrender of passport and/or reporting to a police station. The court can also make a condition as to where the accused lives while on bail; this could be at a home address or at a bail hostel.

Renewed applications and appeals

Normally, only one further bail application can be made to the magistrates against refusal of bail, unless there is a change of circumstance. The accused can appeal against a refusal to grant bail to a judge at the Crown Court. An accused who has been sent for trial to the Crown Court can also apply there for bail.

▼ Figure 8.10 Bail

Key facts	
Who can grant bail?	• The police • Magistrates • Crown Court
Bail Act 1976	There is a presumption in favour of bail. However: • For an offence while already on bail, bail can only be given if the court is satisfied there is no significant risk of further offending. • There must be exceptional circumstances for bail to be granted for murder, attempted murder, manslaughter, rape or attempted rape where the defendant has already served a custodial sentence for such an offence.
When can bail be refused?	Bail can be refused if there are reasonable grounds for believing the defendant would: • fail to surrender • commit further offences • interfere with witnesses.
Conditions that can be imposed	• Sureties • Residence in bail hostel • Curfew • Surrender of passport etc.
Comment	• Some of those in prison are awaiting trial and could have been given bail. • There is the problem of balancing bail against the need to protect the public.

▼ Figure 8.11 Advantages and disadvantages of bail in criminal justice

Advantages of bail	Disadvantages of bail
• Accused is innocent until found guilty and should not be held in custody while innocent • Accused can gather evidence and witnesses to support defence; unrestricted access to legal advice • Conditions can be attached to ensure good behaviour and some control over accused • Accused can continue living with family and in work	• Accused may interfere with witnesses and/or evidence • Accused may abscond before trial • General public not protected if bail is granted • Accused may commit further offences

ACTIVITY

Consider each of the following situations and explain, with reasons, whether you think bail would be granted or not.

- 1 Alex, aged 19, is charged with robbery when he threatened a shopkeeper with a gun and stole £2000. He has no previous convictions and lives at home with his mother.
- 2 Homer, aged 43, is charged with three offences of burglary. He has been convicted of burglary on two occasions in the past. He is in a stable relationship with a young family.
- 3 Melanie, aged 21, is charged with theft of items from a sportswear shop. She is unemployed and homeless. She has no previous convictions.

COMMENT

Balancing conflicting interests

The criminal justice system has to balance the conflicting interests of the accused (who is presumed innocent at this stage and entitled to their liberty) against the needs of the public to be protected from potentially dangerous criminals. For this reason, there are restrictions on bail being granted and conditions on the granting of bail.

There are also methods of trying to ensure that an offender who is given bail will not reoffend. The first is the provision of bail hostels, where offenders can

live while they are on bail. The second is the use of electronic tagging. This allows the police to know if any conditions attached to bail are broken, such as flouting curfew.

It is argued that too many people are refused bail, as about 10 per cent of those held in prison are the accused who are awaiting trial and remanded in custody. Statistics show that one in five of these will be found not guilty, but will not be entitled to any compensation for the time spent in custody. Even where the accused is later found guilty, another one in five will be given non-custodial sentences.

8.7 Factors and conditions for bail

8.7.1 Sureties

The court (and the police) can require a surety for the grant of bail. A surety is a person who is prepared to promise to pay the court a sum of money if the accused fails to attend court. This promise is called a recognisance, and no money is paid unless the accused fails to answer to bail. This system is different from that of other countries, especially the USA, where the surety must pay the money into court before the accused is released on bail, but gets the money back when the accused attends court as required.

8.7.2 Repeat serious offences

Where an accused is charged with murder, attempted murder, manslaughter, rape or attempted rape and they have already served a custodial sentence for a similar offence, they only have the right to bail if the court thinks that there are exceptional circumstances.

8.7.3 Offence committed while on bail

Where an accused aged 18 or over is on bail and commits a further offence, s 14 of the Criminal Justice Act 2003 amends the Bail Act 1976 to read:

'He may not be granted bail unless the court is satisfied that there is no significant risk of his committing an offence on bail (whether subject to conditions or not).'

8.7.4 Restrictions on bail for adult drug users

Section 19 of the Criminal Justice Act 2003 amended the Bail Act 1976 to place restrictions on bail for adult offenders who have tested positive for specified Class A drugs where:

- » the offender is charged with either possession or possession with intent to supply a Class A drug, or
- » the court is satisfied that there are substantial grounds for believing that the misuse of a Class A drug caused or contributed to the offence, or that the offence was motivated wholly or partly by the intended misuse of such a drug, and
- » the defendant has refused to agree to participate in an assessment or follow-up in relation to their dependency upon or propensity to misuse specified Class A drugs.

Such a defendant may not be granted bail unless the court is satisfied that there is no significant risk of them committing an offence on bail (whether subject to conditions or not).

TARGET SKILLS

- 1 State what 'being granted bail' means.
- 2 Identify the test used to decide if an appeal against conviction or sentence is taken by a defendant convicted in the Crown Court.
- 3 Assess the value of the Criminal Cases Review Commission.
- 4 Consider how the granting of bail balances the conflicting interests of an accused and the state.

STRETCH AND CHALLENGE

Bernard tells you he has been placed under RUI by the police and told to return to the police station in 3 months' time. He is confused what this means. Write some notes for him explaining what RUI means and the effect that it might have on his family life and work. He is in full-time employment as a carer for vulnerable children, has a settled home, he carries out voluntary work in a local hospital and is married with a family.

TEST YOURSELF

- 1 Describe, including examples, the meanings of summary, triable-either-way and indictable offences.
- 2 Describe the rights of a convicted person to appeal.
- 3 Describe the role of Crown Courts in the criminal justice process.
- 4 Describe the issues that a court will take into account for granting bail.
- 5 Assess the different procedures involved in a criminal trial by magistrates and a Crown Court trial before a judge and jury.

EXAM-STYLE QUESTIONS

- 1 Describe the role of Magistrates' Courts in the criminal justice process.
- 2 Assess the value of bail in criminal justice.

9

Police powers

Introduction

When a crime is committed or reported, it should be investigated by the police. Their investigations are controlled, with rules on how to carry out arrests, and how to detain and question suspects before a charge is made.

In addition, the police have powers to stop and search people on the street whom they regard as suspicious, and there are rules to govern such searches. This chapter links to the key concept of power and its limits.

9.1 Police and Criminal Evidence Act 1984

The police, like everyone else, must respect an individual's civil rights. The public are entitled to be allowed to move freely and to have their person and their property respected. On the other hand, the police must have sufficient powers to investigate crime and bring offenders to justice. Parliament has therefore given the police special powers that can be used in certain circumstances.

These powers include the right to: stop suspects in the street and to search them; to arrest, detain and interview suspects; and, when necessary, to take fingerprints and samples (such as blood) for scientific analysis. Without these powers, it would be very difficult, if not impossible, to investigate crimes.

It is important that members of the general law-abiding public are not unnecessarily harassed by the police and that suspects are protected from overzealous police methods. The law on police powers and procedure is mainly contained in the Police and Criminal Evidence Act 1984 (PACE) and the Codes of Practice made under s 66 of that Act. There are eight codes, A–G, and we will look at the following:

- » Code A deals with the power to stop and search
- » Code C deals with the detention, treatment and questioning of suspects
- » Code E deals with recording interviews with suspects
- » Code F deals with visual recording of interviews (that is, videoing interviews)
- » Code G deals with police powers of arrest
- » Code H has rules relating to the detention, treatment and questioning of suspects arrested under s 41 of the Terrorism Act 2000.

9.2 Stop and search

9.2.1 Sections 1–7 PACE 1984

Police powers to stop and search individual suspects and vehicles are set out in these sections.

Section 1 gives the police the right to stop and search individuals and vehicles in a public place. 'Public place' not only means in the street, but also extends to private areas and gardens if the police officer has good reasons for believing that the suspect does not live at that address.

To use the powers under PACE, a police officer (or a PCSO in uniform) must have reasonable grounds for suspecting that they will find stolen or prohibited articles. 'Prohibited articles' include offensive weapons such as knives, or articles made or adapted for use in connection with burglary or theft, taking a motor vehicle without authority, fraud or criminal damage. Any such item found during the search can be seized.

A stop and search does not, of itself, amount to an arrest, provided the suspect co-operates, though it may be a step before an arrest.

If the search is carried out in public, the police can only request that the suspect removes their outer coat, jacket and gloves (s 2(9)).

A written record of the search, including its purpose, the grounds and its result, must be made as soon as possible after the search.

9.2.2 Code of Practice A

Code of Practice A contains details and guidance on when stop and search powers should be used. In particular, it stresses that police officers must not act just because of a person's characteristics or behaviour.

Paragraph 2.2B of the Code says: 'Reasonable suspicion can never be supported on the basis of personal factors.'

Unless the police officer has a description of a suspect, a person's physical appearance or the fact that a person is known to have a previous conviction cannot be used alone or in combination with each other as the reason(s) for searching that person.

Reasonable suspicion cannot be based on stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. It is an objective test and not just the officer's personal opinion. The grounds must exist before the stop and are generally based on some form of intelligence. Despite this guidance, there is still evidence that certain groups, especially BAME youths, are more likely to be stopped and searched than other groups.

The Code prohibits searches that involve exposure of intimate parts of the body and that are conducted as a routine extension of a less thorough search, simply because nothing is found in the course of the initial search.

Where there may be religious sensitivities about removing face coverings, the officer should allow the item to be removed out of public view and in the presence of an officer of the same gender.

9.2.3 Stop and search under s 23 of the Misuse of Drugs Act 1971

If an officer has reasonable grounds to suspect that a person is in possession of a controlled drug, the officer may stop and search them or any vehicle and seize the substance. Controlled drugs are drugs of Class A such as cocaine and methadone, Class B such as cannabis and amphetamine, and Class C such as diazepam.

Searches under this Act can only be carried out if the officer has reasonable grounds for suspecting that they will find what they are looking for, so random searches are not authorised. Again, a written record of the search and its result must be made as soon as possible after the search.

9.2.4 Stop and search under the Terrorism Act 2000

A police officer may stop and search a person, any possessions or vehicle under s 43(1) of this Act if they reasonably suspect that the person is a terrorist, to discover whether they have in their possession anything which may amount to evidence that they are a terrorist. This power can be used at any time, or in any place, where there is reasonable suspicion, and no authorisation from a senior officer is required.

In addition, under s 47A a senior officer may designate a certain area if there is suspicion that a terrorist act will take place. Officers can, within that area, select individuals or vehicles for stop and searches to look for evidence that the vehicle is being used for the purposes of terrorism, or that the individual being searched is a terrorist.

Again, a written record of the search must be made as soon as possible after the search.

Internet research

Look at the latest figures for the use of stop and search at www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest

- 1 How many stop and searches were carried out in the latest year, and how does that compare with the previous year?
- 2 What was the most common reason for a stop and search?
- 3 Which ethnic group was most likely to be stopped and searched?

9.3 Arrest

9.3.1 Section 24 PACE 1984

Section 24 PACE sets out the powers the police have to arrest a suspect without a warrant. These powers were completely changed at the beginning of 2006 by the Serious Organised Crime and Police Act 2005 (SOCPA). Section 110 SOCPA substituted a new s 24 into PACE. Previously, there had to be an arrestable offence, but now an arrest can be made for any offence.

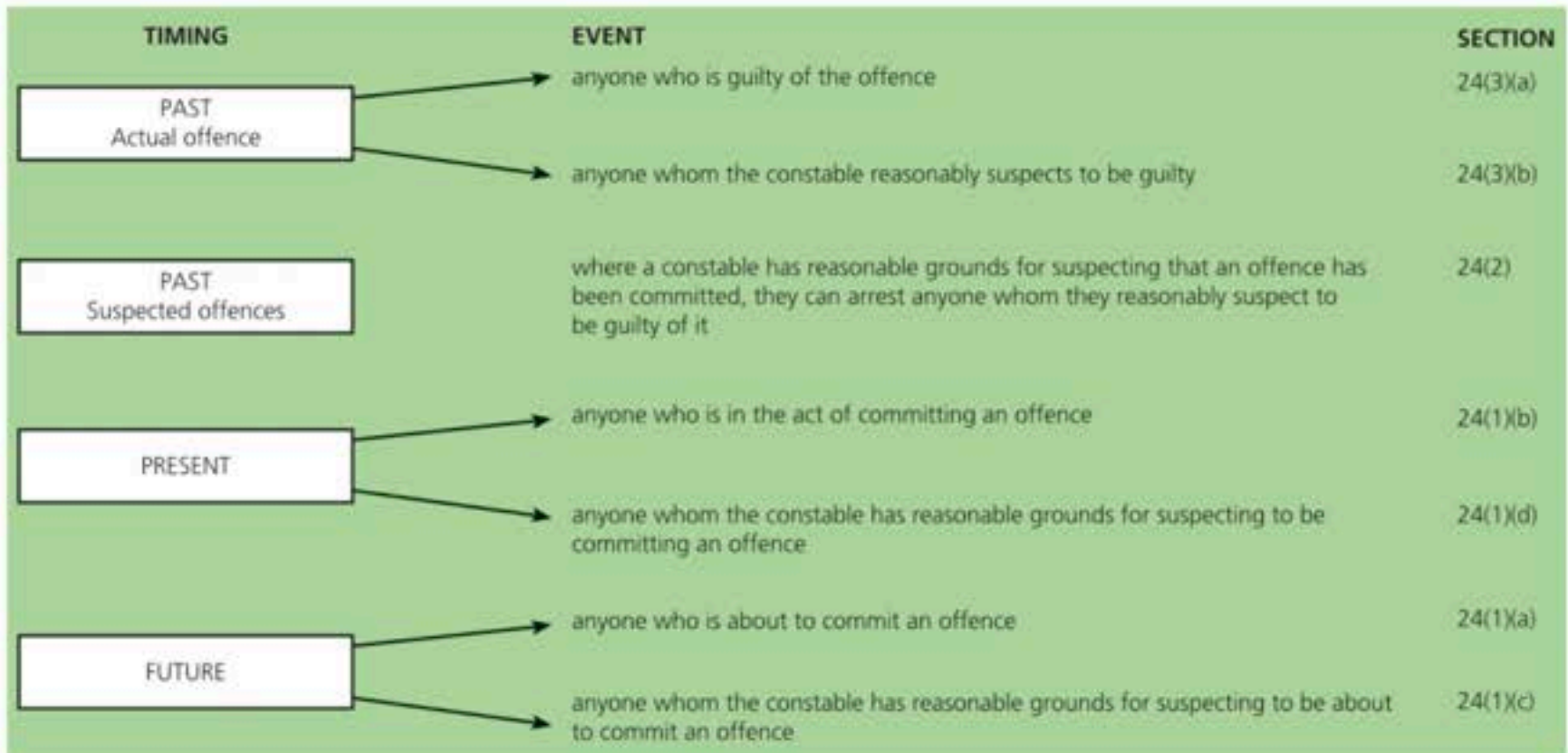
A constable may arrest, without a warrant, anyone:

- » who is about to commit an offence
- » who is in the act of committing an offence
- » whom the constable has reasonable grounds for suspecting to be about to commit an offence
- » whom the constable has reasonable grounds for suspecting to be committing an offence.

Also, if a constable has reasonable grounds for suspecting that an offence has been committed, they may arrest, without a warrant, anyone whom they have reasonable grounds to suspect of being guilty of it. In addition, if an offence has actually been committed, a constable may arrest without a warrant:

- » anyone who is guilty of the offence
- » anyone whom they have reasonable grounds for suspecting to be guilty of it.

However, these powers of arrest can only be exercised if the constable has reasonable grounds for believing that it is necessary to arrest a person for any of the following reasons:



▲ Figure 9.1 Police powers of arrest

- » to establish the name and address of the person
- » to prevent the person suffering or causing physical injury to themselves or any other person
- » to prevent the person causing loss of, or damage to, property, or committing an offence against public decency, or obstructing the highway
- » to protect a child or other vulnerable person
- » to allow the prompt and effective investigation of the offence or of the conduct of the person in question
- » to prevent the person disappearing.

9.3.2 Code of Practice G

Code of Practice G gives guidelines for arrest under these powers. It says:

'2.1 A lawful arrest requires two elements: A person's involvement or suspected involvement or attempted involvement in the commission of a criminal offence; AND Reasonable grounds for believing that the person's arrest is necessary.'

Again, the reasonable grounds are objective:

'2.2 The arrested person must be informed that they have been arrested, even if this fact is obvious, and of the relevant circumstances of the arrest in relation to both the above elements.'

The Code points out that the power to arrest is exercisable only if the constable has reasonable grounds

for believing that it is necessary to arrest the person. It remains an operational decision at the discretion of the arresting officer to decide:

- which one or more of the necessary criteria (if any) applies to the individual; and
- if any of the criteria do apply, whether to arrest, grant street bail after arrest, report for summons or for charging by post, issue a penalty notice or take any other action that is open to the officer.'

9.3.3 Manner of arrest

Whenever an officer makes an arrest, they should at the time of the arrest, or as soon as practicable after, tell the person arrested that they are under arrest and the reason for it, even if it is perfectly obvious. There is no set form of words to be used and, as is often portrayed in television dramas, it is sufficient if the arresting officer says something like 'you're nicked for theft'. They must also tell the arrested person why it was considered necessary to arrest them.

Where necessary, the officer may use reasonable force to make an arrest. Once an arrest has taken place, the suspect must be taken to a police station for a custody officer to decide whether the suspect should be placed in detention.

CASE EXAMPLE

Taylor v Chief Constable of Thames Valley Police (2004)

The Court of Appeal held that the test of whether the words of arrest were sufficient is: 'Was the person arrested told, in simple non-technical language that they could understand, the essential legal and factual grounds for their arrest?'

Taylor was a ten-year-old boy who had been throwing stones during an anti-vivisection protest. When he was present at a later protest, he was identified by a police officer who said: 'I am arresting you on suspicion of violent disorder on 18 April, 1998 at Hillgrove Farm.' The Court of Appeal held that this was understandable, and so there was a lawful arrest.

9.3.4 The right to search an arrested person

Where a person has been arrested, the police have a right to search that person for anything that might be used to help an escape, or anything that might be evidence relating to an offence. If such a search takes place in public, an officer can only require the suspect to remove outer coat, jacket and gloves.

ACTIVITY

Consider whether there has been a lawful arrest in the following situations.

- 1 After an incident in which a man was stabbed and seriously hurt, a police officer grabs hold of Damon. When Damon protests and asks, 'Why?', the police officer says, 'You know what it's for'.
- 2 A man sees a person he knows as Gary climbing out of the window of a house. The man rings the police. A police constable goes to Gary's house and arrests him for suspected burglary.

9.4 Detention and treatment of suspects at police stations

This section explores ss 56 and 58 PACE 1984, and Codes of Practice C, E, F and H.

Once a suspect has been arrested and taken to a police station, there are rules setting out very strict time limits on how long they may be held there. There are also rules about the treatment of people in detention; these are contained in PACE, together with Code of Practice C.

9.4.1 Time limits on detention

The general rule is that the police may detain a suspect for 24 hours. After this, the police must charge or

release any person who has been arrested on suspicion of a summary offence.

Where a suspect has been arrested for an indictable offence, they can be detained for a further 12 hours (making a total of 36 hours), but only with the permission of a senior officer of superintendent rank or above. To detain a suspect beyond 36 hours, the police must apply to the Magistrates' Court. The magistrates can order detention for up to a maximum of 96 hours in total. The detainee has the right to be represented and oppose such an application.

▼ Figure 9.2 Time limits on detention of a suspect

Time factor	Event(s)
Start of detention	Arrested person arrives at police station and custody officer decides there is reason to detain them
6 hours	First review by custody officer
15 hours and every 9 hours thereafter	Second and subsequent reviews by custody officer
24 hours	Summary offence: must charge or release suspect Indictable offence: after 24 hours, permission of a superintendent or above is needed to extend the detention to 36 hours
36 hours	Police may apply to magistrates to extend the period of detention for an indictable offence
96 hours	Maximum time for detaining an arrested person (except under the Terrorism Act 2006); police must charge or release suspect

The detention must be reviewed by the custody officer. Initially, this must be no later than six hours after the initial detention, and then at intervals of not less than nine hours. If at any time the custody officer becomes aware that there are no grounds for continuing the detention, then they are under a duty to order an immediate release from custody. Also, while a person remains in custody, the custody officer must keep a record of all events that occur, such as interviews or visits to the cell by police officers.

9.4.2 Rights of a detained person

Detainees must be told their rights by the custody officer when they arrive at the police station. These rights include:

- » having someone informed of the arrest
- » being told that independent free legal advice is available and being allowed to consult privately with a solicitor
- » being allowed to consult the Code of Practice.

The right to have someone informed of the arrest

This right is given by s 56 PACE. The arrested person can nominate any friend, relative or any other person whom they think is likely to take an interest in their welfare. The person nominated by the detainee must be told of the arrest and where the person is being held. This should normally be done as soon as practicable, but, in the case of an indictable offence, a senior police officer may authorise that there be a delay of up to 36 hours. This can only be done if there are reasonable grounds for believing that telling the named person will lead to:

- » interference
- » harm to evidence or to other persons
- » the alerting of others involved in the offence or hindering the recovery of property obtained through the offence.

Code C states that, in addition to the right to have someone informed of the arrest, a detained person should be allowed to speak on the telephone 'for a reasonable time to one person'. If the suspect is under the age of 18, the police must also contact a person 'responsible for his welfare' and inform them of the arrest.

The right to legal advice

Under s 58 PACE, a detained person may either contact their own solicitor, or they can use the system of duty solicitors that is provided free for anyone under arrest.

In fact, the Code of Practice tries to make sure that detained people are aware of their right to legal advice. Under the Code, the custody officer, when authorising the detention of someone at the police station, must get the suspect to sign the custody record saying whether they wish to have legal advice. Police stations must have posters 'prominently displayed' advertising the right to free legal advice, and an arrested suspect must not only be told orally of this right, but also given a written notice of it.

It is possible for a senior police officer to authorise a delay to a suspect's right to see a solicitor in the case of an indictable offence for up to 36 hours. However,

this can only occur if there are reasonable grounds for believing that giving access to a solicitor will lead to:

- » interference with, or harm to, evidence or to other persons, and/or
- » the alerting of others involved in the offence or hindering the recovery of property obtained through the offence.

The case of *R v Samuel* (1988) stressed that it would only be on rare occasions that such a delay was justified, and that it must be based on specific aspects of the case, not a general assumption that access to a solicitor might lead to the alerting of accomplices.

CASE EXAMPLES

R v Samuel (1988)

The defendant was a 24-year-old man, whose mother had already been informed of her son's arrest some hours before he was refused access to a solicitor.

The Court of Appeal felt that if anyone was likely to be alerted then it would already have happened, and that there was no reason to deny Samuel his 'fundamental freedom' of consulting a solicitor. As his final interview with the police had taken place after his solicitor had been refused access, the evidence of what was said at that interview was inadmissible in court and so Samuel's conviction for robbery was quashed.

R v Grant (2005)

The Court of Appeal held that the court would not tolerate illegal conduct by the police. In this case, there had been deliberate interference by the police with the detained suspect's right to privileged communication with his solicitor. This was such a serious abuse of process that it justified his conviction for murder being quashed.

▼ Figure 9.3 Rights of suspects in police detention

Key facts		
Right	Source	Comment
To have someone informed of the detention	s 56 PACE	Can be delayed for up to 36 hours for an indictable offence
To speak to someone on the telephone	Code of Practice C	Not compulsory – police can refuse
To be told of the right to legal advice	Code of Practice C	Notices displayed in police stations Duty of custody officer to bring this to the suspect's attention
To legal advice	s 58 PACE	Can be delayed for up to 36 hours for an indictable offence but only in exceptional circumstances – <i>R v Samuel</i>
To have an appropriate adult present at interview	Code of Practice C	Applies to those under 18 and also to people with mental illness or learning difficulties – <i>R v Aspinall</i>
To consult the Codes of Practice	The Codes of Practice	

9.4.3 Police interviews of suspects: Code E (audio recording), Code F (visual recording)

Any detained person may be questioned in a formal interview. All interviews at a police station must be recorded and, in some cases, for example where the suspect is a juvenile or considered vulnerable, the interview may be visually recorded as well as audio-taped.

A problem in many cases is that questioning of the suspect starts before they arrive at the police station (possibly in the police car on the way to the station) and these informal interviews are not recorded. In many cases, the defendant challenges the truth of police evidence about an alleged informal interview.

In order to protect suspects from the possibility of police fabricating evidence of a confession made outside the police station, that confession should be put to the suspect at the beginning of any recorded interview that subsequently takes place. This allows a suspect the chance to make comments about it in the recorded interview.

Suspects have the right to have a solicitor present at any interview, unless it is one of the rare occasions referred to in *Samuel*. However, if the suspect does not ask for a solicitor, the police may conduct the interview without one being present. In addition, if the matter is urgent or the solicitor likely to be delayed for some time, the police have the right to start questioning a suspect before a solicitor arrives.

CASE EXAMPLE

R v Halliwell (2012)

The defendant had been arrested on suspicion of the abduction of a woman. The arresting officers tried to interview him as a matter of urgency before taking him to a police station. He refused to speak to them and asked to be taken to a police station and to see a solicitor.

The arresting officers contacted the senior investigating officer (SIO) and told him this. The SIO arranged to meet them and the defendant at an outdoor location away from the police station, and interviewed the defendant about the whereabouts of the woman. The SIO did not caution

the defendant before starting the interview. During this interview, the defendant asked the SIO if he wanted 'another one'. The SIO took this to be a reference to a second murder, but he still did not caution the defendant about this second possible offence and continued to question him. The defendant then admitted murdering a woman some seven or eight years earlier.

During the interview, the defendant made repeated requests to be taken to a police station and to be allowed to speak to a solicitor. He was eventually taken to a police station four hours after his arrest. At the police station, he was allowed a solicitor. He was also properly cautioned and interviewed. During this interview, he answered 'no comment' to every question.

At a pre-trial hearing, it was ruled that the information given in the interview away from the police station was not admissible, as the rules under PACE had been completely disregarded. Further, the defendant's confession about a murder of a young woman and the location of her body should not be admissible, as he had not been allowed to see a solicitor.

Appropriate adult

If the suspect is under the age of 18 or is mentally vulnerable, there must be an 'appropriate adult' present during all interviews. This right is in addition to the right to legal advice. Research suggests that many mentally vulnerable individuals are not always being given this protection.

In *R v Aspinall* (1999), the Court of Appeal ruled that a defendant who suffered from schizophrenia should have had an appropriate adult present when interviewed by police. This was so, even though the defendant appeared able to understand the police questions. The interview was, therefore, not admissible as evidence.

ACTIVITY

Consider why it is important for an arrested suspect to be taken to a police station as soon as possible after arrest.

9.4.4 Treatment of suspects and exclusion of evidence

Code of Practice C gives protection to suspects who are being questioned in regard to the physical conditions of the interview; for example, the Code states that interview rooms must be adequately lit, heated and ventilated, and that suspects must be given adequate breaks for meals, refreshments and sleep.

In theory, the treatment of a suspect is monitored by the custody officer, who is supposed to keep accurate records of all happenings during the detention period. This should include the length and timing of interviews and other matters, such as visits of police officers to the defendant's cell, so that any breaches of the rules will be obvious. However, research by Sanders and Bridge suggests that a substantial minority of custody records (about 10 per cent) are falsified.

Protection is given to suspects as to the way they should be treated while being detained and questioned. Section 76 PACE states that the court shall not allow statements that have been obtained through oppression to be used as evidence. Oppression is defined as including torture, inhumane or degrading treatment and the use or threat of violence.

Evidence can also be excluded under s 78 PACE. Under this section, the trial judge has discretion to refuse to admit evidence. The judge considers whether the breaches of PACE and the evidence obtained through them would have an adverse effect on the fairness of the trial. The judge in *R v Halliwell* (2012) exercised his discretion under this section, by refusing to admit evidence of the defendant's confession to murder.

9.4.5 Searches, fingerprints and body samples

When a suspect is being held at a police station, the police have no automatic right to search them. However, the custody officer has a duty to record everything a person has with them when they arrive, and if the custody officer thinks a search is necessary to carry out this duty, then a non-intimate search may be made. Searches are authorised under ss 54 and 55 PACE.

Where an adult suspect has been arrested on a drugs offence, a sample of urine or a non-intimate sample may be taken to establish any Class A drug in their body.

Strip searches

These are defined in Code C as searches 'involving the removal of more than outer clothing'. Outer clothing includes socks and shoes. The Code stresses that a strip search may only take place if it is necessary to remove an article that a person in detention should not be allowed to keep, and there is reasonable suspicion that the person might have concealed such an article.

Such searches should not take place in an area where the search can be seen by any person who does not need to be present, nor by a member of the opposite sex. Suspects should not normally be required to remove all their clothing at the same time. A man should be allowed to put his shirt back on before he removes his trousers, and a woman should be given a robe or similar garment to wear once she has removed her top garment. Searches should be carried out by officers of the same sex as the suspect.



▲ **Figure 9.4** A detention officer carries out a DNA test on a male suspect in a police station

Intimate searches

Under s 62 PACE, a high-ranking police officer can authorise an intimate search if there is reason to believe that the suspect has with them an item that could be used to cause physical injury to themselves or others or that they are in possession of a Class A drug. An intimate search is defined as 'a search which consists of the physical examination of a person's body orifices other than the mouth'. If it is a drugs-related search, then it may only be carried out by a suitably qualified person, for example a doctor or nurse. If it is a search for other items then, if practicable, it should be carried out by a suitably qualified person, but can be by another person if a high-ranking police officer authorises it.

There are different rules for intimate samples. These are defined as:

- (a) a sample of blood, semen or any other tissue fluid, urine or pubic hair
- (b) a dental impression
- (c) a swab taken from any part of a person's genitals or from a person's body orifice other than the mouth.

These samples can only be taken by a registered medical practitioner or a registered nurse. Although a sample will only be taken where there is reasonable ground for suspecting involvement in a particular recordable offence, the sample may then be checked against information held on other crimes.

While a suspect is detained, s 61 PACE allows the police to take fingerprints and non-intimate body samples such as hair and saliva without consent. If necessary, reasonable force may be used to obtain these.

Refusal of any samples or prints allows the court or jury to take such inferences from the refusal as they deem fit.

9.4.6 Interviews

Code C states that suspects must be given adequate breaks during their detention for meals, refreshments and sleep.

Before an interview, it has to be established to the satisfaction of the custody officer that the suspect is fit to be interviewed. If the suspect is under the age of 18 or mentally ill, they are entitled to an appropriate adult being present as well as a lawyer. Any suspect can request a lawyer to be present throughout the interview and can request breaks in order to receive legal advice.

Interviews should take place in interview rooms which are adequately heated, lit and ventilated and normally used as such. The persons taking part should be able to sit throughout the interview. The room should be equipped with an audio-recording device and some will be equipped with video recording (s 60 and s 60A PACE). Suitable breaks should be allowed. An interpreter should be made available if required.

At the start of every interview, the suspect should be cautioned or reminded that they are under caution.

During the interview, officers are free to ask any questions they consider appropriate. The suspect is free to answer, remain silent or reply 'no comment'. The suspect can make a written statement under caution, instead of, or in addition to, answering orally.

All questioning should cease once the suspect has been charged.

If a suspect is in police detention at a hospital, they may not be questioned without the agreement of a responsible doctor.

9.4.7 The right to silence

Until the Criminal Justice and Public Order Act 1994 was enacted, a suspect could refuse to answer any questions without any adverse conclusion being drawn on their silence if the case came to trial. Now ss 34–39 of the 1994 Act put limits on the right to silence. These sections allow inferences to be made from the fact that a suspect has refused to answer questions. As a result, the wording of the caution given to a suspect before interviewing commences now states:

'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.'

This means that the defendant cannot be forced to speak; they can remain silent. However, at any future trial the judge may comment on the defendant's failure to mention a crucial matter, and this failure can form part of the evidence against them. A defendant's silence is not enough for a conviction on its own; there must be prosecution evidence as well.

COMMENT

Evaluating the right to silence

Critics of this limitation on the right to silence claim that it is a breach of a basic principle in criminal cases – that the defendant is presumed innocent until proven guilty.

When the Criminal Justice and Public Order Act 1994 was passed, the government argued that it was necessary to assist in the fight against crime. Their view was that the right to silence was giving criminals an advantage as, by keeping silent, they were less likely to be convicted. Critics pointed out that silence was an important safeguard against oppressive questioning by the police. It was particularly important for the weak and the vulnerable. Even a senior police officer recognised this. John Alderson, former Chief Constable for Devon and Cornwall, wrote:

'History tells us that, when an individual has the stand up against the entire apparatus of the modern State, he or she is very vulnerable. That is why, in criminal cases, the burden of proof has always rested on the State rather than on the accused.'

9.4.8 Legal advice

Under Code of Practice C, the suspect is entitled to legal advice, either by telephone or face to face, throughout the period of detention. This advice should be available privately. As stated above, the suspect is entitled to a lawyer being present during interviews.

Where the suspect's lawyer attends the interview and advises the suspect not to answer some or all of the questions, the legal advice may be a proper reason for refusing to answer. Andrew Keogh in an article 'The right to silence – revisited again' (2003) NLJ 1352–53 pointed out that a solicitor advising a

young or otherwise vulnerable person may recognise that the evidence against them is very weak. In such circumstances, advising a client to say nothing makes good sense.

In *R v Beckles* (2004), it was held that a jury should be told that no adverse inference should be drawn where a defendant 'genuinely and reasonably' relies on a solicitor's advice to remain silent in an interview.

9.4.9 Role of the custody officer

Every police station that has facilities to detain suspects must have a custody officer of at least the rank of sergeant on duty at all times. While in detention, every suspect will be in the care of the custody officer, who must ensure that the provisions of Code C are observed by all officers.

The custody officer must under Code C:

- » see every arrested person when they are brought to the police station and open a custody record which notes the times of detention, breaks and interviews and records their possessions (s 76 PACE)
- » authorise and record any search
- » ensure that the suspect is offered legal advice, an appropriate adult or interpreter as appropriate and to have someone informed of their arrest and detention
- » ensure that the suspect is given any necessary medical treatment and kept safe and secure during the whole of their detention
- » ensure that the suspect is fit for interview
- » ensure that detention time limits are kept
- » when a suspect is charged, ensure that the suspect understands the charge, and make a decision on whether the suspect should be granted bail (and any conditions) or detained in custody.

9.5 Impact of the breach of the rules concerning police powers

9.5.1 Stop and search

As police powers of stop and search are very wide, there are safeguards. The police officer must identify themselves, the police station where they are based and the reason for the search. A plain clothes officer must produce documents to show that they are a police officer. Failure to give reasons for the search makes it unlawful.

This was shown in *Osman v DPP* (1999) and confirmed in *Michaels v Highbury Corner Magistrates' Court* (2009).

CASE EXAMPLES

Osman v DPP (1999)

The officers did not give their names or station. The Queen's Bench Divisional Court held that this made a search of Mr Osman unlawful, and so he could not be guilty of assaulting the police in the execution of their duty. The court stressed that the formality of providing the suspect with the officer's name and station was 'of great importance in relation to civil liberties'.

Michaels v Highbury Corner Magistrates' Court (2009)

Michaels was seen by police apparently trying to hide from them. He then walked towards them and was seen to place something in his mouth. He was questioned and then told that he was going to be searched. He was asked to open his mouth and did so. The officers told him not to swallow what was in his mouth and took hold of him. However, he did swallow an item. He was charged with obstructing the police during their search.

His conviction was quashed by the Queen's Bench Divisional Court, as the officers had not given their names or station before asking him to open his mouth as part of their search. This made the search unlawful.

Also, if the officer fails to give a reason for the search, then that search is unlawful and presumably any items seized have to be returned.

9.5.2 Arrest

Article 5 of the European Convention on Human Rights (ECHR) requires that there be a lawful arrest to bring a person before a competent authority on suspicion of having committed an offence. Further, every person arrested shall be informed promptly in a language that is understood of the reasons for arrest. As a result, the provisions of PACE have to be judged against this standard in relation to an arrest.

Section 24(4) PACE states that an arresting officer can arrest only if they have reasonable grounds for believing that it is necessary to make the arrest for one of the following reasons:

- » to enable the person's name or address to be ascertained, or where it is doubtful that the person has given their real name or address

- » to prevent the person:
 - causing physical injury to themselves or any other person
 - suffering physical injury
 - causing loss of or damage to property
 - committing an offence against public decency
 - causing an unlawful obstruction of the highway
- » to protect a child or other vulnerable person
- » to allow the prompt and effective investigation of the offence or of the conduct of the person
- » to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

According to s 28(3) PACE, no arrest is lawful unless the arrested person is given the grounds at the time of, or as soon as reasonably practicable after, the arrest, and this applies even if the grounds for arrest are obvious. Arrest is a continuing act, so if there is a delay in informing the arrested person of the grounds, what starts as an unlawful arrest could become lawful when the grounds are given.

If there is no power given by law for an arrest, then any arrest based on this ground will be unlawful. For example, if the ground of 'obstruction' is given when there is no breach of the peace, or none of the grounds in s 24 exist, there is no offence and any arrest will be unlawful.

If a person is arrested unlawfully, then they should be freed as soon as practicable and a civil action for damages for false imprisonment could be taken.

ACTIVITY

Consider if there has been a breach of PACE in the following case.

Leroy, aged 23, has been arrested on suspicion of murder. He is taken to the police station at 7 a.m. The custody officer tells him that he will not be allowed to see a lawyer or make any phone calls. Leroy is interviewed for eight hours that day about the alleged murder. He continually denies any involvement and demands to see a lawyer. The police take his fingerprints and a sample of saliva for DNA testing. Leroy spends the night in the cells. The following morning at 11 a.m. he is finally allowed to make a telephone call to his brother.

9.5.3 Detention

Article 5 ECHR requires that, to justify depriving a person of their liberty, there be a lawful detention before bringing a person before a competent authority on suspicion of having committed an offence, and that detention is considered reasonably necessary.

Further, Article 6 requires the conduct of a fair trial with a presumption of innocence, including matters which bear on the conduct of the trial. This includes the obtaining of evidence, the ability to offer explanations by a person arrested or having to risk the consequences of adverse inferences being drawn from remaining silent. As a result, the provisions of PACE have to be judged against this standard.

Section 76 PACE states that courts shall not allow as evidence confessions that have been obtained through oppression. 'Oppression' is defined as including torture, inhumane or degrading treatment, and the use or threat of violence.

Internet research

What does the latest version of Code C say about questioning of suspects after a charge has been put? For the 2019 version of the code, see www.gov.uk/government/publications/pace-code-c-2019

The custody officer at the police station should keep a record of all happenings during the period of detention, including the times and lengths of interviews and other matters such as visits to the suspect's cell.

Section 78 PACE allows a judge to refuse to admit evidence if breaches of PACE and evidence obtained as a result would have an adverse effect on the fairness of the trial. This provision is likely to include any admission by the suspect away from the police station, such as statements made in a police car on the way to the station.

▼ Figure 9.5 Police powers

Key facts			
Power	Sections in PACE	Code of Practice	Comments
Stop and search	Sections 1–7 PACE	A	- Must be in a public place - Must have reasonable grounds for suspecting they will find stolen or prohibited articles
Arrest	Section 24 PACE		- Must have reasonable grounds for suspecting involvement in offence AND - Must have reasonable grounds for believing arrest is necessary
Detention	Sections 34–46 PACE	C	Time limits: 24 hours for summary offence 36 hours for indictable offence (can be extended to 96 hours for serious offences) Detainee's rights: - have someone told - be told of availability of legal advice - to see Code of Practice
Interviewing	Section 53 PACE	E	- Police must caution at start of every session - Should tape and/or video-record interview - An appropriate adult should be present for people aged under 18 or with mental illness or learning difficulties - Legal adviser can be present - Appropriate breaks must be allowed
Searches	Sections 54 and 55 PACE	C	Intimate search must be carried out by person of the same sex
Fingerprints	Section 61 PACE		Reasonable force can be used to obtain prints
Samples	Sections 62 and 63 PACE		- Intimate samples must be taken by person of the same sex - Adverse inferences can be drawn of refusal

TARGET SKILLS

- 1 State the information that must be given to a person initially detained at a police station.
- 2 Identify the test for when a police officer can arrest a suspect without a warrant.
- 3 Assess the value of police powers of stop and search.
- 4 Consider how the protection granted by the Police and Criminal Evidence Act 1984 balances the conflicting interests of an accused and the state.

COMMENT

Evaluating powers of arrest – the Coronavirus Act 2020

In addition to the powers set out in the Police and Criminal Evidence Act 1984, the police were given new temporary powers by the Coronavirus Act 2020 to deal with the COVID-19 emergency. They were given the power to:

- detain a person on the street if they thought that person was infected with the virus
- have that person tested

- restrict a person's right to move away from their residence and to be part of a gathering of more than two people.

These were completely new powers and individual officers had enormous discretion to apply the rules, which meant there was inconsistent application throughout the country.

The specific reasons set out for leaving a residence were contained in the Health Protection [Coronavirus Restrictions] (England) Regulations

2020 SI 350/2020, and the identical Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 SI 353/2020. A person should not leave the place they were living in 'without reasonable excuse' except for a specified purpose. The 13 specified purposes were set out in s 6 (s 8 in the Welsh version) and included:

- obtaining food and medical supplies
- taking exercise (no more than once a day in Wales)
- going to work (if it could not be done from home)
- obtaining medical assistance.

In s 9 of the Welsh version, power was given to close public paths and access land, to prevent large numbers of people using the area and being in close proximity to each other.

The police were encouraged to follow the 'four Es' when speaking to a member of the public:

- Engage with people out and about to ask them why they are out.
- Explain the law and the need to be inside their homes, stressing the risk to the public and the NHS of being outside.
- Encourage them to go home if they have no 'reasonable excuse' to be outside.
- Enforce only as a last resort.

Problems with the law

- 1 The list of reasonable excuses in the regulations was specific – there could be more reasons that

people needed to leave home that the government had not thought of.

- 2 The initial instruction of the prime minister was that people should only leave their house once a day to exercise. As set out above, this was the case in Wales. But in the English regulations, there was no set number of times a person could leave to exercise. Travelling to exercise was another unclear issue.
- 3 The regulations required that people should not gather in groups so they would maintain a reasonable distance from each other. The government recommended a distance of two metres but there was nothing in law that required this, so police officers were expected to enforce what they considered to be a reasonable distance and this was open to interpretation.
- 4 For work, the regulations set out that a person can leave their residence to travel for the purpose of work but this is subject to a police officer considering that such work is essential and allowing a person to continue. There was no mention of work by self-employed persons and the rules contained no reasonable excuse to be away from home for those who are self-employed to carry on their work.

All these problems show that it is extremely difficult to frame a law that covers every single situation and to maintain a balance between public health and the rights of individuals.

STRETCH AND CHALLENGE

Some people arrested and detained by the police are unable to read or write.

Prepare diagrams (mind maps) to help such people understand their rights when detained in the police station.

TEST YOURSELF

- 1 Describe the information that must be given to a person when they are stopped and searched.
- 2 Describe when the police have power to arrest a suspect without a warrant.
- 3 If an officer reasonably suspects that a person has committed an offence, can the officer lawfully arrest that person, even if it is later discovered that there had been no offence?
- 4 Describe the detention time limits for a person arrested on suspicion of committing an indictable offence.
- 5 Describe the role of the custody officer.

EXAM-STYLE QUESTIONS

- 1 Describe police powers to stop and search a suspect on the street.
- 2 Assess the protection given by the Police and Criminal Evidence Act 1984 to suspects detained at a police station.

10

The judiciary – superior and inferior judges

Introduction

Judges are collectively referred to as 'the judiciary'. There are different levels of judge:

- ★ superior judges are High Court Judges and above
- ★ inferior judges are Circuit Judges and below.

Which level they are affects the selection process, the training, the work and the terms on which they hold office. The head of the judiciary is the Lord Chief Justice. This chapter links to the key concept of power and its limits.

10.1 Qualifications

To become a judge, whether superior or inferior, it is necessary to meet the judicial appointment eligibility conditions relevant to that level. This means the applicant

must have the relevant legal qualification and have gained experience in the law for a certain period. Judges can be former barristers, solicitors and, for some posts, fellows of the Chartered Institute of Legal Executives (CILEx), Registered Patent Attorneys and Trade Mark Attorneys.

▼ **Figure 10.1** Qualifications and role of judges

Key facts			
Court	Judge	Qualification	Role
Supreme Court	Justices of the senior court	15-year Supreme Court qualification or hold high judicial office - Barrister or solicitor	- Hear appeals on points of law - Civil and criminal cases
Court of Appeal	Lords Justices of Appeal	7 years' legal experience or be an existing High Court Judge - Barrister or solicitor	- Hear appeals - Criminal cases against conviction and/or sentence - Civil cases on the finding and/or the amount awarded
High Court	High Court Judges	- Barrister or solicitor 7 years' legal experience OR - Be a Circuit Judge for 2 years	- Sit in one of the three Divisions - Hear first-instance cases and decide liability and remedy - Some appeal work
Crown Court	- High Court Judges - Circuit Judges - Recorders	- See above 7 years' legal experience or be a Recorder or District Judge for 3 years - Barrister or solicitor 5 years' legal experience	- Try cases with a jury - Decide the law - Pass sentence on guilty defendants
County Court	- Circuit Judges - District Judges	- See above - Barrister or solicitor 5 years' legal experience	- Civil cases – decide liability and remedy - District Judges hear small claims
Magistrates' Courts	District Judges (Magistrates' Courts)	- Barrister or solicitor 5 years' legal experience - NB CILEx Fellows can be appointed as Deputy District Judges	- Criminal cases – decide law and verdict - Pass sentence on guilty defendants - Some family work

10.2 Selection and appointment

10.2.1 The Judicial Appointments Commission

The selection of judges is administered by the Judicial Appointments Commission. It is responsible for selecting over 500 people each year for appointment to judicial posts. The commission advertises its selection exercises on its website, through its email newsletter and on Twitter.

For superior-level judges, the commission selects a candidate and recommends them for appointment to the Lord Chancellor. The Lord Chancellor can accept or reject that recommendation, or can ask the panel to reconsider.

The power of the Lord Chancellor to reject a candidate or ask the commission to reconsider has been criticised, as it infringes the independence of the judiciary. This power is now given in secondary legislation made under s 94C of the Constitutional Reform Act 2005. The Lord Chancellor must have the agreement of the Lord Chief Justice before deciding whether to accept, reject or ask for reconsideration.

For inferior-level judges, the process is completely separate from the government. All judges below High Court level are appointed by the Lord Chief Justice after recommendation by the Judicial Appointments Commission.

10.2.2 Process for appointing judges

The process for appointing judges is as follows:

- » Appointments are made solely on merit.
- » The commission is entirely responsible for assessing the merit of the candidates and selecting candidates for appointment.
- » No candidate can be appointed unless recommended by the commission.
- » The commission must consult the Lord Chief Justice and another judge of equivalent experience before recommending a candidate for appointment.

10.2.3 Required judicial qualities

The commission lists five qualities that are desirable for a good judge:

- » intellectual capacity
- » personal qualities, including integrity, independence of mind, sound judgement, decisiveness, objectivity and willingness to learn
- » ability to understand and deal fairly
- » authority and communication skills
- » efficiency.

It is also important that the potential judge is of good character. If a person has a criminal conviction, they

would not be considered for a judicial appointment. The only exception is for minor motoring offences, but even here the person must not have too many of these, as shown by the case of *R (Graham Stuart Jones) v Judicial Appointments Commission* (2014), where an applicant for appointment as a District Judge had seven penalty points on his driving licence for motoring offences. He was said by the commission to be an outstanding candidate, but the commission rejected him because its guidelines state that having more than six points 'normally prevents selection'. The High Court upheld the commission's decision.

Internet research

Look at the Judicial Appointments Commission's website <https://judicialappointments.digital> to see what judicial posts are currently advertised, the qualifications required and what selection exercises are set.

10.2.4 Justices of the Supreme Court

Justices of the Supreme Court are appointed from those who hold high judicial office, for example as a judge in the Court of Appeal, or from those who have been qualified to appear in the senior courts for at least 15 years.

As the Supreme Court is the final appellate court for Scotland and Northern Ireland as well, judges can also be appointed from those who have qualified to appear in courts in Scotland or Northern Ireland for at least 15 years.

For new appointments, judges for this court are selected according to the method set out in Part 3 of the Constitutional Reform Act 2005. This states that when there is a vacancy, the Office of the President of the Court must convene a Supreme Court Selection Commission. This commission must include the President and the Deputy President of the Supreme Court and one member of the Judicial Appointments Commission, a member of the Judicial Appointments Board for Scotland and a member of the Northern Ireland Judicial Appointments Commission.

The commission will decide on the selection process to be used, select a candidate and report this to the Lord Chancellor. The Lord Chancellor has to accept the commission's nomination. The Lord Chancellor then notifies the Prime Minister, who recommends the appointment to the Queen. The Queen then formally makes the appointment.

10.2.5 Lords Justices of Appeal

Lords Justices of Appeal must have been qualified as a barrister or solicitor and have gained experience

in law for at least seven years or be an existing High Court Judge. The selection process starts by the Lord Chancellor requesting the Judicial Appointments Commission to convene a selection panel.

Following an interview, the panel then makes its selection for recommendation for appointment. Lords Justices of Appeal are officially appointed by the Queen.

10.2.6 High Court Judges

In order to be eligible to be appointed as a High Court Judge, it is necessary either to have been qualified as a barrister or solicitor, and have gained experience in law for at least seven years, or to have been a Circuit Judge for at least two years. The vast majority of High Court Judges are appointed from barristers who have been in practice for 20 or 30 years. Deputy High Court Judges, who sit part-time, are also appointed, and this is a way of testing the suitability of a person to become a High Court Judge.

Candidates do not have to be Deputy High Court Judges or Queen's Counsel. However, they are usually expected to have previous judicial experience at a lower level. The selection process is similar to that for Court of Appeal Judges. High Court Judges are officially appointed by the Queen.



▲ **Figure 10.2** Judges, QCs and senior legal figures leave Westminster Abbey for The Houses of Parliament

10.2.7 Circuit Judges

An applicant can either have been qualified as a barrister or solicitor and have gained experience in law for at least seven years, or have been a Recorder. About 13 per cent of Circuit Judges are former solicitors.

The Courts and Legal Services Act 1990 also allows for promotion after being a District Judge, magistrate or chairperson of an employment tribunal for at least three years.

These provisions have widened the pool of potential judges and are gradually leading to a better cross-section among the judges at this level. The usual route to becoming a Circuit Judge is to be appointed as a lower-level judge (a Recorder or District Judge) first and then apply to be a Circuit Judge. The selection process is similar to that for High Court Judges.

For all judicial posts below that of Circuit Judge, there is an extra filtering process. All applicants must do an online qualifying test to assess their abilities to perform judicial roles.



▲ **Figure 10.3** Circuit judges in Westminster

10.2.8 Recorders

This is a part-time post. The applicant must have been qualified as a barrister or solicitor and have gained experience in law for at least seven years. An applicant is appointed as a 'Recorder-in-training' first and then appointed as a Recorder.

10.2.9 District Judges

At this level, an applicant must have been qualified as a barrister or solicitor and have gained experience in law for at least five years, or have been a Deputy District Judge. The vast majority of District Judges in the County Court are former solicitors.

District Judges in the Magistrates' Courts need the same qualifications. It is usual to have sat part-time as a Deputy District Judge before being considered for the position of District Judge. Under the Tribunals, Courts and Enforcement Act 2007, CILEx Fellows are now eligible to be appointed as Deputy District Judges.

The system of selection by the Judicial Appointments Commission has led to improved diversity in the judiciary. This can be seen by comparing the percentage of women and BAME judges now with 20–30 years ago.

10.3 The role of the judiciary

10.3.1 General role

The general role of a judge is the same at all levels: judges decide disputes in a fair, unbiased way, applying the law of England and Wales.

Judges in civil courts of first instance (County Court and High Court) sit on their own. It is very rare to have a jury in a civil case in the High Court, and even rarer in the County Court. The judge hears evidence from all the witnesses and also looks at any relevant papers in the case. They then decide the facts, how the law applies to those facts, and make the decision as to who has won the case.

A judge in a criminal court of first instance (a trial court) sits in the Crown Court with a jury. The jury decides the facts and whether the defendant is guilty or not guilty. The judge decides any relevant law in the case. Where a defendant pleads guilty, or is found guilty by a jury, the judge has to decide on the sentence.

Judges are also responsible for case management before the trial, in both civil and criminal cases. This means that they have to make sure that the parties in the case get it ready for trial as quickly as possible.

Appeal court judges in the Court of Appeal and Supreme Court have a different role. They do not hear evidence from witnesses. Instead, they hear arguments on legal points in the case and decide if the decision made at the trial should stand or whether the appeal should be allowed.

10.3.2 Role of Supreme Court judges

The Supreme Court hears about 70 cases each year. These are appeals from the Court of Appeal or, in exceptional cases, from the High Court. It also hears appeals from courts in Scotland and Northern Ireland. Appeals can be in either civil or criminal cases – there are generally more civil appeals each year. A case can only be appealed to the Supreme Court if there is a point of law involved. Often civil cases involve complicated and technical areas of law, such as planning law or tax law, and will frequently involve how legislation should be interpreted.

There are 12 judges in the Supreme Court, known as 'Justices'. They must sit as an uneven number panel (minimum three judges) to hear a case. Any decision the Supreme Court makes on a point of law will become a precedent for all lower courts to follow. The judges of the Supreme Court also sit as the Judicial Committee of the Privy Council to hear cases on appeal from some Commonwealth countries and other overseas territories.



▲ Figure 10.4 Courtroom 1 of the UK Supreme Court

10.3.3 Role of Court of Appeal judges

The Court of Appeal is divided into Civil and Criminal Divisions, and usually a panel of three will sit to hear cases. There are 38 Lords Justices of Appeal who sit in either Division to decide either civil or criminal cases. Their workload is much heavier than the Supreme Court.

In the Criminal Division, they will hear an appeal against sentence or conviction by a defendant. In the Civil Division, appeals may be heard against the finding of liability or the remedy awarded, for example the amount of money awarded as damages.

In law reports, Court of Appeal judges are referred to as Lord Justice or Lady Justice, but when their judgments are being quoted, they are usually referred to by their surname followed by LJ, for example Singh LJ.

10.3.4 Role of High Court Judges

Each judge in the High Court will be assigned to one of the Divisions: the Queen's Bench Division, the Chancery Division or the Family Division. They will only hear cases relating to the work of that Division. The main function of High Court Judges is to try a case of first instance, because it is the first time the case has been heard in court. A single judge will hear evidence from witnesses, and read any case papers, decide what the law is and make a decision as to which side has won the case (the liability). If the claim is for damages (an amount of money), the judge decides how much should be awarded to the winning claimant.

The type of work dealt with by each Division of the High Court is described more fully in Chapter 6. High Court Judges can also hear an appeal in a civil case which has been tried in the County Court.

In law reports, High Court Judges are referred to as Mr Justice or Mrs Justice, but when their judgments are being quoted, they are usually referred to by their surname followed by J, for example Birss J.

ACTIVITY

Find a law report on a site such as www.bailii.org, or in a newspaper such as *The Times* or from an authorised series of law reports. The case can be about any topic, civil or criminal.

Write a short report of the case, containing the names of the parties, the court hearing the case, the names and status of the judge(s) and, briefly, what the case is about.

10.3.5 Inferior-level judges

Circuit Judges are full-time judges who hear both civil cases in the County Court and criminal cases in the Crown Court:

- » In civil cases in the County Court, the judge sits on their own. They decide the law, the facts and the outcome of the case – the liability and any remedy such as damages.
- » In criminal cases in the Crown Court, the judge sits with a jury. The jury decides the verdict – guilty or not guilty – and the judge decides the law. Where a defendant is found, or pleads, guilty, the judge decides the sentence.

Recorders are part-time judges who are appointed for a period of five years. They are used mainly in the Crown Court to try minor criminal cases, but some sit in the County Court to decide civil cases, including small claims cases of under £10 000 in value.

District Judges (Magistrates' Courts) sit to try criminal cases in the Magistrates' Courts. They sit on their own and decide facts and law. They will decide whether the defendant is guilty or not guilty. When a defendant pleads guilty, or is found guilty, they also decide the sentence. They generally have the same sentencing powers as lay magistrates. They may also sit to hear family cases as part of the Family Court, but this will usually be with two lay magistrates.

10.4 Training

Training of judges is carried out by the Judicial College. There are three main elements to training:

- 1 Knowledge of substantive law, evidence and procedure
- 2 The acquisition and improvement of judicial skills
- 3 The social context within which judging occurs.

On first appointment, all new judges have to go through an induction programme. This normally consists of a residential course of three to five days. New judges at lower levels are assigned an experienced judge to act as a mentor and support them at the start of their

judicial career. Superior-level judges have to attend an induction course for the appropriate level.

For experienced judges, continuing education is given by a mixture of residential and non-residential courses, supplemented by e-learning. Continuing education will include the effect of any new legislation.

Social context

This form of continuing education involves training in human awareness, including gender, racial and disability issues. The training explores the perceptions of unrepresented parties, witnesses, jurors, victims and their families. It is aimed at making judges more aware of other people's viewpoints.

10.5 Retirement and removal

It is important that judges are impartial in their decisions and, in particular, that the government cannot force a judge to retire or resign if they make a decision with which the government disagrees. In the UK, judges are reasonably secure from political interference.

10.5.1 Retirement

Since the Judicial Pensions and Retirement Act 1993, all judges now have to retire at the age of 70, although there are some situations in which authorisation can be given for a judge to continue beyond that age. The Lord Chancellor may authorise retired senior judges to sit part-time until the age of 75.

10.5.2 Removal of judges

Superior-level judges

Superior-level judges have 'security of tenure', which means that they cannot be dismissed by the Lord Chancellor on behalf of the government. This right originated in the Act of Settlement 1700, which allowed judges to hold office while of good behaviour (previously the monarch could dismiss judges at will). The same provision is now contained in the Senior Courts Act 1981 for High Court Judges and Lords Justices of Appeal, and in the Constitutional Reform Act 2005 for Justices of the Supreme Court. As a result, they can only be removed by the monarch, following a petition presented by both Houses of Parliament. This gives superior judges protection from political whims and allows them to be independent in their judgments.

This power of Parliament to remove a superior judge has never been used for an English judge. However, it was used in 1830 to remove an Irish judge, Jonah Barrington, who had misappropriated £700 from court funds.

The Lord Chief Justice can, however, after consulting with the Lord Chancellor, declare vacant the office of any judge who (through ill health) is incapable of carrying out their work and of taking the decision to resign. This power was first introduced in the Administration of Justice Act 1973 and is now contained in the Senior Courts Act 1981. In fact, what has happened on two occasions in the past is that pressure has been put on unsatisfactory High Court Judges to resign. The first of these was in 1959, when the Lord Chancellor asked Mr Justice Hallett to resign; the second was in 1998, when Mr Justice Harman resigned after criticisms by the Court of Appeal.

Inferior-level judges

Inferior-level judges do not have the same security of tenure as superior-level judges. The Lord Chancellor has the power to dismiss an inferior-level judge for incapacity or misbehaviour. Under the Constitutional Reform Act 2005, the Lord Chancellor must comply with set procedures and have the consent of the Lord Chief Justice before he can remove any judge from office.

A criminal conviction for dishonesty would obviously be regarded as misbehaviour and would lead to the dismissal of the judge concerned. This happened in the 1970s in the case of Bruce Campbell, a Circuit Judge who was convicted of evading customs duty on cigarettes and whisky. In 2014, it also happened in the case of Constance Briscoe, a Recorder who was convicted and imprisoned for perverting the course of justice. She had lied and then altered her statement regarding her involvement in a case where she was a witness.

In addition, under the Constitutional Reform Act 2005, the Lord Chief Justice has the power to suspend a person from judicial office if they are subject to criminal proceedings or have been convicted. The Lord Chief Justice can only exercise this power if the Lord Chancellor agrees, and must use set procedures. Where there is a criminal conviction, there is no need for further investigation.

10.5.3 Complaints about judges

Any complaint about the behaviour of a judge is investigated by the Judicial Conduct Investigation Office. If it finds the complaint to be true, then the Lord Chancellor and Lord Chief Justice have the power to take disciplinary action. This can be formal advice, a warning, a reprimand, suspension from office or, in serious cases, removal of a judge from office.

In 2009, District Judge Margaret Short was removed for 'inappropriate, petulant and rude' behaviour in one case and 'intemperate and ill-judged' behaviour in another case. In 2015, one District Judge and two Deputy District Judges were removed from office for viewing pornographic material on their official judicial IT accounts.

10.6 Judicial independence

Each judge is meant to conduct proceedings in a fair and unbiased way. An important rule of natural justice is that no person can be a judge in a case in which they have an interest. This has been applied so that it also includes cases where the judge has interest in the promotion of some cause. This was seen in the *Pinochet Case* and *Howell v Lees Millais* (2007).

▼ Figure 10.5 Judges and their tenure

Key facts		
Title of judge	Court in which they sit	Tenure
Justices of the Supreme Court	Supreme Court	'During good behaviour' (s 33 of the Constitutional Reform Act 2005)
Lord Justices of Appeal	Court of Appeal: Civil Division or Criminal Division	'During good behaviour' (s 11(3) of the Senior Courts Act 1981)
High Court Judge	Civil cases: High Court Criminal cases (judges of QBD): Crown Court	'During good behaviour' (s 11(3) of the Senior Courts Act 1981)
Circuit Judges	Civil cases: County Court Criminal cases: Crown Court	Can be dismissed by the Lord Chancellor with agreement of the Lord Chief Justice
District Judges	Civil cases: County Court Criminal cases: Magistrates' Court	Can be dismissed by the Lord Chancellor with agreement of the Lord Chief Justice
Recorders	Civil cases: County Court Criminal cases: Crown Court	Appointed for a fixed term; appointment may not be renewed by the Lord Chancellor

CASE EXAMPLES

Pinochet Case

In December 1998, the judges in the House of Lords heard an appeal by the former head of state of Chile, Ugarte Pinochet, and decided that he did not have immunity from arrest and extradition. The allegations against Pinochet were about torture and deaths that occurred in Chile during the period he was head of state.

Amnesty International, the human rights movement, had been granted permission to intervene in the appeal and had made written submissions to the House of Lords. One of the judges who heard the case, Lord Hoffmann, was an unpaid director of Amnesty International Charitable Trust.

When the lawyers acting for Pinochet discovered that Lord Hoffmann had this connection, they asked the House of Lords to set aside the decision and have the case reheard by a completely independent panel of judges. The Law Lords decided that the original decision could not be allowed to stand. Judges had to be seen to be completely unbiased. The fact that Lord Hoffmann was connected with Amnesty meant that he could be said to have an interest in the outcome of the case.

This decision upheld the idea that judges must be impartial.

Howell v Lees Millais (2007)

Smith J, a High Court Judge, had been negotiating with a firm of solicitors for a consultancy, if he were to retire from the Bench. This negotiation broke down and Smith J sent an acrimonious email to the firm.

Soon after this, a disputed case about a trust came before the judge. It involved a partner from the firm of solicitors with whom the judge had been negotiating. The QC representing the partner wrote to the judge, asking him to step down from the case. The judge refused. There was then an application in court before the case began, asking for the judge to transfer the case to another judge. Again, the judge refused and threatened the QC, making the application with 'professional consequences'. An application was then made to the Court of Appeal, which was very critical of the judge's behaviour. It was a clear case where there was a real possibility of bias.

The judge was referred to the Office for Judicial Complaints (as it was then known) for his failure to remove himself from the case and for his behaviour. He was reprimanded.

10.6.1 Bias and human rights

The test for bias has been influenced by the European Convention on Human Rights.

In the case of *Re Medicaments (No. 2), Director General of Fair-Trading v Proprietary Association of Great Britain* (2001), the Court of Appeal followed decisions of the European Court of Human Rights. It said that the test was an objective one of whether the circumstances were such as to lead a fair-minded and informed observer to conclude that there was a real possibility of bias.

10.6.2 The separation of powers

The theory of separation of powers was first put forward by Montesquieu, a French political theorist, in the eighteenth century. The theory states that there are three primary functions of the state, and that the only way to safeguard the liberty of citizens is by keeping these three functions separate. As the power of each is exercised by an independent and separate body, each can keep a check on the others and thus limit the amount of power wielded by any one group.

Ideally, this theory requires individuals not to be members of more than one 'arm of the state'. Some countries, for example the USA, have a written constitution that clearly embodies this theory. In the UK, there is no written constitution, but even so, the three organs of the state are roughly separated. There is some overlap, especially in the fact that the Lord Chancellor is involved in all three functions of the state. However, the Lord Chancellor's role in relation to the judiciary is now much reduced.

The three arms of the state identified by Montesquieu are as follows:

- 1 The legislature: the law-making arm of the state; in the UK, this is Parliament
- 2 The executive: the body administering the law; in the UK, this is the government
- 3 The judiciary: the judges who apply the law.

There is an overlap between the executive and the legislature, in that the ministers forming the government also sit in Parliament and are active in the law-making process.

With the exception of the Lord Chancellor, there is very little overlap between the judiciary and the other

two arms of the state. This is important, because it allows the judiciary to act as a check and ensure that the executive does not overstep its constitutional powers. This is in accordance with Montesquieu's theory. However, it is open to debate whether the judiciary is truly independent from the other organs of government.

Independence of judges from the legislature

Judges are generally not involved in the law-making functions of Parliament. Full-time judges are not allowed to be members of the House of Commons. The rule is not as strict for part-time judges, so that Recorders and Assistant Recorders can be members of Parliament.

There used to be judges in the House of Lords when the Appellate Committee of the House of Lords was the final court of appeal. The main reason for the creation of the Supreme Court in 2009 was to separate the judiciary from the legislature. The judges of the Supreme Court are not allowed to be members of the House of Lords.

Independence of judges from the executive

Superior-level judges cannot be dismissed by the government and, in this way, they can truly be said to be independent of the government. They can make decisions that may displease the government, without the threat of dismissal. The extent to which judges are prepared to challenge or support the government is considered below.

Judicial independence is now guaranteed under s 3 of the Constitutional Reform Act 2005. This states that the Lord Chancellor, other ministers in the government and anyone with responsibility for matters relating to the judiciary or the administration of justice must uphold the continued independence of the judiciary. The section also specifically states that the Lord Chancellor and government ministers must not seek to influence judicial decisions.

10.6.3 Freedom from pressure

There are several ways in which judges are protected from outside pressure when exercising their judicial functions:

- » They are given a certain degree of financial independence, as judicial salaries are paid out of the Consolidated Fund, so that payment is made without the need for Parliament's authorisation. This does not completely protect them from parliamentary interference, in the terms on which they hold office. As already seen, changes can be made to retirement ages and qualifying periods for pensions.

- » Judges have immunity from being sued for actions taken or decisions made in the course of their judicial duties. This was confirmed in *Sirros v Moore* (1975) and is a key factor in ensuring judicial independence in decision making.
- » As already noted, the security of tenure of the superior judges protects them from the threat of removal by the government or the legislature.

10.6.4 Independence from political bias

This is the area in which there is most dispute over how independent the judiciary is. Writers such as Professor Griffith have pointed out that judges are too pro-establishment and conservative (with a small 'c'). Nearly a hundred years ago, this problem was recognised when a judge in the Court of Appeal admitted that it was difficult to be impartial, saying:

'I am not speaking of conscious partiality, but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that when you deal with other ideas you do not give as sound and accurate judgments as you would wish.'

Judicial review

During the 1990s, there were several challenges, by way of judicial review, to ministerial (executive) actions. In a sizeable number of cases, the judges ruled against the minister concerned.

For example, in *R v Home Secretary, ex parte Fire Brigades Union* (1995), it was held that the changes to the Criminal Injuries Compensation Scheme made by the Home Secretary were unlawful. Also, in *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* (1995), it was decided that the Foreign Secretary, Douglas Hurd, had acted unlawfully over the development of the Pergau Dam.

Human rights

More recently, the courts have upheld challenges by asylum seekers and by detainees held under the Anti-Terrorism, Crime and Security Act 2001.

With the Human Rights Act 1998 incorporating the European Convention on Human Rights, judges can declare in a case that an Act is incompatible with the Convention. The first case in which this happened was *H v Mental Health Review Tribunal* (2001).

Decisions of this nature put pressure on the government to change the law to comply with the Convention. With the increasing diversity of judges, improved training and decisions such as those outlined in this subsection, it is possible to argue that judges are no longer so out of touch with the 'real world' and that they are increasingly prepared to challenge the establishment.

Judges continue to show their independence from the Executive as the following two examples show, contrary to the view of Professor Griffiths. The campaigner Gina Miller brought two judicial review actions questioning government's decisions.

In October 2016, the Prime Minister announced her intention to give notice under Article 50 of the Treaty of European Union for the UK to leave the EU. Mrs Miller and others challenged her power to do so without the authority of an Act of Parliament. The Queen's Bench Division Divisional Court made a Declaration that there was no such power to give Notice without Parliament's prior authority. This decision was confirmed by the Supreme Court. Parliament responded by passing the European Union (Notification of Withdrawal) Act 2017 authorising the Prime Minister to give the notification.

Another challenge was brought by Mrs Miller and others in 2019. In the case of *R (on the application of Miller) v The Prime Minister* (2019) a judicial review action questioned whether the advice given by the Prime Minister to the Queen to prorogue Parliament for five weeks at a crucial time in the Brexit negotiations was lawful. It was questioned in the case whether the purpose of the prorogation was to prevent further debate and delay. The Supreme Court found that there was no reason for the advice to be given and a Declaration to that effect was made.

The decision of the judges in both cases received strong criticism in certain newspapers. However, the judges were merely, and correctly, applying rules of law which the politicians had not followed correctly.

CASE EXAMPLES

R (on the application of Q) v Secretary of State for the Home Department (2003)

Collins J in the High Court declared that the Home Secretary's power to refuse to provide assistance to asylum seekers who had not immediately, on their entry to the UK, declared their intention to claim asylum, was unlawful. The Court of Appeal upheld this decision, although it did suggest how the relevant Act could be made compatible with human rights.

A and Another v Secretary of State for the Home Department (2004)

The House of Lords declared that the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights.

The Act allowed foreign nationals to be detained indefinitely without trial, where there was suspicion that they were involved in terrorist activity. The Lords held that this breached both Article 5 (the right to liberty) and Article 14 (no discrimination on basis of nationality). This decision forced the government to change the law.

Decisions against the government

CASE EXAMPLE

DPP v Hutchinson (1990)

Women had camped by the Greenham Common Royal Air Force (RAF) base, in protest against the storage of nuclear missiles. Some of the women were prosecuted under a bylaw for being on Ministry of Defence property unlawfully. The House of Lords ruled in the women's favour, holding that the minister had exceeded his powers in framing the bylaw so as to prevent access to common land.

Pro-government decisions by judges

CASE EXAMPLES

Council of Civil Service Unions v Minister for the Civil Service (1984) (the 'GCHQ Case')

A minister for the Conservative government withdrew the right to trade union membership from civil servants working at the intelligence headquarters in Cheltenham. The House of Lords upheld the minister's right, and the decision was seen as anti-trade union.

Attorney-General v Guardian Newspapers Ltd (1987) (the 'Spycatcher' case)

The House of Lords granted an interlocutory injunction to the government banning the sale of a book about the security services, on the grounds that it was in the national interest of security to do so. This injunction was granted, even though the book had already been published in America and Australia.

▼ Figure 10.6 Evaluation of the judiciary

Selection and appointment	• Traditional view was that judges are elderly white males • More female judges, and those from ethnic minorities, are being appointed, though judges at the highest level still have a majority of white males
Independence of judiciary – dismissal	• Superior level judges have security of tenure and can only be dismissed by parliamentary petition • Inferior level judges can be removed by Lord Chancellor with approval of Lord Chief Justice for misbehaviour or incapacity • Judicial salaries are paid from Consolidated Fund
Independence of judiciary – separation of powers	• Judges cannot hear a case in which they have an interest • Judiciary is separate from Legislature and Executive • Judges hear cases involving government decisions by judicial review • Judges will find against government when rules have not been correctly followed or applied

TARGET SKILLS

- 1 Define the theory of the separation of powers.
- 2 Describe the selection process for inferior level judges.
- 3 Assess the disciplinary processes of inferior- and superior-level judges.
- 4 Discuss why it is important for judges to be independent of the executive.

STRETCH AND CHALLENGE

'The present judiciary consists of too many elderly white males and does not reflect today's society.'

Research the judicial statistics to see if this statement is accurate.

TEST YOURSELF

- 1 Describe the qualifications required by a Circuit Judge.
- 2 Describe the qualifications required by a High Court Judge.
- 3 Describe the procedure for the selection of superior-level judges.
- 4 Describe how an inferior-level judge can be disciplined.
- 5 Assess how judges are independent of the executive.

EXAM-STYLE QUESTIONS

- 1 Describe how both inferior and superior level judges are selected and appointed.
- 2 Assess the value of an independent judiciary.

11

Legal professionals

Introduction

In England and Wales, there are two main types of lawyer – barristers and solicitors. The professions train separately and are administered separately, although there are opportunities to transfer from one to the other. Most countries do not have this clear-cut division among lawyers: a person will qualify simply

as a lawyer, although it will be possible to specialise later.

Legal executives can support barristers and solicitors or, in some instances, work for themselves. This chapter links to the key concept of effectiveness and certainty.

11.1 Barristers

There are about 16 500 barristers in practice in England and Wales, which includes about 3000 barristers employed by organisations such as the Crown Prosecution Service (CPS), independent businesses, local government and the Civil Service.

Collectively, practising barristers are referred to as ‘the Bar’, and they are controlled by their own professional body – the General Council of the Bar. All practising barristers must also be a member of one of the four Inns of Court: Lincoln’s Inn, Inner Temple, Middle Temple and Gray’s Inn, all of which are situated close to the Royal Courts of Justice in London.

11.1.1 Qualification and training

A high standard of professional behaviour is required of barristers to justify the trust placed in them by the public and other professionals. As a result, training is rigorous.

Entry to the Bar is normally degree-based, with at least a 2:1 degree:

- » Graduates with a law degree can progress to Bar training.
- » Graduates with a non-law degree will have to complete a one-year Graduate Diploma in Law (GDL) to achieve a certain amount of legal knowledge before progressing to Bar training.

From 2020, those intending to qualify as a barrister will have to do all the following:

- » complete a short Bar Course Aptitude Test (BCAT)
- » join one of the Inns of Court
- » complete the Bar Professional Training Course, which is a one-year full-time course or two-year part-time course that allows students to gain the specialist

skills, knowledge of procedure and evidence and competencies required to present cases in court; students apply directly to institutions – universities or other training providers – offering this course

- » complete 12 sessions of training provided by one of the Inns of Court
- » be called to the Bar by an Inn of Court
- » complete a 12-month pupillage.

During the pupillage, the student barrister will gain practical training under the supervision of an experienced barrister. The first six months will be a non-practising period and the second six months will be a practising period, where the student barrister can begin presenting cases. Pupils are paid during pupillage by the chambers they are attached to.

11.1.2 Role of barristers

Barristers practising at the Bar are self-employed, and usually work from a set of chambers where they can share administrative expenses with other barristers. Chambers vary in size, from small with 10–20 barristers to larger sets with over 50 barristers. The chambers employ a clerk as a practice administrator – booking in cases and negotiating fees – and they have other support staff. Being a member of a chambers means that a barrister is more likely to obtain work, will have administrative matters dealt with and will have support from other members of the chambers.

A barrister owes a duty of confidentiality to a client, but also owes a duty to the court. This means that a barrister must not mislead a court or a judge or waste a court’s time and will need to make sure the court has all the relevant information it needs, even if it weakens their client’s case.

A barrister's duty to the court is an important one, which can override other duties such as the duty to act in the best interests of each client. However, it does not require them to breach their duty of confidentiality to their client. This means that if a client confesses their guilt to the barrister, that barrister cannot continue to represent the client in a not-guilty defence.

Barristers have full rights of audience, which means they can present a case in any court in England and Wales. The majority of barristers in private practice concentrate on advocacy, which is the presentation of cases in court.

Advocacy in criminal cases

Barristers generally specialise in either prosecution or defence work.

For the prosecution, a barrister will be instructed by the Crown Prosecution Service (CPS). The barrister initially advises on the likely success of the charges that have been brought and works with the CPS and the police to ensure that there is sufficient evidence available to prove those charges. When the case comes to court, the barrister will outline the case to the court, lead prosecution witnesses through their evidence, cross-examine defence witnesses and make a closing speech to highlight the strengths of the prosecution case and the weaknesses of the defence.

When acting for a defendant, a barrister will be instructed by a solicitor who has seen a defendant from the outset. The barrister will advise on the strength of the prosecution evidence and any weaknesses in the defence. Ultimately, it is for the defendant to decide whether to plead guilty or not guilty.

When the case comes to court, the barrister will cross-examine prosecution witnesses and, if it is considered the prosecution evidence is weak, put forward no case to answer. If this is rejected, the barrister will examine the defendant and any defence witnesses, and make a closing speech outlining the weaknesses in the prosecution case and the strengths of the defence. If the defendant is found guilty, the barrister will present a plea in mitigation before sentencing.

After a conviction and sentence, the barrister can advise on the possibility of an appeal against conviction and/or sentence. They can then present an appeal to an appeal court. An appeal is likely to consist of legal arguments. Witnesses are unlikely to be required for further evidence.



▲ Figure 11.1 A barrister outside a Crown Court

Advocacy in civil cases

In a civil case, a barrister can be instructed by a solicitor or (except in family cases) directly by a client. Much of the evidence and the legal arguments will be presented in writing before any court hearing. Those documents will usually be drafted by a barrister.

In court, the advocacy will concentrate on important pieces of evidence and legal issues. When liability is decided by the judge, a barrister will argue for an award, usually the amount of damages, and for the award of costs. After the hearing, the barrister will advise on the possibility of an appeal against liability and/or the amount of damages and, if necessary, will draft the appeal papers. As with criminal cases, an appeal is likely to consist of legal arguments with no further evidence.

Direct access

For many years, anybody who wished to instruct a barrister had to go to a solicitor first, and the solicitor would then brief a barrister. This would create extra expense, as it meant paying two lawyers. Due to criticism of this practice, the Bar introduced Bar Direct, under which professionals, such as accountants and surveyors, could brief a barrister directly without using a solicitor. Subsequently, this arrangement was extended, and now it is no longer necessary to go through a solicitor in order to instruct a barrister for most civil cases. However, direct access is still not allowed for criminal cases or family work. To carry out direct-access work, a barrister must have completed additional training.

Limited advocacy work

Some barristers specialise in areas such as tax or company law and rarely appear in court.

Cab-rank rule

Normally, barristers operate what is known as the 'cab-rank rule', under which they cannot turn down a case if it is in the area of law they deal with and they are free to take the case. However, in direct access, the cab-rank rule does not apply. Barristers can turn down a case that requires investigation or support services that they cannot provide.

Employed barristers

Barristers can be employed by government organisations, the Civil Service, local government or businesses. In particular, the Crown Prosecution Service employs a large number to prosecute criminal cases. Employed barristers have the same rights of audience (that is, rights to present cases in court) as self-employed barristers.

11.1.3 Regulation

The General Council of the Bar

This body represents barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services. It fulfils the function of what might be called a 'trade union', representing the interests of the Bar. It makes the Bar's view on issues, such as legal-aid payment rates, known to the appropriate government department.

The council also promotes fair access to justice for all, the highest standards of ethics, equality and diversity across the profession, and the development of business opportunities for barristers at home and abroad.

Bar Standards Board

This body regulates the barrister's profession. It sets training and entry standards, and also sets out a code of conduct that barristers should comply with.

The board investigates any alleged breach of the code of conduct. It can discipline any barrister who is in breach of the code. If the matter is serious, it will be referred to a disciplinary tribunal, arranged by an independent Bar Tribunals and Adjudication Service. A tribunal has several sanctions it can impose, including:

- » reprimanding the barrister (formally warning them about their behaviour)
- » making the barrister complete further professional development training
- » ordering the barrister to pay a fine
- » suspending the barrister for up to three years
- » in extreme cases, disbarring (striking off) the barrister.

If a complainant is unhappy with the decision of the Bar Standards Board, a complaint can be made to the Legal Ombudsman (see subsection 11.5).

Liability

A barrister does not enter into a contract with a client, so a dissatisfied client cannot sue for breach of contract. However, just as with solicitor advocates, a barrister can be liable in negligence for a poor quality of advocacy – more than just losing a civil claim or being convicted in a criminal case.

11.1.4 Queen's Counsel

After at least ten years practising as a barrister or as a solicitor with an advocacy qualification, it is possible to apply to become a Queen's Counsel (QC). About 10 per cent of the barristers practising at the Bar are Queen's Counsels. Becoming a Queen's Counsel is known as 'taking silk'. QCs usually take on more complicated and high-profile cases than junior barristers (all barristers who are not Queen's Counsel are known as 'juniors'), and they can command higher fees for their recognised expertise. Often a QC will have a junior barrister to assist with the case.

Lawyers apply to become QCs. They have to pay an application fee and, if successful, an appointment fee. Applicants must provide references from other lawyers, including judges before whom they have appeared. Applicants are interviewed by an independent selection panel, which recommends those who should be appointed to the Lord Chancellor.

11.2 Solicitors

There are about 147 000 solicitors practising in England and Wales, and they are controlled by their own professional body, the Law Society. About 75 per cent work in private practice and the remainder are in employed work, such as for local government, the Civil Service, the Crown Prosecution Service or private businesses.

11.2.1 Qualification and training

Current qualification and training

As with barristers, the solicitor's profession has, in the past, been mainly degree-entry. Graduates with a non-law degree have to study the same Graduate Diploma in Law (GDL) as barristers.

The next stage is the Legal Practice Course (LPC), which includes training in skills such as client interviewing, negotiation, advocacy, drafting documents and legal research. There is also an emphasis on business management, for example keeping accounts. The LPC can be done as a one-year full-time course or a two-year part-time course.

Following the academic training, the student must complete a two-year practical training period called a

training contract. During this time, the trainee will be paid, and will do their own work under supervision.

A Professional Skills Course has to be completed, which builds on the LPC. For this course, there is a compulsory element of 48 hours of tuition with assessments and an elective element that involves a further 24 hours of tuition. At the end of the training contract, the trainee will be admitted as a solicitor by the Law Society and their name will be added to the roll (or list) of solicitors. After qualifying, solicitors have to attend continuing education courses to keep their knowledge up to date.

There is also a route under which non-graduates can qualify as solicitors by first becoming legal executives. This route has been open only to mature candidates and takes longer than the graduate route.

Future qualification and training

A new route for qualifying as a solicitor is due to be introduced from September 2021 and will, for several years, run alongside the current route. Trainees will have to pass a two-stage Solicitor's Qualifying Examination (SQE) and complete a period of qualifying work experience. The SQE will assess the core knowledge and skills required to be a solicitor, focusing on the areas of law which a solicitor's qualification licenses people to practise.

ACTIVITY

At the time of writing, the Solicitor's Qualifying Examination route (the new route to qualifying as a solicitor) was still being developed.

Research the new arrangements from the Law Society (www.lawsociety.org.uk) and complete a flowchart to show how solicitors will qualify in the future.

11.2.2 Role of solicitors

The majority of those qualifying as a solicitor will work in private practice in a solicitors' firm. However, there are other careers available, including working in the Crown Prosecution Service, for a local authority or government department, or as legal advisers in commercial or industrial businesses. A solicitor in private practice will generally work in a partnership, ranging from a 'high-street' practice to a big city firm. The number of partners is not limited, and some of the biggest firms will have over a hundred partners, as well as employing assistant solicitors and legal executives. The type of work done by a solicitor will largely depend on the firm. A high-street firm will probably be a general practice, advising individual clients on a range of topics, including:

- » conveyancing (the legal side of buying and selling flats, houses, office buildings and land)
- » the making of wills
- » consumer problems
- » business matters
- » personal injury
- » family matters.

This work is likely to involve interviewing clients, negotiating on their behalf, writing letters and emails, and drafting contracts, leases or other documents.

Some solicitors act for clients in civil or criminal cases – known as litigation. Generally, in a civil case, a solicitor will be the first source of legal advice. The solicitor will collect evidence, both documentary and oral, and if the case is straightforward will prepare and issue court papers. The solicitor may then carry out advocacy, usually in the County Court. If the case is more complex, the solicitor may decide to instruct a barrister to advise on the case, draft the court papers and carry out the advocacy. The solicitor will support the barrister throughout the case, including obtaining any further evidence.

In a criminal case, a solicitor may initially meet a client in the police station. Advice will be given to the suspect and the solicitor can sit in on interviews. If the police press charges, the solicitor will obtain details of the prosecution case (known as disclosure) and advise the client on the strength of the evidence. If the case is a summary or triable-either-way case heard in the Magistrates' Court, the solicitor can carry out the advocacy. If the case is a more serious triable-either-way or indictable offence, the solicitor is likely to brief a barrister or a solicitor advocate to advise and to carry out the advocacy. Again, the solicitor will support the barrister throughout the court hearings.

Specialising

Although some solicitors may handle a variety of work, it is more usual for a solicitor to specialise in one particular field. The firm itself may handle only certain types of cases (perhaps only civil actions and not take any criminal cases), or a firm may specialise in family matters. In large city firms, there will be an even greater degree of specialisation, with departments dealing with just one area of law or a limited number of clients.

Advocacy

All solicitors have rights of audience in the lower courts – the Magistrates' Court and County Court. From 2015, a new system of accreditation for criminal advocates to gain higher rights of audience was announced. Level 1 allows advocacy in the Magistrates' Court and some limited Crown Court work (but not trials). For progression to Level 2 (less serious trials at the

Crown Court), solicitors will have to be assessed at an assessment centre, followed by assessment by judges in trials. If successful at Level 2, they will then be able to progress to higher levels by further assessment.

Solicitors with an advocacy qualification are eligible to be appointed as Queen's Counsel (see Section 11.1.4) and also to be appointed as judges.

11.2.3 Regulation

As a solicitor deals directly with a client, a contract will be entered into. This means that if the client does not pay, the solicitor has the right to sue for outstanding fees. It also means that the client can sue the solicitor for breach of contract if the solicitor fails to do the agreed work. A client can also sue the solicitor in negligence if they suffer loss due to poor quality of work.

It used to be the case that an advocate (either solicitor or barrister) presenting a case in court could not be sued for negligence. However, in *Hall v Simons* (2000), the House of Lords decided that an advocate, solicitor or barrister, could be liable for negligent advocacy.

CASE EXAMPLE

Hall v Simons (2000)

Three firms of solicitors were sued by their clients for negligent advocacy. The lower courts were bound by the decision of *Rondel v Worsley* (1969), which decided that lawyers could not be liable for negligent advocacy.

Using the Practice Statement 1966, the House of Lords ruled by reversing *Rondel v Worsley*. In light of changes in the law of negligence, the working of the legal professions, the administration of justice and public perceptions, the protection given to advocates was no longer appropriate.

In addition, solicitors can be liable in negligence to persons who are not their clients but who are affected by their negligent work. This is shown in *White v Jones* (1995).

CASE EXAMPLE

White v Jones (1995)

A father wanted to make a will leaving each of his daughters £9000. He wrote to his solicitors, instructing them to draw up a will to include this. The solicitors received this letter on 17 July 1986 but had done nothing about it by the time the father died on 14 September 1986. As a result, the daughters did not inherit any money. They successfully sued the solicitor for the £9000 they had each lost.

The Law Society

The Law Society is the governing body of solicitors and has supported the interests of solicitors in England and Wales for almost 200 years. All practising solicitors must be members of the Law Society. On its website, the Law Society states that it:

'... exists to support, promote and represent all solicitors so they can help their clients. We also work to ensure no one is above the law and to protect everyone's right to have access to justice.'

It leads the debate on issues affecting solicitors throughout England and Wales and helps raise the profile of the profession through campaigns. In particular, it speaks to government, Parliament and the public on a range of legal issues, and works to influence policy and legislation to make sure that it protects its members, the public and the justice system. The Law Society makes sure that the profession's voice is heard with the right people – government, industry and internationally.

Solicitors' Regulatory Authority

This body deals with complaints about professional misconduct of solicitors. It will initially investigate the complaint. If there is evidence of serious professional misconduct, it can bring the case to the Solicitors' Disciplinary Tribunal.

If the tribunal upholds the complaint, it can fine or reprimand the solicitor or, in more serious cases, it can suspend a solicitor from the Roll, so that they cannot practise for a certain time. In very serious cases, the tribunal can strike off a solicitor from the Roll, so that they are prevented from practising again as a solicitor.

11.3 Legal executives

There are over 20000 practising legal executives in the UK. They work in solicitors' firms, local authorities, the CPS and company legal departments. They are qualified lawyers who have passed the Institute of Legal Executives' Professional Qualification in Law. They are likely to specialise in a particular area of law.

11.3.1 Qualification and training

To become a legal executive, it is necessary to pass the Professional Diploma in Law and the Professional Higher Diploma in Law (PHDL). As well as passing the PHDL examinations, it is also necessary to have worked in a solicitors' firm (or in other legal organisation such as the CPS or local government) for at least five years. When all the qualifications have been achieved, the person becomes a Fellow of the Chartered Institute of Legal Executives.

A Fellow can progress to become a solicitor. In order to do this, they will have to pass the Law Society's Legal Practice Course (LPC), but they may be given exemption from the two-year training contract.

11.3.2 Role of legal executives

Legal executives specialise in a particular area of law and their work is similar to that of a solicitor, although they tend to deal with more straightforward matters. For example, they can:

- » handle parts of a property transfer
- » assist in the formation of a company
- » draft wills
- » advise people with matrimonial problems
- » advise clients accused of a crime
- » advise a client detained in a police station
- » interview witnesses.

They also have some rights of audience in court and can complete an advocacy course and obtain wider rights of audience. This can include making applications where the case is not defended in family matters and in civil cases in the County Court.

In litigation cases, there are three different practising certificates:

- » a Civil Proceedings Certificate
- » a Criminal Proceedings Certificate, which allows legal executives to make applications for bail or deal with cases in the Youth Court
- » a Family Proceedings Certificate, which allows appearances in the Family Court of the Magistrates' Court.

Legal executives work for a firm of solicitors in private practice. Their work is charged at an hourly rate directly to clients in the same way as solicitors' work is charged, but their work is likely to be charged at a lower rate

than that of a solicitor. In this way, a legal executive makes a direct contribution to the income of the firm. The partners of the firm are responsible for the legal executive's work – it is unlikely that a legal executive will be sued personally for negligent work directly by a client.

11.3.3 Regulation

Chartered Institute of Legal Executives

All legal executives are members of the Chartered Institute of Legal Executives (CILEx). This organisation:

- » provides education, training and development of skills for legal executives
- » protects the status and interests of legal executives
- » promotes and secures professional standards of conduct among members and those who are registered with the institute.

CILEx publishes a code of conduct and guides to good practice, but regulation of its members is performed by the CILEx Regulation Board. This is the independent regulator of members of CILEx and it investigates complaints about legal executives.

When an investigation is complete, a summary of the issues is prepared and the matter is put to the Professional Conduct Panel for consideration. The panel will decide if there has been misconduct. If there has been misconduct, it may reprimand or warn a member. It will refer serious matters to the disciplinary tribunal, which has the power to:

- » exclude a person from membership of the institute
- » reprimand or warn the member
- » order the legal executive to pay a fine and costs.

▼ Figure 11.2 Summary of the requirements for barristers, solicitors and legal executives

Key facts			
	Barrister	Solicitor	Legal Executive
Qualifications and training	• Degree-entry followed by Bar Course Aptitude Test (BCAT) • Join an Inn of Court • Bar Professional Training Course • Complete 12 training sessions • Call to the Bar • 12-month pupillage	• Degree-entry; Graduate Diploma in Law (GDL) for non-law-degree entrants • Legal Practice Course (LPC) • two-year training contract • Professional Skills Course • Admitted to Roll of Solicitors • Solicitors Qualifying Examination (SQE) from 2021	• Professional Diploma in Law and Professional Higher Diploma in Law • Work for at least five years
Role	• Self-employed, based in chambers • Briefed by solicitors but can carry out direct-access work in civil cases • Mostly advocacy work but can write opinions and draft documents	• Private practice in partnerships • Deal directly with clients • Can brief barrister if case is complex • Carry out wide variety of work but likely to specialise in one area	• Work for solicitors or other legal organisations • Carry out similar work to solicitors but in less complex matters
Regulation	• Bar Council • Bar Standards Board	• Law Society • Solicitors Regulatory Authority	• CILEx Regulation Board

11.4 The Legal Ombudsman

The Legal Ombudsman's Office was set up by the Office for Legal Complaints, to deal with complaints made against the legal profession. It deals with complaints against all legal professionals. It also deals with complaints about actions taken by the Bar Standards Board, the Solicitors Regulatory Authority or CILEx. It can order a legal professional to:

- » apologise to the client
- » give back any documents the client might need
- » put things right if more work can correct what went wrong
- » refund or reduce any legal fees paid
- » pay compensation of up to £30 000.

Internet research

Look at the Legal Ombudsman's website at www.legalombudsman.org.uk and find a case study of a complaint.

You could use this as the basis of a presentation to your class. Include in your research the number of complaints made in the past year and the main reasons for making a complaint.

▼ Figure 11.3 Evaluation of legal profession

The professions	• Separate professions of barristers, solicitors, and legal executives • Individual qualifications for entry and training • Barristers work with and for solicitors • Legal executives work with and for solicitors • Each profession has separate regulatory and disciplinary bodies
Composition of professions	• Traditionally, barristers and solicitors male dominated • More women than men now entering barristers' and solicitors' professions • More ethnic minority groups entering barrister's and solicitor's professions
Liability	• All professions liable in negligence to clients; indemnity insurance compulsory • Barristers and solicitor advocates liable for negligent advocacy • Solicitors and legal executives enter into contract with client – can sue for unpaid fees and be sued for not performing contract duties. • No contract between barrister and client – barrister cannot sue for unpaid fees

TARGET SKILLS

- 1 State how an individual can access the advice and assistance of a barrister.
- 2 Identify the role of the Legal Ombudsman.
- 3 Assess the legal liability of barristers, solicitors and legal executives.
- 4 In the twenty-first century, there is a definite need for lawyers. Discuss the accuracy of this statement.

STRETCH AND CHALLENGE

Your friend Harriett tells you she wants to become a lawyer when she is older. She wants to know more detail on how to become a lawyer and what lawyers do.

Prepare a diagram which explains the qualifications needed and the work that different types of lawyers do.

TEST YOURSELF

- 1 Describe what is meant by 'direct access' to a barrister and the areas of law in which it is allowed.
- 2 Describe what a QC does and what the qualification means.
- 3 Compare the current qualification process of solicitors with the 'new' SQE qualification process.
- 4 Describe the legal liability of barristers, solicitors and legal executives.
- 5 Describe the role of legal executives.

EXAM-STYLE QUESTIONS

- 1 Describe the advocacy role of legal professionals – barristers, solicitors and legal executives.
- 2 Discuss why legal professionals should be responsible for their negligent work.

Introduction

There is a long-established tradition of using lay people (people who are not legally qualified) in the decision-making process in the English legal system. This applies particularly in criminal cases:

- ★ Lay magistrates hear cases in the Magistrates' Court.
- ★ There is a jury to try cases in the Crown Court.

In the past, lay people were also used to decide civil cases, but this rarely happens now. This chapter links to the key concept of justice, fairness and morality.

12.1 Lay magistrates

Lay (or legally unqualified) magistrates usually sit as a bench of three. They have a wide workload that is mainly connected to criminal cases, although they also deal with some civil matters.

12.1.1 Role in civil cases

In civil matters, magistrates mostly deal with family cases in a Family Proceedings Court, which is not open to the public. They also hear cases in open court about non-payment of council tax or television licences.

The Family Proceedings Court

There is a special panel for a Family Court to hear family cases, including orders for protection against violence, affiliation cases, adoption orders and proceedings under the Children Act 1989.

Magistrates undergo extensive training before they sit in the Family Proceedings Court, where procedures are very different from in the criminal courts. The court setting is private, informal and ideally takes place with parties seated around a large table. Cases can be emotional and upsetting for both parties, and usually the lay magistrates appointed to this court are very experienced. There is usually a fair amount of reading involved, as both parties will file statements and reports before a hearing.

Magistrates always provide written reasons for their decision and can be assisted with extra information provided by a children's guardian, usually a specialised social worker.

12.1.2 Role in criminal cases

Lay magistrates will normally sit as a panel of three, but a District Judge (Magistrates' Court) will sit alone. Magistrates try 97 per cent of all criminal cases. These

will all be summary offences and triable-either-way offences where the defendant opts for trial in the lower court. Where the defendant pleads guilty, magistrates will decide on a sentence after hearing representations from the prosecution and the defence. Where the defendant pleads not guilty, they will hear evidence and decide guilt or innocence. If the defendant is found guilty, they will again decide on a sentence.

Their sentencing powers are limited to a maximum of six months' imprisonment for one offence and a fine of £5000. If they consider the defendant merits a higher sentence, they can refer the case to the Crown Court for sentencing.

For indictable offences and in triable-either-way offences where the defendant opts for a Crown Court trial, they deal with preliminary hearings which can involve Early Administrative Hearings, remand hearings, bail applications and committal proceedings before the case is transferred to a Crown Court.

Youth Court

Specially nominated and trained magistrates form a Youth Court panel to hear criminal charges against young offenders aged between 10 and 17. These panels must usually include at least one man and one woman. Again, hearings are informal and private.

Appeals

Lay magistrates can also sit in a Crown Court to hear appeals from a Magistrates' Court against conviction and/or sentence. In these cases, two lay magistrates form a panel with a qualified judge.

12.1.3 Role of the magistrates' clerk

Every magistrates' bench is assisted by a clerk, also known as a legal adviser. The legal adviser's duty is to guide lay magistrates on questions of law, practice and procedure. The clerk is not meant to assist in

decision making and should not normally retire with the magistrates when they go to make their decision.

12.1.4 Qualifications

Lay magistrates do not need to have any legal qualifications. There are, however, some requirements as to their character, in that they must be suitable in character, integrity and understanding for the work they have to perform. In 1998, the Lord Chancellor set out six key qualities that candidates should have:

- » good character
- » understanding and communication
- » social awareness
- » maturity and sound temperament
- » sound judgement
- » commitment and reliability.

They must have certain 'judicial' qualities – it is particularly important that they are able to assimilate factual information and make a reasoned decision upon it. They must also be able to take account of the reasoning of others and work as a team. The other qualifications are as follows:

- » Lay magistrates must be aged between 18 and 65 on appointment and have to retire at 70.
- » Lay magistrates are expected to live or work within or near to the local justice area to which they are allocated.
- » Lay magistrates must be prepared to commit themselves to sitting at least 26 half-days each year. This is quite an onerous commitment and does prevent some people from applying to be a magistrate.

Some people are not eligible to be appointed. These include people with serious criminal convictions, although a conviction for a minor motoring offence will not automatically disqualify a candidate. Others who are disqualified include undischarged bankrupts, members of the forces and those whose work is incompatible with sitting as a magistrate, such as police officers and traffic wardens. Relatives of those working in the local criminal justice system are not likely to be appointed, as it would not appear 'just' if, for example, the wife of a local police officer were to sit to decide cases. In addition, people whose hearing is impaired or who by reason of infirmity cannot carry out all the duties of a magistrate cannot be appointed. Close relatives will not be appointed to the same bench.

ACTIVITY

Put the list of six key qualities in Section 12.1.4 into order, with the one that you think is most important first and the least important last.

Compare your list with others in your class.

Can you think of any other qualities a magistrate would need?

12.1.5 Selection and appointment

Selection

About 1200 new lay magistrates are appointed each year. The appointments are made by the Senior Presiding Judge. In order to decide whom to appoint, the Senior Presiding Judge relies on recommendations made by local advisory committees.

Local advisory committees

The membership of these committees used to be secret, but since 1993 all names must be published. The committee should have a maximum of 12 members and these should include a mixture of magistrates and non-magistrates. However, the majority of the members tend to be current or former magistrates. The committees try to encourage as wide a range of potential candidates as possible to put themselves forward. Advertisements may be placed in local newspapers, especially free papers, or on community noticeboards, in radio adverts or even on buses. This is done in order to attract as wide a spectrum of potential candidates as possible. The intention is to create a panel that is representative of all aspects of society.

To achieve this, magistrates are matched against a mix of occupational, industrial and social groupings as shown in the last census.

When applying, the candidate must fill in an application form and give the names of two referees. There is then a two-stage interview process:

- » At the first interview, the panel tries to find out more about the candidate's personal attributes, in particular looking to see if they have the six key qualities required. The interview panel will also explore the candidate's attitudes on various criminal justice issues, such as youth crime or drink driving.
- » A second interview is aimed at testing candidates' potential judicial aptitude, and this is done by a discussion of at least two case studies that are typical of those heard regularly in Magistrates' Courts. The discussion might, for example, focus on the type of sentence that should be imposed on specific case facts.

Appointment

The advisory committees will interview candidates and then submit names of those they think are suitable to the Senior Presiding Judge, who will then appoint new magistrates from this list.

12.1.6 Training

The training of lay magistrates is supervised by the Magisterial Committee of the Judicial College. This committee has drawn up a syllabus of the topics that lay magistrates should cover in their training. However, because of the large numbers of lay magistrates, most

of the actual training is carried out in local areas, sometimes through the legal adviser, sometimes through weekend courses organised by universities, with magistrates from the region attending.

The Judicial College provides some direct training for Bench Chairmanship and for members of the local Training Committees. The Judicial College also provides guidance and training material for local delivery. This includes bench books for use in courts and good practice guides for Training Committees on running mentoring schemes and appraisals. This material is used by the legal adviser to deliver training in each area.

New magistrates must:

- » attend introductory training so that they understand the organisation of the bench, the administration of the court and the roles and responsibilities of those involved in Magistrates' Courts
- » attend training on the key skills, knowledge and understanding required of magistrates
- » attend court and observe experienced magistrates in action
- » visit establishments, such as a prison or a probation office.

The initial introductory training is covered before the new magistrate starts sitting in court. They will take part in a structured courtroom observation of cases on at least three occasions. These should be arranged so

that they see different aspects of the work and should include preliminary decisions such as bail, a short summary trial and sentencing.

Mentors

Each new magistrate keeps a personal development log of their progress and has a mentor (an experienced magistrate) to assist them.

During the first two years of the new magistrate sitting in court, some of the sessions will be mentored. In the same period, the magistrate is also expected to attend about seven training sessions.

Appraisal

After one year, or whenever it is felt that the magistrate is ready, there will be an appraisal of the magistrate to check if they have acquired the necessary skills. Any magistrate who is unable to satisfy the appraiser will be given extra training. If, after further training and mentoring, the magistrate still cannot show that they have acquired the necessary skills, then the matter is referred to the local advisory committee, who may recommend that the magistrate is removed from sitting.

This scheme involves practical training 'on the job'. It also provides a check on whether the magistrate has actually benefited from the training they have received. Those magistrates who chair the bench are given extra training and are also appraised for this role.

▼ Figure 12.1 Lay magistrates

Key facts	
Qualifications	• Aged 18 to 65 on appointment; can sit until 70 • Need to live or work in or near the local justice area • Six key qualities required, e.g. understanding and communication skills, social awareness, sound judgement • Disqualified by criminal record, bankruptcy or work that is incompatible
Appointment	• Recommended by local advisory committees • Senior Presiding Judge formally appoints
Training	• Supervised by the Magisterial Committee of the Judicial College • Initial training with mentor appointed • Regular subsequent training and specialist training, e.g. chairing a bench or family work • Regular appraisals
Composition of bench	• Three lay magistrates • 12 000 lay magistrates nationally: • 56% women • 12% BAME • 84% aged over 50; 1% aged under 30
Role	• Hear trials of summary offences, sentence guilty pleas • Deal with ancillary matters, e.g. issuing warrants, hearing bail applications, committals • Sit in Youth Court if specially trained • Can sit with a judge to hear appeals in Crown Court • Sit in Family Proceedings Court if specially trained

▼ Figure 12.2 Evaluation of lay magistrates

	Advantages of use of lay magistrates	Criticisms of use of lay magistrates
Background	• Cross-section of local people appointed; more representative than professional judges • Good gender balance nationally • Reasonable percentage from BAME groups nationally	Not a true cross-section of the population – 84% are aged over 50 and the majority are from professional or managerial backgrounds
Locality	Have to live or work locally – should have some knowledge of the area and its problems; awareness of local issues and opinions and patterns of crime	Unlikely to live in problem areas and so do not truly know the area's issues; local knowledge being lost due to court closures
Cost	Cheaper than using professional judges, as only receive expenses Cheaper than Crown Court for dealing with cases	More District Judges having to be appointed, as fewer lay magistrates are volunteering
Training	• National training tailored for lay magistrates • Local training for specific issues • Mentor scheme provides support for newly qualified magistrates • Annual appraisals identify possible issues in service	Despite training, there can be inconsistencies between benches on sentencing
Law	Use of legal adviser makes decisions legally based	Too great a reliance on legal adviser
Appeals	Few appeals made against conviction or sentence	Possible bias in favour of police and prosecution

12.2 Juries

12.2.1 Role in criminal courts

Juries have been used in the English legal system for over 1000 years.

The most important use of juries today is in the Crown Court, where they decide whether the defendant is guilty or not guilty. Jury trials account for less than 1 per cent of all criminal trials. This is because 97 per cent of cases are dealt with in the Magistrates' Court, and about two out of every three defendants will plead guilty at Crown Court. This means that a jury is only used in about 20 000 cases each year. A jury in the Crown Court has 12 members.

Split function

A trial is presided over by a judge and the functions are split between the judge and jury. The judge decides points of law and the jury decides the facts. At the end of the prosecution case, the judge has the power to direct the jury to acquit the defendant if it is decided that, in law, the prosecution's evidence has not made out a case against the defendant. This is called a directed acquittal.

The defence will then put its case and call any witnesses. At the end of the evidence, the judge will sum up the case and direct the jury on any law involved. The jury will retire to a private room and make a decision in secret on the guilt or innocence of the accused. Initially, the jury must try to come

to a unanimous verdict; that is, one on which all the members agree. The judge must accept the jury verdict, even if they do not agree with it. This long-established principle goes back to *Bushell's Case* (1670). The jury does not give any reasons for its decision.

Majority verdicts

If, after at least two hours (longer where there are several defendants), the jury has not reached a verdict, the judge can call it back into the courtroom and direct that a majority verdict can be accepted. Where there is a full jury of 12, the majority verdict can be 10–2 or 11–1. If the jury has fallen below 12, then only one can disagree with the verdict; that is, if there are 11 jurors, the verdict can be 10–1; if there are ten jurors, it can be 9–1. If there are only nine jurors, the verdict must be unanimous, as a jury cannot go below nine members.

Majority verdicts were introduced because of the fear of jury 'nobbling'; that is, jurors being bribed or intimidated by associates of the defendant into voting for a not-guilty verdict. When a jury had to be unanimous, only one member needed to be bribed to cause a 'stalemate' in which the jury was unable to reach a decision. It was also thought that the acquittal rates in jury trials were too high and majority decisions would result in more convictions. Where the jury convicts a defendant on a majority verdict, the foreman of the jury must announce the numbers both agreeing and disagreeing with the verdict in open court. This provision is contained in s 17(3) of the Juries Act 1974

and is aimed at making sure the jury has come to a legal majority, and not one, for example, of 8–4 that is not allowed.

12.2.2 Qualifications for jury service

The Juries Act 1974 (as amended) sets out the qualifications. To qualify for jury service, a person must be:

- » aged between 18 and 75 inclusive
- » registered as a parliamentary or local government elector
- » ordinarily resident in the UK, the Channel Islands or the Isle of Man for at least five years since their thirteenth birthday.

In addition, the person must not be:

- » a mentally disordered person, or
- » disqualified from jury service.

12.2.3 Disqualification

Some criminal convictions disqualify a person from jury service. Disqualified permanently from jury service are those who at any time have been sentenced to any of the following:

- » imprisonment for life, detention for life or custody for life
- » detention during Her Majesty's Pleasure or during the Pleasure of the Secretary of State
- » imprisonment for public protection or detention for public protection
- » an extended sentence
- » a term of imprisonment of five years or more
- » a term of detention of five years or more.

Those in the following categories are disqualified for ten years:

- » those who have at any time in the last ten years served a sentence of imprisonment
- » those who have at any time in the last ten years had a suspended sentence passed on them
- » those who have at any time in the last ten years had a community order or other community sentence passed on them.

In addition, anyone who is currently on bail in criminal proceedings is disqualified from sitting as a juror. If a disqualified person fails to disclose that fact and turns up for jury service, they may be fined up to £5000.

12.2.4 Eligibility issues

Lack of capacity

A judge may discharge a person from being a juror for lack of capacity to cope with the trial. This could be because the person does not understand English adequately or because of some disability that makes them unsuitable as a juror. This includes blind people, as they would be unable to see plans and photographs produced in evidence.

In June 1995, a deaf man was prevented from sitting on a jury at the Old Bailey, despite wishing to serve and bringing with him a sign-language interpreter. The judge pointed out that that would mean an extra person in the jury room and this was not allowed by law.

Discretionary excusals

Anyone who has problems that make it difficult for them to do their jury service may ask to be excused or for their period of service to be put back to a later date. The court has discretion to grant such an excusal, but will only do so if there is a sufficiently good reason. Such reasons include being too ill to attend court, suffering from a disability that makes it impossible for the person to sit as a juror, or being a mother with a small baby. Other reasons could include doing essential work, for example as a doctor or other member of medical staff.

There are sometimes temporary events that would make it difficult for a person to do jury service, such as business appointments that could not be undertaken by anyone else, being due to sit examinations or having a holiday booked. In these situations, the court is most likely to defer jury service to a more convenient date, rather than excuse the person completely.

If a person is not excused from jury service, they must attend on the date set or they may be fined up to £1000 for non-attendance.

Members of the armed forces

There is a special rule for full-time serving members of the armed forces. They may be excused from jury service if their commanding officer certifies that their absence from duty (because of jury service) would be prejudicial to the efficiency of the service.

Lawyers and police on juries

Judges, lawyers and police are eligible to serve on juries, despite the feeling that this could lead to bias or to a legally well-qualified juror influencing the rest of the jury. The test to be applied in such cases is:

'... whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

In *Hanif v United Kingdom* (2012), the European Court of Human Rights ruled that having a police officer on the jury was a breach of Article 6(1) of the European Convention on Human Rights – the right to a fair trial. In this case, the police-officer juror had immediately alerted the court to the fact that he knew one of the prosecution police witnesses. It was particularly important, as the evidence of this witness was crucial to the case against the defendant. However, the trial judge ruled that this did not matter. The case continued with the police-officer juror being the foreman of the jury, and the defendant was convicted. The Court of Appeal, somewhat surprisingly, upheld the conviction.

Judges on jury service

In June 2004 (just two months after the rules on jury service changed), a judge from the Court of Appeal, Lord Justice Dyson, was summoned to attend as a juror. This prompted the Lord Chief Justice, Lord Woolf, to issue observations to judges who are called for jury service. These point out the following:

- » A judge serves on a jury as part of their duty as a private citizen.
- » Excusal from jury service will only be granted in extreme circumstances.
- » Deferral of jury service to a later date should be sought where a judge has judicial commitments that make it particularly inconvenient for them to do jury service at the time they were called to do so.
- » At court, if a judge knows the presiding judge or other person in the case, they should raise this with the jury bailiff or a member of the court staff if they consider it could interfere with their responsibilities as a juror.
- » It is a matter of discretion for an individual judge sitting as a juror as to whether they disclose the fact of their judicial office to the other members of the jury.
- » Judges must follow the directions given to the jury by the trial judge on the law and should avoid the temptation to correct guidance that they believe to be inaccurate, as this is outside their role as a juror.

The point about letting the court know when someone involved in the case is personally known to the juror is also relevant to practising lawyers who are called for jury service.

ACTIVITY

Discuss whether you think the following people should sit on a jury:

- a woman who was fined for shoplifting a month ago
- a man who was fined and disqualified from driving for taking cars without the consent of the owner
- a doctor who works in general practice
- an 18-year-old student who has exams in three weeks
- a Circuit Judge who frequently tries cases in the Crown Court
- a woman who is 32-weeks' pregnant.

12.2.5 Vetting and challenges

Selecting a jury

At each Crown Court, there is an official who is responsible for summoning enough jurors to try the cases that will be heard in each two-week period. This

official will arrange for names to be selected at random from the electoral registers for the area the court covers. This is done through computer selection at a central office. It is necessary to summon more than 12 jurors, as most courts have more than one courtroom and it will not be known how many of those summoned are disqualified – or will be excused.

Those summoned must notify the court if there is any reason why they should not or cannot attend. All others are expected to attend for two weeks' jury service, though, of course, if the case they are trying goes on for more than two weeks they will have to stay until the trial is completed. Where it is known that a trial may be exceptionally long, such as a complicated fraud trial, potential jurors are asked if they will be able to serve for such a long period.

Vetting

Once the list of potential jurors is known, both the prosecution and the defence have the right to see that list. In some cases, it may be decided that this pool of potential jurors should be 'vetted' (that is, checked for suitability). There are two types of vetting: Disclosure and Barring Service (DBS) and authorised jury checks.

DBS checks

Checks can be made on prospective jurors to eliminate those who are disqualified.

Authorised jury checks

This is where a wider check is authorised into a juror's background and political affiliations. This practice was brought to light by the 'ABC' trial in 1978, where two journalists and a soldier were charged with collecting secret information. It was discovered that the jury had been vetted for their loyalty. The trial was stopped and a new trial ordered before a fresh jury. Following this case, the Attorney-General published guidelines in 1980 (revised in 1988) on when political vetting of jurors should take place. They state that:

- » Vetting should only be used in exceptional cases involving national security, where part of the evidence is likely to be given on camera (in secret), such as in terrorism cases.
- » Vetting can only be carried out with the Attorney-General's express permission.

Challenging

Jurors are usually divided into groups of 15 and allocated to a court. At the start of a trial, the court clerk will select 12 out of these 15 at random. Once the court clerk has selected the panel of 12 jurors, these jurors come into the jury box to be sworn in. At this point, before the jury is sworn in, both the prosecution and the defence have certain rights to challenge one or more of the jurors. There are two challenges that can be made:

- » to the array
- » for cause.

To the array

This is a challenge to the whole jury, on the basis that it has been chosen in an unrepresentative or biased way. It was used successfully against the 'Romford' jury at the Old Bailey in 1993 when, out of a panel of 12 jurors, nine came from Romford, with two of them living within 20 doors of each other in the same street.

This challenge was also used in *R v Fraser* (1987), as the defendant was from a BAME background but all the jurors were white. The judge agreed to empanel another jury. However, in *R v Ford* (1989), it was held that if the jury was chosen in a random manner, then it could not be challenged simply because it was not multi-racial.

For cause

This involves challenging the right of an individual juror to sit on the jury. To be successful, the challenge must point out a valid reason why that juror should not serve on the jury. An obvious reason is that the juror is disqualified, but a challenge for cause can also be made if the juror knows or is related to a witness or defendant. If such people are not removed from the jury, there is a risk that any subsequent conviction could be quashed.

CASE EXAMPLE***R v Wilson and Sprason* (1995)**

The wife of a prison officer was summoned for jury service. She had asked to be excused attendance on that ground, but this request had not been granted.

She served on the jury, which convicted the two defendants of robbery. Both defendants had been on remand at Exeter prison, where her husband worked. The Court of Appeal said that justice must not only be done, it must be seen to be done. The presence of the woman on the jury prevented that, so the convictions had to be quashed.

Prosecution right to stand by jurors

This is a right that only the prosecution can exercise. It allows a juror to be put to the end of the list of potential jurors, so that they will not be used on the jury unless there are not enough other jurors. The prosecution does not have to give a reason for 'standing by', but the Attorney-General's guidelines issued in 1988 make it clear that this power should be used sparingly.

▼ **Figure 12.3** The use of juries in criminal cases

Key facts	
Aspects	Summary
Qualification	• Aged 18–75 inclusive • Registered to vote • Resident in the UK for at least five years since age 13
Disqualification	• Sentenced to five years' or more imprisonment = disqualified for life • Served a prison sentence OR suspended sentence OR a community order = disqualified for ten years • On bail = disqualified while on bail
Excusals	• Members of the armed forces • Discretionary: ill, business commitments or other 'good reason'
Selection	• A central office selects names from the lists of electors • Summons sent to these people • Must attend unless disqualified or excused
Vetting	• May be checked for criminal record (<i>R v Mason</i> (1980)) • In cases of national security, may be subject to a wider check on background (subject to Attorney-General's guidelines)
Challenges	• Individual juror may be challenged for cause, e.g. knows defendant • Whole panel may be challenged for biased selection – but no right to a multi-racial jury (<i>R v Ford</i> (1989)) • Prosecution may 'stand by' any juror
Function	• Decide verdict: guilty or not guilty • Sole arbiters of fact but judge directs them on law • Verdict: – must try for a unanimous verdict – if cannot reach a unanimous verdict, then a majority verdict can be accepted of 10–2 or 11–1

12.2.6 Disadvantages of the jury system

Bias

One or more jurors on a panel may have a prejudice that can affect the deliberations and therefore the verdict. It may be a bias against the police or racial prejudice. However, if this is only shown in the jury room, there can be no appeal or investigation made.

Media influence

Media coverage of the case jurors are sitting on may influence them. This is especially true in high-profile cases, where there has been a lot of publicity about police investigations.

CASE EXAMPLES

R v West (1996)

Rosemary West was convicted for the murders of ten young girls and women, including her own daughter. From the time the bodies were first discovered, the media coverage was intense. In addition, some newspapers had paid large sums of money to some of the witnesses in order to secure their story after the trial was completed.

One of the grounds on which Rosemary West appealed against her conviction was that the media coverage had made it impossible for her to receive a fair trial. The Court of Appeal rejected the appeal, pointing out that otherwise it would mean that if 'allegations of murder were sufficiently horrendous so as to inevitably shock the nation, the accused could not be tried'. It also said that the trial judge had given adequate warning to the jurors to consider only the evidence they heard in court.

R v Taylor and Taylor (1993)

Two sisters were charged with murder. Some newspapers published a picture that gave a false impression of what was happening. After the jury convicted the two defendants, an appeal was made on the grounds of the possible influence this picture could have had on the jury's verdict; the Court of Appeal quashed the convictions.

Use of the internet

There have been several cases, such as *R v Karakaya* (2005), where it was found that at least one member of the jury had researched aspects of the case on the internet. Judges usually direct jurors not to look at the internet for information, but it seems that the use of internet research by jurors is becoming more common.

The risk of using the internet is that the information may be prejudicial to the defendant; for example, doing a search on a defendant's name may find newspaper

reports of previous convictions, which the jury should not know about. Also, defendants have been known to upload highly personal information regarding their own behaviour, including crimes, onto social-networking sites.

Because of the increasing use of the internet, the Criminal Justice and Courts Act 2015 makes it a criminal offence with a maximum penalty of two years' imprisonment intentionally to research the internet for information relevant to the case. The Act also makes it a criminal offence to disclose such information to another member of the jury.

Internet research

The case of *R v Young* (1995) is an interesting example of how a jury reached its verdict. Make an internet search for this case and read about what happened in more detail.

12.2.7 Alternatives to the use of a jury

Despite all the problems of using juries in criminal cases, there is still a strong feeling that they are the best method available. However, if juries are not thought suitable to try serious criminal cases, what alternative form of trial could be used?

Trial by a single judge

This is the method of trial in the majority of civil cases in England and Wales. It is generally regarded as producing a fairer and more predictable result.

Trial by a single judge was used for some years in certain criminal trials in Northern Ireland. These were called the Diplock courts and were used to replace jury trial because of the special problems of threats and jury nobbling that existed between the different sectarian parties. Diplock courts have now been abolished. However, there appears to be less public confidence in the use of judges to decide all serious criminal cases.

The arguments against this form of trial are that judges become case-hardened and prosecution-minded. They are also from an elite group and would have little understanding of the backgrounds and problems of most defendants. Individual prejudices are more likely than in a jury, where the different personalities should go some way to eliminating bias. On the other hand, judges are trained to evaluate cases and they are also trained in racial awareness. This may make them better arbiters of fact than an untrained jury.

Trial by a panel of judges

In some other European countries, cases are heard by a panel of three or five judges sitting together. This allows for a balance of views, instead of the verdict of a single person. However, it still leaves the problems

of judges becoming case-hardened and prosecution-minded and coming from an elite background. The other difficulty is that there are not sufficient judges and the UK system of legal training and appointment would need a radical overhaul to implement this proposal. It would also be expensive.

A judge sitting with lay assessors

Under this system, the judge and two lay people would make the decision together. This method is used in Scandinavian countries. It provides the legal expertise of the judge, together with lay participation in the legal system by ordinary members of the public. The lay people could either be drawn from the general

public, using the same method as is used for selecting juries at present, or a special panel of assessors could be drawn up, as in tribunal cases. This latter suggestion would be particularly suitable for fraud cases.

A mini-jury

Finally, if the jury system is to remain, then it might be possible to have a smaller number of jurors. In many other European countries, such as Spain, a jury has nine citizens sitting with a professional judge. Alternatively, a jury of six could be used for less serious criminal cases that at the moment can have a full 12-member jury trial, as occurs in some American states.

▼ Figure 12.4 Evaluation of juries

	Advantages of use of jury	Criticisms of use of jury
Public confidence	- Long-established system - Jury considered a fundamental requirement of a democratic society - Lord Devlin: 'the lamp that shows that freedom lives' - Michael Mansfield: 'the jury is the most democratic element of our judicial system'	- Public confidence can be lost by perverse decisions - No intelligence tests used – long, complicated trials may not be understood by some jurors - Service is compulsory so may be unpopular - Jury tampering may occur in a limited number of cases
Jury equity	- Decisions based on fairness; no reasons given <i>R v Ponting</i> (1985) – jury refused to convict when his defence was that he acted in public interest <i>R v Kronlid</i> (1996) – jury refused to convict when defence was lawful excuse <i>R v Randle and Pottle</i> (1991) – jury refused to convict for helping spy escape from prison due to time lapse	- Decisions such as <i>Ponting</i>, <i>Kronlid</i> and <i>Randle and Pottle</i> can be considered perverse (wrong) - Juries may acquit too many defendants
Open justice	- Trial in public - Explaining issues to jury will help defendant understand law and process	- Events outside jury room can be investigated which could have affected decision making <i>R v Young</i> (1995) – some members used a Ouija board <i>R v Karakaya</i> (2005) – juror shared internet search results about case with other jury members
Secret discussion	Jury free of pressure in making decisions	Lack of reasoning could suggest jury did not understand the case, especially in fraud trials
Impartiality	- Members of jury not connected to the case - Not case-hardened	- Secret discussions may result in jury members influencing others, just to reach a verdict - Jury may be influenced by reporting of case – <i>R v Taylor and Taylor</i> (1993)
Representative	Due to random selection, a wide range of ages and backgrounds – the jury will be representative	Selection based on electoral register may mean it is unrepresentative

TARGET SKILLS

- 1 State the qualifications required by lay magistrates.
- 2 State the disqualifications and reasons for not serving on a jury.
- 3 Assess the role played by lay magistrates in the criminal justice process.
- 4 Evaluate the advantages and disadvantages of using juries to decide guilt or innocence in a criminal trial.

STRETCH AND CHALLENGE

Chris has received a summons for jury service. He has never been to court before and does not understand the notes accompanying the summons. Write some notes for Chris explaining about the court he will sit in, the types of cases he may hear, the trial procedure and what he will have to do as part of the jury service.

TEST YOURSELF

- 1 Describe the selection process for lay magistrates.
- 2 Describe the work of lay magistrates in the criminal justice process.
- 3 Describe the selection process for members of a jury.
- 4 Describe the reasons why a person may not serve on a jury.
- 5 Assess the value of lay persons (lay magistrates and juries) in the criminal justice process.

EXAM-STYLE QUESTIONS

- 1 Describe the role of a jury in a criminal trial.
- 2 Discuss the disadvantages of using lay persons in the criminal justice system.

13

*Actus reus and mens rea***Introduction**

Criminal law is concerned with the liability of a person for wrongdoing against another person, society and/or the state. Everybody recognises that some behaviour is criminal.

The finding of guilt or innocence to a charge of a criminal offence requires the elements of the crime to be proved beyond reasonable doubt. This chapter considers the underlying principles that apply to criminal offences. This section of the book links particularly to the key concept of liability.

13.1 The principles underpinning fault in the criminal law

Fault, in a legal sense, is some form of wrongdoing. This might be an offence in criminal law or being negligent in the civil law of tort. Fault is the term used to describe the idea of blameworthiness. It then usually ensures that the person at fault has legal responsibility. Sometimes a person can be at fault even if the offence or action carried out is termed 'no fault'.

For criminal law, there are two elements which must be proved to show that the defendant is at fault, and therefore guilty:

- » The *actus reus* is the physical element of the crime, i.e. what the defendant has done or not done.
- » The *mens rea* is the mental element of the crime, i.e. what the defendant is intending or thinking, or failing to think about, when the crime is committed.

Each crime has its own *actus reus* and *mens rea*. For example, in theft the defendant must:

- » appropriate property belonging to another for the *actus reus*
- » do this dishonestly and intend to permanently deprive the other of it for the *mens rea*.

For *mens rea*, the difference between an accident and a criminal offence is what is in a person's mind. For example, a minor car accident when parking a car will not normally be considered criminal. It is an error by the driver and may, in civil law, give rise to a claim in negligence. The event only becomes criminal when the accident contains an element of *mens rea* that shows an intention or recklessness to cause damage to the other car.

Crimes can be categorised as either a conduct crime or a result crime:

- » A conduct crime is where the conduct of the accused forms the offence, and there is no required result from that conduct. For example, in theft, the conduct of appropriating the property of another is the theft; there is no required result such as spending the stolen money.
- » For a result crime, the result element must happen for the offence to be committed. For example, in criminal damage, it is necessary to prove that the accused's acts or omissions caused damage to, or destruction of, property belonging to another. If the damage or destruction occurred from some other cause, the offence has not been committed. This is so even though all the other elements of the *actus reus* are present and the accused had the necessary *mens rea*.

For a successful prosecution of any crime, there must be proof of the elements of the offence beyond reasonable doubt. This is a much higher standard than in civil law, where the standard of proof is on the balance of probabilities.

13.2 Actus reus**13.2.1 Conduct element of a crime**

The *actus reus* is the physical element of a crime. It can be:

- » an act, or
- » a failure to act (an omission), or
- » a state of affairs.

Voluntary nature of *actus reus*

The act or omission must be voluntary on the part of the defendant. If the defendant has no control over their actions, then they have not committed the *actus reus*. This was explained in *Hill v Baxter* (1958).

CASE EXAMPLE

Hill v Baxter (1958)

The defendant ignored a road sign that said 'halt' and carried on, causing his van to crash. He claimed to have remembered nothing for some time before the crash and said he was an automaton. He was convicted as there was no real evidence of this but, the court gave examples where a driver of a vehicle could not be said to be doing the act of driving voluntarily, included where a driver lost control of his vehicle because he was stung by a swarm of bees, was struck on the head by a stone or had a heart attack while driving.

State of affairs cases

There are some rare instances in which the defendant has been convicted even though the act was not voluntary. These situations involve what are known as 'state of affairs' cases, such as *R v Larsonneur* (1933).

CASE EXAMPLE

R v Larsonneur (1933)

The defendant, a French woman, had been ordered to leave the UK. She decided to go to Ireland, but the Irish police deported her and took her back to the UK. She did not wish to go back and was certainly not doing this voluntarily.

When she arrived back in the UK, she was immediately arrested and charged with 'being an alien to whom leave to land in the UK had been refused', in other words, an illegal immigrant. She was convicted of the offence. It did not matter that she had been brought back by the Irish police against her will.

13.2.2 Omissions as *actus reus*

The normal principle is that the *actus reus* must be a positive act, and that an omission cannot make a person guilty of an offence. This was explained by Stephen J, a nineteenth-century judge, in the following way:

'A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned. A has committed no offence.'

More recently, Lord Diplock clarified the legal position, when he stated in *R v Miller* (1983):

'I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which

consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence. I venture to think that the habit of lawyers to talk of *actus reus*, suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failures to act cannot give rise to criminal liability in English Law.'

There are a number of situations where a person can have the *actus reus* of a crime through a failure to act, an omission. These are where:

- » an Act of Parliament creates an offence involving an omission
- » a contractual duty to act exists
- » a duty exists because of a relationship between the victim and the accused
- » a duty towards the victim has been taken on voluntarily by the accused
- » a duty to act arises as a consequence of the accused's official position
- » a duty to act arises because the defendant has set in motion a chain of events.

An Act of Parliament creates an offence involving an omission

An Act of Parliament can create liability for an omission. Many of these statutory offences are regulatory and concern matters such as prevention of pollution and public safety (for example failing to take a breath test as a driver). They often only require proof of an *actus reus* to establish guilt, i.e. they are strict liability offences.

A contractual duty to act exists

An example of this can be seen in *R v Pittwood* (1902).

CASE EXAMPLE

R v Pittwood (1902)

The defendant was employed as a railway crossing keeper, meaning he was responsible for opening and closing the gates between a road and a railway line. After opening the gates to allow a cart to pass through, he went to lunch without closing them again. During his absence, a train collided with a horse and cart, killing the cart driver.

The defendant was found guilty of manslaughter, as he had failed in his contractual duty to ensure the gates were closed.



▲ **Figure 13.1** In *R v Pittwood* (1902), the railway crossing keeper was found guilty of manslaughter for failing to close gates similar to these ones

A more modern example would be a lifeguard at a beach who leaves their post unattended, contrary to their contractual duty. This failure to do their duty could make them guilty of an offence if a swimmer was injured.

A duty exists because of a relationship between the victim and the accused

A duty because of a relationship could be, for example, that between a parent and a child. This was shown in *R v Gibbins and Proctor* (1918).

CASE EXAMPLE

***R v Gibbins and Proctor* (1918)**

The child's father and his partner failed to feed the child, so that it died of starvation. They had a duty to feed the child as a result of the relationship of parent to child, so had a duty to act. Their omission to act formed the *actus reus* of the offence, and they were found guilty of murder.

A duty towards the victim has been taken on voluntarily by the accused

A duty which has been taken on voluntarily can give rise to an *actus reus* where the duty is not carried out. This can be seen in *R v Stone and Dobinson* (1977).

CASE EXAMPLE

***R v Stone and Dobinson* (1977)**

Stone's elderly sister came to live with the defendants. She became ill and unable to care for herself. She died, and the two defendants were convicted of manslaughter.

As the deceased was Stone's sister, he owed a duty of care to her. Dobinson had undertaken some care of the elderly woman, and so also owed her a duty of care. The duty was either to help her themselves or to summon help from other sources. Their failure to do either of these meant that they were in breach of their duty. This formed the *actus reus* of the crime.

A duty to act arises as a consequence of the accused's official position

An official position can give rise to a duty to act, and failure to act can then become the *actus reus* of a crime. This is unlike some countries, whose law requires every person to act in situations where another is in danger or distress. An example can be seen in *R v Dytham* (1979).

CASE EXAMPLE

***R v Dytham* (1979)**

Dytham, a police officer, witnessed a violent attack on the victim, but took no steps to intervene or summon help; instead, he drove away from the scene. The officer was guilty of willfully and without reasonable excuse neglecting to perform his duty.

A duty toward the victim arises because the defendant has set in motion a chain of events. This concept of owing a duty and being liable through omission was created in *R v Miller* (1983).

CASE EXAMPLE

R v Miller (1983)

The defendant, a homeless person, fell asleep in an empty house. His lit cigarette fell onto his mattress and a fire started. When he realised this, he left the room and went to sleep in another room. He did not attempt to put out the fire or summon help. He was guilty of arson under s 1 of the Criminal Damage Act 1971.

▼ Figure 13.2 When an omission can form the *actus reus* of a crime

Key facts	
Situation	Examples
Statutory duty	Failing to provide a specimen of breath (s 6 of the Road Traffic Act 1988)
Contractual duty, especially due to employment	<i>R v Pittwood</i> (1902)
Duty due to relationship between the victim and the accused	<i>R v Gibbins and Proctor</i> (1918)
Duty undertaken voluntarily, e.g. care of an elderly relative	<i>R v Stone and Dobinson</i> (1977)
Duty arising from public office, e.g. police officer	<i>R v Dytham</i> (1979)
Duty arising due to a dangerous situation created by the defendant	<i>R v Miller</i> (1983)

Doctors' duties

If discontinuing medical treatment is in the best interests of a patient, this is not an omission which can form the *actus reus*. This was decided in *Airedale NHS Trust v Bland* (1993), in which the NHS Trust was given permission to stop artificially feeding a man who had been in a persistent vegetative state (PVS) for over three years.

13.2.3 Causation

Where a consequence must be proved, the prosecution has to show that:

- » the defendant's conduct was the factual cause of that consequence, and

- » the defendant's conduct was in law the cause of that consequence, and
- » there was no intervening act which broke the chain of causation.

Factual cause

The defendant can only be guilty if the consequence would not have happened 'but for' the defendant's conduct – see *R v Pagett* (1983). The opposite situation was seen in *R v White* (1910).

CASE EXAMPLES

R v Pagett (1983)

The defendant used his pregnant girlfriend as a shield while he shot at armed police officers. The police fired back and the girlfriend was killed. Pagett was convicted of her manslaughter. She would not have died 'but for' him using her as a shield in the shoot-out.

R v White (1910)

The defendant put cyanide in his mother's drink, intending to kill her, but she died of a heart attack before she could drink it. The defendant was therefore not the factual cause of her death. He was not guilty of murder, although he was guilty of attempted murder.

Legal causation

The thin-skull rule

Under the thin-skull rule, a defendant must take their victim as they find them. This means that if the victim has something unusual about their physical or mental state which makes an injury more serious, then the defendant is liable for the more serious injury. Taking the rule at face value, it means that if the victim has an unusually thin skull, which means that a blow to their head will give them a serious injury, then the defendant is liable for that serious injury. This is so even though that blow would have only caused bruising in a 'normal' person. An example is *R v Blaue* (1975).

CASE EXAMPLE

R v Blaue (1975)

A young woman was stabbed by the defendant. She was told she needed a blood transfusion to save her life but she refused to have one, as her religion did not permit blood transfusions. She died and the defendant was convicted of her murder.

Despite the fact that her religious belief made the wound fatal, the defendant was still guilty because he had to take his victim as he found her.

The chain of causation

Once it is established that there is factual causation, the prosecution must also prove that there is legal causation. This is so that there is little chance of convicting an innocent person. The link between the act and the consequence is known as the chain of causation, and this must remain unbroken if there is to be criminal liability.

Suppose you invite a friend to visit you at your house. On the way to your house, your friend is attacked and seriously injured. It could be said that, but for your invitation, your friend would not have been attacked. However, you clearly did not inflict the injuries; your invitation was not the operating and substantial cause of the injuries, the key test for legal causation. The attack was the operating and substantial cause of the injuries.



▲ Figure 13.3 Breaking the chain of causation

The chain of causation can be broken by:

- » an act of a third party
- » the victim's own act
- » a natural but unpredictable event.

In order to break the chain of causation, so that the defendant is not responsible for the consequence, the intervening act must be both sufficiently independent of the defendant's conduct and sufficiently serious.

Act of a third party – medical treatment

There are a number of cases where the question arose as to whether poor medical treatment was the operating or substantial cause of the injuries. Medical treatment is unlikely to break the chain of causation unless it is so independent of the defendant's acts and 'in itself so potent in causing death' that the defendant's acts are insignificant. The following three cases show this.

CASE EXAMPLES

R v Smith (1959)

Two soldiers had a fight and one was stabbed in the lung by the other. The victim was carried to a medical centre by other soldiers, but was dropped on the way. At the medical centre, the staff gave

him artificial respiration by pressing on his chest. This made the injury worse and he died. Had the proper treatment been given, his chance of recovering would have been as high as 75 per cent. Despite this, the original attacker was still guilty of his murder. This was because the stab wound was the overwhelming cause of the death.

R v Cheshire (1991)

The defendant shot the victim in the thigh and the stomach. The victim had problems breathing and was given a tracheotomy (i.e. a tube was inserted in his throat to help him breathe). The victim died from rare complications of the tracheotomy, which were not spotted by the doctors. By the time he died, the original wounds were no longer life-threatening. The defendant was still held to be liable for his death.

R v Jordan (1956)

The victim had been stabbed in the stomach. He was treated in hospital and the wounds were healing well. He was given an antibiotic but suffered an allergic reaction to it. One doctor stopped the use of the antibiotic, but the next day another doctor ordered that a large dose of it be given. The victim died from the allergic reaction to the drug. In this case, the actions of the doctor were held to be an intervening act which caused the death. The defendant was not guilty of murder.

However, switching off a life-support machine when a patient is braindead does not break the chain of causation.

Victim's own act

If the defendant causes the victim to react in a foreseeable way, then any injury to the victim will have been caused by the defendant. This occurred in *R v Roberts (1971)*.

CASE EXAMPLE

R v Roberts (1971)

A girl jumped from a car in order to escape sexual advances. The car was travelling at between 20 and 40 mph (approximately 30 and 65 kph), and the girl was injured through jumping from the car. The defendant was held to be liable for her injuries.

However, if the victim's reaction is unreasonable, then this may break the chain of causation, as in *R v Williams* (1992).

CASE EXAMPLE

R v Williams (1992)

A hitch-hiker jumped from Williams' car and died from head injuries caused when he hit the road. The car was travelling at about 30 mph (around 50 kph).

The prosecution alleged that there had been an attempt to steal the victim's wallet and that was the reason for his jumping from the car. The court stated that the victim's act had to be foreseeable and also had to be in proportion to the threat. Here it was not in proportion to the threat and so the injury to the victim was not caused by the defendant.

A natural but unpredictable event

This would be where the injury or loss was caused by something such as an earthquake or flood.

▼ Figure 13.4 Key cases: causation

Key cases	
Case	Principle
<i>R v Pagett</i> (1983)	She would not have died 'but for' him using her as a shield in the shoot-out.
<i>R v White</i> (1910)	The defendant was not the factual cause of her death.
<i>R v Blaue</i> (1975)	The defendant was guilty because he had to take his victim as he found her.
<i>R v Smith</i> (1959)	The original attacker was still guilty because the stab wound was the overwhelming cause of the death.
<i>R v Cheshire</i> (1991)	Even though the original wounds were no longer life-threatening, the defendant was still held to be liable for his death.
<i>R v Jordan</i> (1956)	The actions of the doctor were held to be an intervening act which caused the death. The defendant was not guilty of murder.
<i>R v Roberts</i> (1971)	The defendant was held to be liable for her injuries as the victim's reactions to his attack were reasonably foreseeable in relation to the threat.
<i>R v Williams</i> (1992)	Here it was not in proportion to the threat and so the injury to the victim was not caused by the defendant.

COMMENT

Evaluation of *actus reus*

Some legal systems place people under a duty to help others in danger. It can be argued that the modern view of moral responsibility is in favour of such a duty. What about the situation where it is clear that a child is going very near the edge of a cliff? The child's parents or guardians would be liable for failure to act if they did not warn the child and try to remove them from the danger. However, a stranger would not be liable.

Should ordinary people be forced to act as 'rescuers'? The state provides professionals such as the police, fire brigade and ambulance crews to deal with emergency situations. These services are paid for through taxes, so it can be argued that every taxpayer is already doing enough.

A major problem in the law on causation is what is meant by 'intervening act must be both sufficiently independent of the defendant's conduct and sufficiently serious'? Whatever words are used, it is to define and explain to a jury. It can be argued that juries apply different standards in different cases.

Where the victim has a medical condition which makes an injury more serious, should the defendant be liable for the more serious injury or even death? It can be seen as being unjust where the defendant does not know about the medical condition. Similarly, if a person has COVID-19 but has no symptoms and is untested, it seems they can transmit the virus to another person. Is this enough for causation in law?

Internet research

Find the law report for *R v A* (2020), such as at www.bailii.org/ew/cases/EWCA/Crim/2020/407.html, or comments on the case such as <https://blog.6kbw.com/posts/weekly-digest-23-march-2020>.

Write down arguments for and against a finding of causation in a case with these or similar facts.

ACTIVITY

Prepare arguments about the issue of causation as either prosecution or defence counsel for the situation set out below. Then compare arguments with others in your group who have chosen to be the same side of the case and agree your best arguments. If possible, debate the two sides to the argument, possibly as a mock trial.

Facts established by the police investigation:

At about 2:45 a.m. on 19 June, Ali was driving, within the speed limit, towards his home on a two-

way urban road. As he came round a bend in the road, coming in the opposite direction were Bhu on a motorbike and Charles in his car. They appeared to be racing each other. Both their vehicles were estimated to be travelling at over 75 mph (120 kph). Damage to the vehicles shows that Charles' car hit the back of Bhu's motorbike which then hit Ali's car. Unfortunately, Bhu hit the windscreen of Ali's car with such force that both she and Ali were killed.

Did Charles cause Ali's death?

13.3 *Mens rea*

Mens rea is the mental element of an offence. Each offence has its own *mens rea*.

The only exceptions are offences of strict liability. These offences do not require proof of mental element in respect of at least part of the *actus reus*. Strict liability offences are usually regulatory and include most motoring offences such as exceeding the speed limit and environmental offences such as pollution.

Most of the offences against property require *mens rea* including dishonesty, discussed in Chapter 14.

Two terms are generally used to indicate the level of *mens rea* required for a person to be guilty of an offence:

- » intention
- » recklessness.

These terms are particularly relevant to the offences of criminal damage discussed in Chapter 20.

13.3.1 *Intention*

In *R v Mohan* (1975), the court defined intention as:

'... a decision to bring about, in so far as it lies within the accused's power [the prohibited consequence], no matter whether the accused desired that consequence of his act or not.'

This makes it clear that the defendant's motive or reason for doing the act is not relevant. The important point is that the defendant decided to bring about the prohibited consequence.

CASE EXAMPLE

R v Mohan (1975)

The defendant refused to stop when a policeman signalled for him to do so. Instead, he drove towards the officer. This showed a direct intention to scare or injure the policeman.

In most cases, the defendant's intention is clear. For example, where the defendant deliberately punches another person, then they have an intention to use unlawful force on the victim. This is also known as direct intent.

The main problem with proving intention is in cases where the defendant's main aim was not the prohibited consequences, but, in achieving the aim, the defendant foresaw that they would also cause those consequences. This is referred to as 'foresight of consequences' or 'oblique' intent.

The first rule about foresight of consequences is that it is not the same as intention but can be evidence of intention. A jury may use this evidence to find that the defendant had intention, but only where the harm caused as a result of the defendant's actions was a virtual certainty and the defendant realised that this was so. This was explained in *R v Woollin* (1998).

CASE EXAMPLE

R v Woollin (1998)

The defendant lost his temper and threw his three-month-old son towards his pram which was against a wall just over a metre away. The baby suffered head injuries when he hit the wall and died.

The court ruled that the consequence must be a virtual certainty, and the defendant must realise this. If the jury was satisfied on both these points, then there was evidence on which the jury could find intention.

13.3.2 Recklessness

This is a lower level of *mens rea* than intention. Recklessness is the taking of an unjustifiable risk. It has to be proved that the defendant realised the risk, but decided to take it. This can be seen in *R v Cunningham* (1957).

CASE EXAMPLE

R v Cunningham (1957)

The defendant tore a pre-payment gas meter from the wall of an empty house in order to steal the money in it. This caused gas to seep into the house next door, where a woman was affected by it. Cunningham was charged with an offence of maliciously administering a noxious thing, which has a *mens rea* of recklessness or intention to do so.

It was held that he was not guilty since he did not realise the risk of gas escaping into the adjacent house. He had not intended to cause the harm, nor had he taken a risk he knew about. To have the necessary *mens rea*, the defendant must either intend the consequence or realise that there was a risk of the consequence happening and decide to take that risk.

13.3.3 Transferred malice

This is the principle that the defendant can be guilty if he intended to commit a similar crime but against a different victim. An example is aiming a blow at one person with the necessary *mens rea* for an assault causing actual bodily harm but actually hitting another person. This occurred in the cases of *Latimer* (1886) and *Mitchell* (1983).

CASE EXAMPLE

Latimer (1886)

The defendant aimed a blow with a belt at a man in a pub after that man had attacked him. The belt bounced off the man and struck a woman in the face. Latimer was guilty of an assault against the woman, although he had not meant to hit her. There was, however, transferred malice so he could be found guilty of hitting the woman.

CASE EXAMPLE

Mitchell (1983)

The defendant tried to jump the queue at a Post Office. An elderly man took issue with his behaviour and challenged him. The defendant hit the old man and pushed him. The man fell back onto others in the queue including an elderly lady who fell and broke her leg. She later died. Here, the *mens rea* directed towards the old man was transferred to the offence against the old woman.

However, where the *mens rea* is for a completely different type of offence then the defendant may not be guilty. This was the situation in *Pembliton* (1874).

CASE EXAMPLE

Pembliton (1874)

The defendant threw a stone, intending it to hit people with whom he had been fighting. The stone hit and broke a window which was criminal damage. The intention to hit people could not be transferred to breaking the window as there was a different *mens rea* for the two offences.

13.4 Coincidence of *actus reus* and *mens rea*

In order for an offence to take place, both the *actus reus* and the *mens rea* must be present at the same time. This is also known as the 'contemporaneity rule'.

For example:

- » Suppose you decide you do not like your next-door neighbour's fence and set off to tell them that you are going to knock it down. Before you get to their house, you change your mind, and decide the fence is not so bad. You do not actually damage the fence. You cannot be guilty of criminal damage, even though you had the *mens rea* for that offence, as there is no *actus reus*.
- » If a week later, you are driving your car out of your driveway and knock down the fence accidentally, you have now done what could be the *actus reus* for criminal damage. However, you are not guilty of any criminal offence since at the moment you damaged the fence you did not have the necessary *mens rea*. The *mens rea* and the *actus reus* were not present at the same time. (Although there is no crime, there may be liability in the tort of negligence; see Chapter 37.)

However, there are some circumstances where the courts will view the events as a continuing act. Where there is a continuing act for the *actus reus* and, at some point

while that act is still going on the defendant has the necessary *mens rea*, then the two do coincide and the defendant will be guilty. This can be seen in *Fagan v Metropolitan Police Commissioner* (1968).

CASE EXAMPLE

Fagan v Metropolitan Police Commissioner (1968)

Fagan was told by a police officer to park by the pavement. Fagan drove onto the policeman's foot without realising he had done so. The policeman pointed out what had happened and asked Fagan several times to move the car off his foot. Initially he refused to move his car and swore at the policeman, telling him he could wait. Eventually Fagan did move the car. The court stated that once Fagan knew the car was on the police officer's foot, he had the required *mens rea* for the offence. As the *actus reus* (the car putting force on the foot) was still continuing, the two elements were then present together.

▼ Figure 13.5 Key cases: *mens rea*

Key cases	
Case	Principle
<i>R v Mohan</i> (1975)	This is an example of direct intention, as the defendant decided to bring about the prohibited consequence.
<i>R v Woollin</i> (1998)	This is an example of indirect (oblique) intention. The consequence must be a virtual certainty and the defendant must realise this. If the jury are satisfied on both these two points, then there is evidence on which the jury can find intention.
<i>R v Cunningham</i> (1957)	Recklessness is the taking of an unjustifiable risk. It has to be proved that the defendant realised the risk but decided to take it for there to be recklessness.
<i>R v Latimer</i> (1886)	An example of transferred malice
<i>R v Mitchell</i> (1983)	An example of transferred malice
<i>R v Pembliton</i> (1874)	The intention to hit people could not be transferred to breaking the window, as there was a different <i>mens rea</i> for the two offences.
<i>Fagan v Metropolitan Police Commissioner</i> (1968)	Where there is a continuing act for the <i>actus reus</i> and, at some point while that act is still going on the defendant has the necessary <i>mens rea</i> , then the two do coincide and the defendant will be guilty.

COMMENT

Evaluation of *mens rea*

With respect to *mens rea*, it is difficult for judges to explain the law to jurors and then for jurors to apply the law. This is partly because jurors are trying to decide what was going on in the defendant's mind, and partly because the tests are not always straightforward, and words such as 'infer' and 'find' may seem to be interchangeable.

Recklessness is a subjective test. This makes it clear that the defendant is at fault. It makes people take responsibility where they are aware there is a risk of the consequence occurring.

This is fair on the defendant, as they are only guilty if they realise the risk. However, it can be argued that the law is not so fair on innocent victims and their families. Someone may have been seriously injured or even killed, yet the attacker may be not guilty if they were not subjectively reckless. So, it can be argued that the law does not give sufficient protection to innocent members of the public.

There is conflict between public policy and legal principles. Public policy is based on public protection and the encouragement of good behaviour. Legal principles impose liability where there is fault. It is often not possible to balance public protection with fairness to the defendant.

It can also be argued that having a subjective test for recklessness means that a defendant can too easily avoid liability. The prosecution has to prove that the defendant was aware of the risk. It can be difficult to prove what was in their mind and it allows their characteristics to be taken into account in deciding whether they realised the risk.

The main problem with proving intention is in cases where the defendant's main aim was not the prohibited consequences but, in achieving the aim, the defendant foresaw that they would also cause those consequences. This is not a straightforward concept for a judge to explain to a jury.

TARGET SKILLS

- 1 Define the meaning of the term *mens rea*.
- 2 State two situations where an omission can be sufficient to form the *actus reus* of a crime.
- 3 Assess whether the law relating to the chain of causation being broken by medical treatment provides justice.
- 4 Discuss the effectiveness of the law with respect to the finding of oblique (indirect) intention.

STRETCH AND CHALLENGE

Some countries have laws that require all citizens to take appropriate action to help others in an emergency. List points for and against this type of law in the following circumstance:

You are rushing to get home as there is to be a family celebration that starts soon. As you rush along, you notice a person lying unconscious, or maybe dead, at the edge of the road. It seems that person has fallen from his motorbike.

Would your views be different if the person had not fallen from a motorbike, but appeared to be a homeless man, known locally to be a drug addict?

TEST YOURSELF

- 1 Briefly explain what is meant by *actus reus*.
- 2 Explain the 'but for' test in causation.
- 3 Give two examples of events that can break the chain of causation.
- 4 What is meant by 'foresight of consequences'?
- 5 In criminal law, when is a defendant reckless?

EXAM-STYLE QUESTIONS

- 1 Vlad was driving his car when he saw Wayne, against whom he bore a grudge. He accelerated hard towards Wayne, who was still standing in the road. Frightened, Wayne tried to jump out of the way but his hand was hit by the mirror. Wayne went to hospital where X-rays showed that he had three badly broken fingers. While at the hospital, he contracted a disease from which he died.
Explain whether Vlad caused Wayne's death.
- 2 Evaluate the law with respect to causation.

14

Theft

Introduction

Everyone knows that theft is wrong and a crime. The definition given in the Theft Act 1968 attempts to express the meaning of theft in legal terms, so that there are rules to support decisions in cases. However, there have been occasions where the application of the Act has resulted in decisions that may be considered unjust.

When the Theft Act 1968 was passed, the definition of 'theft' was meant to be in simple everyday language that ordinary people could understand. However, some case decisions on the elements of theft show that is not always the case. This chapter links to the key concept of liability.

14.1 The definition of theft

Theft is defined in s 1 of the Theft Act 1968:

'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.'

Sections 2–6 of the Act cover, in order, the meaning of the words and phrases in the definition, which makes it easy to remember the section numbers:

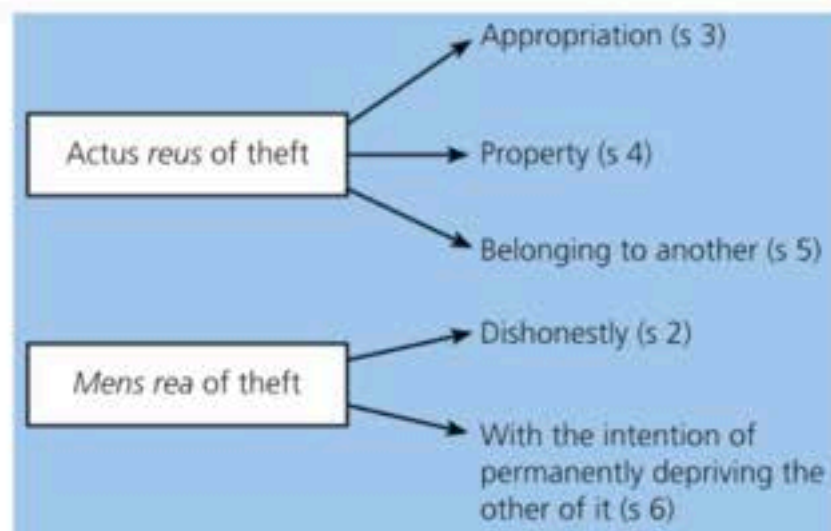
- » section 2 – dishonestly (part of the *mens rea*)
- » section 3 – appropriates (part of the *actus reus*)
- » section 4 – property (part of the *actus reus*)
- » section 5 – belonging to another (part of the *actus reus*)
- » section 6 – with the intention of permanently depriving the other of it (part of the *mens rea*).

All the elements of the *actus reus* and *mens rea* must be proved for there to be theft.

Remember that the offence is contained in s 1. A person charged with theft is always charged with stealing 'contrary to s 1 of the Theft Act 1968'. Sections 2–6 are definition sections explaining s 1 and do not themselves create any offence.

14.2 Actus reus of theft

The *actus reus* of theft is made up of the three elements contained in the phrase 'appropriates property belonging to another'. To prove the *actus reus*, it has to be shown that there was appropriation by the defendant (s 3) of something which is property within the definition of the Act (s 4) and which, at the time of the appropriation, belonged to another (s 5).



▲ Figure 14.1 Elements of theft

14.2.1 Appropriation (s 3)

Section 3(1) states:

'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.'

The important words are 'any assumption by a person of the rights of an owner amounts to appropriation'. The word 'appropriation' is significant because it replaces the word 'taking' in the old law that existed prior to the Act.

Appropriation is the act of taking something. The most obvious example would involve a physical taking, such as a thief taking a wallet from a victim's pocket without their knowledge. However, a wide variety of acts can be considered appropriation, including physically picking

up an item, destroying property, throwing property away, selling property, switching price labels on items, giving worthless cheques in payment for goods, receiving a gift and deciding to keep an item.

Taking goods from a shelf in a supermarket and placing them in one's pocket or shopping bag is an example of appropriation. This is clearly assuming the rights of an owner. It has also been decided that the action of taking the goods from a shelf in a supermarket is of itself an appropriation. The issue of the shop's consent to this normal action of shopping is discussed below.

Remember that appropriation alone does not constitute theft. It is only one of the five elements that must be proved for there to be theft.

Rights of an owner

When deciding a case, the rights of the owner must first be established, before deciding whether any of them have been taken.

The rights of an owner include selling the property or destroying it, as well as possessing it, consuming it, using it, lending it or hiring it out. For there to be appropriation, the thief must do something which assumes (takes over) at least one of the owner's rights. This can be seen clearly in *R v Vinall* (2011). This is, in fact, a robbery case, but as we will see in the next chapter, the offence of robbery requires a theft to have taken place.

CASE EXAMPLE

R v Vinall (2011)

Two young men were cycling when they encountered the defendants, who subjected them to verbal abuse and then punched one from his bicycle, made other threats and chased them for a short distance. The defendants walked away, one of them having picked up the bicycle. The bicycle was left by a bus shelter some 45 metres further on, and the police stopped them about half a mile away. The appeal against conviction raised issues of appropriation, intention permanently to deprive, and the time at which, and the purpose for which, force was used in determining whether robbery had been committed.

With respect to appropriation, the Court of Appeal stated either of two actions could be regarded as a sufficient assumption of the rights of owner:

- the initial act of taking the bicycle
- the subsequent act of abandoning the bicycle.

The rights of an owner also include the right to sell property. Appropriation by assuming the right to sell is demonstrated by the case of *R v Pitham and Hehl* (1977).

CASE EXAMPLE

R v Pitham and Hehl (1977)

The defendant tried to sell furniture belonging to another person and in that person's house. This was held to be an appropriation. The offer to sell was an assumption of the rights of an owner and the appropriation took place at that point. It did not matter whether the furniture was removed from the house or not. Even if the owner was never deprived of the property, the defendant had still appropriated it by assuming the rights of the owner to offer the furniture for sale.

The right to destroy property is also an owner's right. This means that if the defendant destroys property belonging to another person, they can be charged with theft, although they have also, of course, committed the separate offence of criminal damage. Similarly, if the property is not destroyed but merely thrown away, there is an infringement of the owner's rights.

R v Morris (1983) confirmed that appropriation can apply to *any* of the owner's rights and not necessarily *all* of them. As such, the courts have been able to take a wide interpretation of appropriation.

CASE EXAMPLE

R v Morris (1983)

The defendant switched the price labels of two items on a supermarket shelf. He then put one of the items, which now had a lower price on it, into a basket provided by the store for shoppers. He took the item to the checkout and paid for it. The defendant's conviction for theft was upheld, as he had assumed a right by switching the price labels.

▼ Figure 14.2 Key cases: appropriation [s 3]

Key cases		
Case	Facts	Law
<i>R v Vinall</i> (2011)	The defendants took a bicycle and abandoned it a short distance away.	Appropriation could have occurred during: - the initial act of taking the bicycle, and/or - the subsequent act of abandoning the bicycle.
<i>R v Pitham and Hehl</i> (1977)	The defendants tried to sell furniture belonging to another person and in that person's house.	Appropriation occurred by assuming the right to sell another's property.
<i>R v Morris</i> (1983)	The defendant switched the price labels of two items on the shelf in a supermarket.	Appropriation occurred by assuming the owner's right to put labels on the goods. Appropriation can apply to any of the owner's rights and not necessarily all of them.

Consent to the appropriation

Can a defendant appropriate an item when it has been given to them by the owner?

The Theft Act 1968 does not state that the appropriation has to be without the consent of the owner, even though the previous law was that theft could only occur where owners did not consent to the taking. So what is the position where the owner has allowed the defendant to take something because the owner thought that the defendant was taking what was owed to them?

This point was considered in *Lawrence v Commissioner for Metropolitan Police* (1972).

CASE EXAMPLE

Lawrence v Commissioner for Metropolitan Police (1972)

An Italian student, who spoke very little English, arrived at Victoria Station and showed an address to Lawrence, who was a taxi driver. The journey should have cost 50p, but Lawrence told him it was expensive. The student got out a £1 note and offered it to the driver. Lawrence said it was not enough, so the student opened his wallet and allowed Lawrence to help himself to another £6. Lawrence argued that he had not appropriated the money as the student had consented to him taking it. The court stated that there was appropriation in this situation.

In *R v Morris*, the whole system of supermarket shopping is shown to rely on the customer taking goods from shelves and the idea of the 'honest shopper'. This means that there is implied consent from shops operating a

self-service style of shopping to customers removing items from shelves, or petrol from a pump, for the purpose of purchasing the goods at the price stated. Switching labels involves an interference with the goods that is not consented to.

The point was considered again in the case of *R v Gomez* (1993), from which it can be seen that any removal of goods from a shelf in a shop is an appropriation. Note that appropriation is only one of the elements of the offence.

CASE EXAMPLE

R v Gomez (1993)

The defendant worked as a shop assistant. He persuaded the manager to accept in payment for goods two cheques which he knew to be stolen and had no value. The court stated that an act expressly or impliedly authorised by the owner of goods or consented to by him or her could amount to an appropriation of the goods within the meaning of the Theft Act 1968.

To have committed an appropriation, the defendant need not do anything contrary to the owner's apparent wishes. The issue of theft will still depend on, for example, dishonesty, and usually what the defendant is doing is not consistent with the victim's actual wishes (because the victim does not usually know the facts behind the defendant's actions).

Consent without deception – the problem of gifts

Does the decision in *R v Gomez* (1993) extend to situations where a person has given property to

another without any deception being made? This was the problem raised in the case of *R v Hinks* (2000).

CASE EXAMPLE

R v Hinks (2000)

The defendant, aged 38, was friendly with John Dolphin, aged 53, who was of limited intelligence but understood the concept of ownership of property and making a valid gift. The defendant described herself as Mr Dolphin's main carer.

In the period from April to November 1996, Mr Dolphin withdrew sums totalling around £60 000 from his building society account and deposited them in the defendant's account. Mr Dolphin also gave the

defendant a television set. During the summer of that year, Mr Dolphin made withdrawals of the maximum permissible sum of £300 every day, so that he lost most of his savings and money inherited from his father.

The House of Lords decided that even though there was a valid gift, there was an appropriation. The question remained as to whether an ordinary member of the public would see the act as dishonest for there to be theft.

▼ Figure 14.3 Key cases: consent to appropriation

Key cases		
Case	Facts	Law
<i>Lawrence v Commissioner for Metropolitan Police</i> (1972)	A taxi driver took too much money from the proffered wallet of his passenger who did not speak the same language.	There was only consent to the appropriation of the correct amount of money and not the excess because of the deception.
<i>R v Gomez</i> (1993)	Goods were handed over in exchange for worthless cheques.	The consent to appropriation of the goods was not genuine because of the deception about the value of the cheques.
<i>R v Hinks</i> (2000)	The defendant persuaded the victim to make a series of payments to her from his bank account which she insisted were gifts. The victim was of limited intelligence but understood the concept of ownership of property and making a valid gift.	Even though there was a valid gift, there was appropriation.

When does appropriation take place?

Another effect of the decision in *Gomez* is that appropriation is viewed as occurring at one specific point in time. We have already seen that in the case of *R v Vinall* (2011). This is important, as criminal law has a basic principle of coincidence of *actus reus* and *mens rea*. The later act, in a case such as *Vinall*, might be the relevant one if, for example, it was impossible to prove an intention permanently to deprive at the time of the initial taking of the bicycle.

This is further illustrated by the case of *R v Atakpu and Abrahams* (1994), where it can be seen that appropriation occurs the first time a person assumes the rights of the owner.

CASE EXAMPLE

R v Atakpu and Abrahams (1994)

The defendants hired cars in Germany and Belgium using false driving licences and passports. They were arrested at Dover and charged with theft. The Court of Appeal quashed their convictions because the moment of appropriation under the law in *Gomez* was when they obtained the cars. Therefore, the thefts had occurred outside the jurisdiction of the English courts. As the defendants had already stolen the cars in Germany and Belgium, keeping and driving them in England was not a new appropriation – a later assumption of the right of an owner or a continuing act.

A later assumption of a right

Section 3(1) makes it clear that there can also be an appropriation where the defendant acquires property without stealing it but then later decides to keep or deal with the property as an owner. The appropriation in this type of situation takes place at the point of 'keeping' or 'dealing'.

This could occur where the defendant hires a drill from a tool hire shop but instead of returning it decides to keep it. The defendant is acting as though they are the owner with the right to keep the drill.

Dealing in the property could occur where the defendant borrows a bicycle (or other property) but then sells it or gives it away. This can also happen when hiring a car. If the defendant sells the car instead of returning it, then they have dealt with it as an owner.

COMMENT

Evaluation of the law on appropriation

There are a number of problems with the law on appropriation:

- the width of acts which can be considered appropriation
- appropriation being regarded as occurring at one point in time
- the implication of the one-point concept for robbery and the conflict with decisions in robbery cases
- being able to appropriate even though the owner has consented to the act
- the conflict between civil and criminal law on gifts
- the reliance on dishonesty, a difficult concept in itself, to distinguish between innocent appropriations and appropriations which are theft
- the need for clarity and certainty in the law.

Much of modern shopping relies on the honest shopper, but the criminal law does not sit neatly with the civil law of contract. This could be improved if prosecutors relied more on fraud than theft as it does not matter whether any gain, loss, or exposure to risk of loss occurs – all that matters is that the fraudster acts with the requisite intent.

We would all consider this a dishonest action, so whether there was an appropriation seems a curious defence; perhaps the key point is that a different offence, such as fraud, may have been more appropriate.

A major argument against the ruling in *Hinks* is that in civil law the gifts were valid, and the £60,000 and the television set belonged to the defendant. Lord Steyn, in the leading judgment, accepted that this was the situation, but he considered it to be

irrelevant to the decision. However, it is clear that there can be criminal liability in both theft and fraud. This is partly because the test for dishonesty has changed, as can be seen in the case of *R v Barton and Booth* (2020).

The effect of the interpretations of appropriation is that there can be seen to be a just result, even though the practical applications can appear to be inconsistent and not to reflect the idea of contemporaneity of *actus reus* and *mens rea*.

14.2.2 Property (s 4)

For there to be theft, the defendant must have appropriated 'property'. Section 4(1) of the Theft Act 1968 gives a comprehensive definition of property, which states that almost anything can be stolen:

"Property" includes money and all other property real or personal, including things in action and other intangible property.

There are five types of item included in the definition of 'property':

- » money
- » real property
- » personal property
- » things in action
- » other intangible property.

Money

'Money' means coins and banknotes of any currency.

Real property

'Real property' is the legal term for land and buildings. Under s 4(1), land can be stolen, but s 4(2) states that this can only occur in three particular circumstances:

- 1 The person dealing with the land does so in a special capacity, for example as a trustee or under a power of attorney. This was considered in the case of *R v Gimbert* (2018), which specifically limited the exceptions to the precise wording of s 4(2).
- 2 Someone not in possession of the land severs anything forming part of the land from the land. For example, it is theft to dig up turf from someone's lawn or to dismantle a wall and take the bricks. In 1972, a man was prosecuted for stealing Cleckheaton railway station by dismantling it and removing it. While he was in fact acquitted, there was no doubt that the station could be property under the Theft Act 1968 definition.
- 3 Being in possession of the land under a tenancy, the tenant appropriates the whole or part of any fixture or structure let to be used with the land. An example of this might be removing and selling a kitchen cupboard fixed to the wall of a rented apartment.

CASE EXAMPLE

R v Gimbert (2018)

Through holding a power of attorney, the defendant stole the victim's house in order to benefit himself and his two sons. However, the power of attorney was invalid, so the exception could not apply. The land in question could not therefore be the basis of theft. The Act of Parliament could not be modified to enable this to be an offence of theft. In practice, most cases of this nature are likely to fall within the Fraud Act 2006, for example s 4 fraud by abuse of position. [See Chapter 21.]

Personal property

'Personal property' covers all moveable items such as books, jewellery, clothes and cars, as well as trivial items such as a sheet of paper or a ballpoint pen.

It was even held in *R v Kelly and Lindsay (1998)* that dead bodies and body parts can be personal property for the purposes of theft. The law has also recognised that regenerative body materials, such as hair (*R v Herbert (1961)*), blood (*R v Rothery (1976)*) and urine (*R v Welsh (1974)*), can be the subject of property rights and are capable of being stolen in certain circumstances.

CASE EXAMPLE

R v Kelly and Lindsay (1998)

Kelly was a sculptor who asked Lindsay to take body parts from the Royal College of Surgeons where he worked as a laboratory assistant. Kelly made casts of the parts. They were convicted of theft and appealed on the point of law that the body parts were not property.

The Court of Appeal held that, though a dead body was not normally property within the definition of the Theft Act 1968, the body parts were property as they had acquired 'different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes'.

Things in action

A 'thing in action' is a right which can be enforced against another person by an action in law. The right itself is property under the definition in s 4.

An example is a bank account. The customer has a right to demand the actual money equivalent to the extent of the credit in the account, or to the

extent of any agreed unexceeded overdraft limit. So, if the defendant causes the bank to debit another person's account, they have appropriated a thing in action. Similarly, a credit card account holder also has a thing in action to the unexceeded limit of the card/account. This can be appropriated too, by unauthorised use.

A cheque itself is a thing in action, but it is also a piece of paper – this is property which can be stolen. It is also a 'valuable security', which can likewise be stolen under the definition of property.

Other intangible property

This refers to other rights which have no physical presence but can be stolen under the Theft Act 1968. For example, the Act creates a separate offence with respect to electricity.

The courts have accepted that confidential information cannot be stolen, as seen in *Oxford v Moss (1979)*, where knowledge of the questions on an examination paper was held not to be property.

CASE EXAMPLE

Oxford v Moss (1979)

A civil engineering undergraduate dishonestly obtained a copy of his upcoming exam paper, read its contents and returned the paper to where he had found it. He was charged with theft of confidential information but was not convicted because information is not property under s 4 of the Theft Act 1968. The court noted that there were many options for the university in the civil courts.

Things which cannot be stolen

There are some things which cannot be stolen, except in specific circumstances which are set out in ss 4(3) and 4(4) of the Theft Act 1968. These include plants, but only those growing wild, so it is possible to steal cultivated plants. Taking apples from trees in a farmer's orchard would be theft, but picking blackberries or mushrooms growing wild in the hedgerow around a field would not be theft, unless it was done for sale or reward or other commercial purpose.

Wild animals cannot be stolen unless held in captivity, such as in a zoo. Once the animal or its carcass has been taken into possession by someone, it can then be stolen. This would happen where game is shot and then collected by the hunter. There are other criminal offences with respect to capturing or killing certain types of animal.

▼ Figure 14.4 Examples of property (s 4)

Key facts	
Type	Example
Money	Coins and banknotes of any currency
Real property	Land and buildings on the land
Personal property	All moveable items, such as jewellery or cars
Things in action	Rights which can be enforced against another person by an action in law, such as a bank account
Other intangible property	Things which have no physical presence, such as a computer game

14.2.3 Belonging to another (s 5)

In order for there to be theft of the property, that property must 'belong to another'. However, s 5(1) of the Theft Act 1968 gives a very wide definition of what is meant by 'belonging to another', so that possession or control of the property or any proprietary interest in it is sufficient. One reason for making it wide ranging is so that the prosecution does not have to prove who the legal owner is.

Possession or control

Obviously, the owner of property normally has possession and control of it, but there are many other situations in which a person can have possession and/or control of property. Someone who hires a car has both possession and control during the period of hire. If the car is stolen during this time, then the thief can be charged with stealing it from the hirer. Equally, as the car-hire company still owns the car (a proprietary right), the thief could be charged with stealing it from the company.

The possession or control of the item does not have to be lawful. Where B has stolen jewellery from A and subsequently C steals it from B, B is in possession or control of that jewellery and C can be charged with stealing it from B. This is useful where it is not known who the original owner is, as C can still be guilty of theft.

This wide definition of 'belonging to' has led to the situation in which an owner was convicted of stealing his own car, in *R v Turner (No. 2)* (1971).

CASE EXAMPLE

R v Turner (No. 2) (1971)

The defendant left his car at a garage for repairs. It was agreed that he would pay for the repairs when he collected the car, after the repairs had been completed. When the repairs were almost finished, the garage left the car parked on the roadway outside its premises. The defendant used a spare key to take the car during the night without paying for the repairs, and was subsequently tried for theft of the vehicle.

The Court of Appeal recognised that, as repairers, the garage had a right to retain possession of the item being repaired until payment was made (a repairer's lien). However, in upholding the conviction, the court relied on the simple words of the statute, that property belongs to anyone in possession or control. This implies that an owner could be guilty of the theft of their own property (although dishonesty might be an issue), even if the victim had no right to stop them taking it back (e.g. if they took it back maliciously, leaving the victim to believe that it had been taken by someone else).

It is possible for someone to be in possession or control of property even though they do not know it is there. This happened in *R v Woodman* (1974).

CASE EXAMPLE

R v Woodman (1974)

A company sold all the scrap metal on its site to another company, which arranged for it to be removed. However, a small amount of the scrap was left on the site.

The company was in control of the site, as it had put a fence around it and had notices warning trespassers to keep out. The defendant took the remaining scrap metal. He was convicted of theft, even though the company was unaware there was any scrap left.

Where goods are left for someone, they belong to the original owner until the new owner takes possession of them. This occurred in *R (on the application of Ricketts) v Basildon Magistrates' Court* (2010), where items were left outside the door of a charity shop.

CASE EXAMPLE

***R (on the application of Ricketts) v Basildon Magistrates' Court* (2010)**

In the first offence, Ricketts took bags containing items of property from outside a charity shop. He argued that the original owner had abandoned the property and, therefore, it did not belong to another. The court ruled that the goods had not been abandoned; the donor had attempted to deliver them to the charity and delivery would only be complete when the charity took possession. Until then, they were the property of the donor.

In the second offence, Ricketts had taken bags of goods from a bin at the rear of another charity shop. These goods were still in the possession of the charity at the time they were appropriated by Ricketts.

CASE EXAMPLE

***R v Webster* (2006)**

The defendant was an army sergeant who had served in Iraq. He had been awarded a medal for his service there. By mistake, the Ministry of Defence sent him a second copy of the medal, which the defendant sold on eBay. He was convicted of theft of the second medal.

On appeal his conviction was upheld on the basis that the Ministry of Defence had retained an equitable interest in the medal. In other words, it still had a proprietary interest in the medal.

▼ Figure 14.5 Key cases: property belonging to another (s 5)

Key cases		
Case	Facts	Law
<i>R v Turner (No. 2)</i> (1971)	The defendant took his car from the repairer without paying by using a spare key.	The repairer had the right to retain the car until payment was received. That right over the car was stolen.
<i>R v Woodman</i> (1974)	All the scrap on a site had been sold. The buyer removed most of it but left some behind, which was subsequently taken by the defendant.	The scrap left behind was capable of being stolen, even though the company was unaware of it.
<i>R (on the application of Ricketts) v Basildon Magistrates' Court</i> (2010)	The defendant took goods that had been left outside a charity shop as a donation to the charity.	These goods could be stolen as they either belonged to the donor of the goods or the charity shop.

Proprietary interest

Where the defendant owns property and is in possession and control of that property, they can still be guilty of stealing it if another person has a proprietary interest in it. This was the key issue in *R v Webster* (2006).

Sections 5(2), 5(3) and 5(4)

Section 5 makes it clear that in certain situations, a defendant can be guilty of theft even though the property may not 'belong to another'. These are situations in which the defendant is acting dishonestly and has either caused a loss to another or made a gain. They concern:

- » trust property
- » property received under an obligation
- » property received by another's mistake.

Section 5(2): trust property

This is simply where property is held by a trustee on behalf of another. Trusts arise in many ways, and there are many charities which are trusts. The trustees running the trust can be liable for the theft of trust property.

Section 5(3): property received under an obligation

There are many situations in which property (usually money) is handed over to the defendant on the basis that they will keep it for the owner or will deal with it in a particular way. Section 5(3) of the Theft Act 1968 tries to make sure that such property is still considered to 'belong to the other' for the purposes of the law of theft.

Under s 5(3), there must be an obligation to retain and deal with the property in a particular way. So, where money is paid as a deposit to a business, the prosecution must prove that there was an obligation to retain and deal with that deposit in a particular way. If the person paying the deposit only expects it to be paid into the bank account of the business, then if that is what happens, there cannot be theft, even if all the money from the account is used for other business expenses and the client does not receive the goods or services for which they paid the deposit. The key aspect is then the question of dishonesty, if an offence is to be established. An example can be seen in *R v Hall* (1972).

CASE EXAMPLE

R v Hall (1972)

The defendant was a travel agent who received deposits from clients for air trips to America. He paid these deposits into the firm's general account but never organised any tickets and was unable to return the money. He was convicted of theft but on appeal his conviction was quashed, because when he received the deposits he was not under an obligation to deal with them in a particular way. The Court of Appeal stressed that each case depended on its facts.

In *R v Klineberg and Marsden (1999)*, there was a clear obligation to deal with deposits in a particular way.

CASE EXAMPLE

R v Klineberg and Marsden (1999)

The two defendants operated a company which sold timeshare apartments in Lanzarote to customers in England. Each purchaser paid the purchase price on the understanding that the money would be held by an independent trust company until the apartment was ready for the purchaser to occupy.

Over £500 000 was paid to the defendants' company, but only £233 was actually paid into the trust company's account. The defendants were guilty of theft, as it was clear that they were under an obligation to the purchasers 'to retain and deal with that property or its proceeds in a particular way' and that they had not done so.

There can be an obligation in less formal situations, such as paying a shared bill. This was shown in the case of *Davidge v Bunnnett (1984)*.

CASE EXAMPLE

Davidge v Bunnnett (1984)

The defendant was given money by her flatmates to pay the gas bill but instead she used it to buy Christmas presents. There was a legal obligation to deal with the money in a particular way and, as she had not fulfilled that obligation, she was guilty of theft.

Section 5(4): property received by another's mistake

Section 5(4) provides for situations where property has been handed over to the defendant by another's mistake and so has become the defendant's property. If there were no special provision in the Act then this could not be 'property belonging to another' for the purposes of the law of theft. This section was considered in *Attorney-General's Reference (No. 1 of 1983) (1985)*.

CASE EXAMPLE

Attorney-General's Reference (No. 1 of 1983) (1985)

The defendant, a police woman, had received an overpayment of wages into her bank account. She recognised it was an overpayment. She did not withdraw any part of the money, but did not return it. She was convicted of theft of the property (a thing in action), as she was under an obligation to return it.

There must be a legal obligation to restore the property. In some situations, there is no legal obligation to restore money.

▼ Figure 14.6 Key cases: proprietary interest

Key cases		
Case	Facts	Law
<i>R v Webster (2006)</i>	An army sergeant was sent a duplicate medal by mistake and sold it.	The Ministry of Defence retained an equitable interest in the medal, so the defendant was guilty of theft.
<i>R v Hall (1972)</i>	A travel agent received travel deposits from customers. He paid the money into the firm's general account and did not arrange tickets for the customers.	The defendant was not under an obligation to deal with the deposits in a particular way under s 5(3) and so was not guilty of theft.
<i>R v Klineberg and Marsden (1999)</i>	The defendants took deposits for the purchase of timeshare apartments and agreed to place them in a separate account until the apartments were built.	As there was a clear obligation to deal with deposits in a particular way, the defendants' failure appropriated the victim's proprietary interest.

Key cases

Case	Facts	Law
<i>Davidge v Bunnett</i> (1984)	The defendant was given money by her flatmates to pay the gas bill but instead she used it to buy Christmas presents.	As there was a legal obligation to deal with the money in a particular way and the defendant had not fulfilled that obligation, she was guilty of theft.
<i>Attorney-General's Reference (No. 1 of 1983)</i> (1985)	The defendant received an overpayment of wages into her bank account. She recognised it was an overpayment. She did not withdraw any part of the money, but did not return it.	The defendant was convicted of theft of the property (a thing in action – the overpayment in her bank account) as she was under an obligation to return it.

COMMENT

Evaluation of the operation of s 5(3) and s 5(4) today

Sections 5(3) and 5(4) were enacted at a time when it was not appreciated that the courts would adopt the extensive interpretation of appropriation that appeared in *Lawrence* and was confirmed in *Gomez* and in *Hinks*. It was believed at that time that in any situation in which the victim apparently consented to the defendant's acquisition of property, no appropriation would take place.

If that acquisition (whether dishonest or not) transferred ownership (not just possession), it would be impossible for the defendant to commit theft by anything that they subsequently did with the property, of which they were now owner. In these

circumstances, either s 5(3) or s 5(4) might have some relevance.

If the requirements for either were met, then it would restore the possibility of theft by continuing to regard the original owner as still the owner (notionally) – or s 5(3) the intended recipient of the property as now the owner (notionally) – so that there could be a later appropriation of property 'belonging to another' by the defendant.

However, under the law as now interpreted, those subsections are often unnecessary. The defendant will appropriate property from the victim as soon as they assume the rights of an owner, even with consent (for example just laying hands on the money), and if they were dishonest at that point and intended permanently to deprive, they would be guilty of theft.

ACTIVITY

In each of the following situations, explain whether the *actus reus* of theft is present.

- 1 Roland works in a small factory where there are only twenty employees. One day he finds a small purse in the washroom. He opens it and finds it contains a £10 note and some coins. There is no name or other identification in it. Roland decides to keep the money, as he does not think he can find the owner.
- 2 Natalie is given a Christmas cash bonus by her employer in a sealed envelope. She has been told by her boss that the bonus would be £50. When she gets home and opens the envelope, she finds there is £60 in it. She thinks her employer decided to be more generous and so keeps the money.

Would your answer be different if:

- Natalie realised there had been a mistake but did not return the money, or
 - the amount in the envelope was £200?
- 3 Errol is given permission by his employer to borrow some decorative lights for use at a party. Errol also takes some candles without asking permission. When putting up the lights, Errol smashes one of them. He lights two of the candles, so that by the end of the evening they are partly burnt down. One of the guests admires the remaining lights and asks if he can have them to use at a disco at the weekend. Errol agrees to let him take the lights.

14.3 *Mens rea* of theft

There are two elements which must be proved for the *mens rea* of theft:

- » the appropriation of the property must be done 'dishonestly' (s 2), and
- » there must be the intention of permanently depriving the other person of it (s 6).

14.3.1 Dishonestly (s 2)

The first point which needs to be proved for the *mens rea* of theft is that when the defendant appropriated the property they did so dishonestly. Because of the problems arising from making appropriation so wide, proof of dishonesty is now the main distinguishing point between theft and an honest appropriation.

There is no definition of what is meant by dishonesty in the Theft Act 1968. Section 1(2) states that:

'it is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.'

In other words, if all the elements of theft are present, the motive of the defendant is not relevant. This means that a modern-day Robin Hood stealing to give to the poor would be guilty of theft. The defendant does not have to gain anything from the theft.

The Act does set out behaviour which is not dishonest, despite the difficulty of proving something through a negative.

Behaviour which is not dishonest

Section 2(1) states that:

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
- (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

These three situations all depend on the defendant's belief. It does not matter whether it is a correct belief, or even whether it is a reasonable belief. If the defendant has a genuine belief in one of these, they are not guilty of theft.

'He has in law the right to deprive the other of it, on behalf of himself or of a third person'

This exception requires an honest, but not necessarily reasonable, belief by the defendant of their right to take the item. This is a subjective test, so the sole concern is for the defendant to convince a jury that they reasonably held that belief.

An example of this is where an employee is instructed to collect goods from a third party. The employee honestly believes they have the legal right to do so (having been told to do so by their employer) and therefore will not

be dishonest in taking the goods, even if, in fact, there is no such right to do so.

CASE EXAMPLE

R v Small (1987)

The defendant noticed an old car parked in the road for some time with the key in the ignition. Parts were missing, and there was no petrol in it. The defendant thought the car had been dumped and therefore decided to get it going and drive it. His defence to stealing the car was that he believed it had been abandoned by its owner and therefore he had a legal right to take it. As there is no requirement that the defendant's belief is reasonable, it does not matter that a reasonable person would have known to contact the Driver and Vehicle Licensing Agency to discover the owner. Therefore, he was not guilty of theft.

A person will not be considered dishonest where they believe that they have in law the right to deprive the other of the property. *R v Holden (1991)* and *R v Robinson (1977)* illustrate this 'claim of right' defence.

CASE EXAMPLES

R v Holden (1991)

The defendant was charged with the theft of scrap tyres from Kwik Fit (a tyre supply and fitting company) where he worked. He claimed that other people had taken tyres with the permission of the supervisor. However, taking tyres was a dismissible offence under his contract of employment.

The Court of Appeal quashed his conviction. As the test is subjective, a person was not dishonest if he believed, reasonably or not, that he had a legal right to the property, providing that belief was genuinely held.

R v Robinson (1977)

The defendant was owed £7 by the victim's wife. When he went to collect the money, a fight developed between the defendant and her husband, during which a £5 note dropped out of the husband's pocket. The defendant kept the £5 note. His conviction for robbery was quashed by the Court of Appeal. There was no theft (an underlying part of robbery) because he had an honest belief that he was entitled to the money.

'He would have the other's consent if the other knew of the appropriation and the circumstances of it'

An example of this is borrowing your friend's ruler without asking, using it and then returning it, or continuing a habitual practice of borrowing tools and machinery between neighbours.

'The person to whom the property belongs cannot be discovered by taking reasonable steps'

This exception commonly applies in situations of finding items and then keeping them. It requires an honest belief by the defendant that the owner cannot be found by taking reasonable steps. An example would be finding a small coin in the street. Here, there is usually an honest belief that the owner could not reasonably be found, but that would not be so if the defendant had just seen someone pull the coin out of their pocket along with a handkerchief and drop the coin. Clearly, the more valuable the item, the less likely the owner cannot reasonably be found.

The situation where a person is willing to pay for something

In some situations, the defendant may say that they are willing to pay for the property or may, on taking the property, leave money to pay for it.

This does not prevent the defendant's conduct from being dishonest, as s 2(2) states that 'a person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property'. This prevents the defendant taking what they like, regardless of the owner's wishes.

The test for dishonesty

Where the exceptions do not apply, the courts have developed a test for what amounts to dishonesty. There is usually little argument about whether an act is dishonest – for example, shoplifting is obviously dishonest and a jury would have little difficulty with that.

However, from time to time defendants have claimed that they had not been dishonest and there was no standard test that should be applied. Examples include borrowing from the petty cash at work without permission and contrary to the company rules but intending to replace the money the next day, or borrowing from the till and leaving an IOU.

R v Ghosh (1982) used to be the leading case on what is meant by 'dishonestly'. In 2017 a civil case redefined dishonesty. Strictly speaking it did not overrule the *Ghosh* test. However, the new test was confirmed in the criminal case of *R v Barton and Booth* (2020).

The Supreme Court adopted the test that already applied in civil law and explained it in these terms:

'... the fact-finding tribunal [or in the case of a criminal trial, the jury] must first ascertain ... the actual [subjective] state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.'

It is now the case that a jury must first establish a defendant's subjective mental state and belief as to their knowledge of the facts. Having done so, the jury must then apply an objective test to the defendant's state of mind – deciding whether by the 'standards of ordinary decent people' their intent was dishonest. This objective test is 'not a matter of law but a jury question of fact and standards'. This was not elaborated upon by the court, as 'dishonesty is something which laymen can easily recognise when they see it'.

The case of *R v Barton and Booth* (2020) clarifies the matter.

CASE EXAMPLE

R v Barton and Booth (2020)

Barton was the owner of a luxury nursing home; Booth was the general manager. For many years, Barton used his position to defraud and steal from elderly and dependant residents. Consistent features in the case of each victim were that they were wealthy, vulnerable and childless. He obtained over £4 million from his criminal activities. Booth was accused of assisting him.

The Court of Appeal confirmed that the test for dishonesty in criminal cases was:

- 1 What was the defendant's actual state of knowledge or belief as to the facts?
- 2 Was their conduct dishonest by the standards of ordinary decent people?

COMMENT

Evaluation of the law relating to dishonesty

The test for dishonesty is used for many offences, so it is essential you know it accurately.

The Divisional Court adopted the civil law test as the correct approach in *DPP v Patterson* (2017). The case of *R v Barton and Booth* (2020) confirms that the new test is the criminal law test for dishonesty.

A defendant's beliefs as to their honesty are less important, not all subjective beliefs are irrelevant. The objective test must be applied to the beliefs that the defendant actually holds. A well-used example is that of a foreigner who travels on the bus in London without paying. In his home country all public transport is free, and he does not realise that he is expected to pay in England. Under the new test, the

court would have to determine his actual, genuine beliefs and then ask itself objectively whether, given those beliefs, the conduct was honest or not.

The new test gives a wider scope for conviction than *Ghosh*, and allows a conviction based on a shortfall in the defendant's conduct alone. This is of particular concern in cases such as *Barton*, where the elements of theft or conspiracy to defraud aside from dishonesty had been made out, and (broadly) the issue for the jury was simply whether the defendants were dishonest, set against a factual backdrop that is difficult for the jury to have sympathy with.

It appears that even magistrates and judges cannot agree on what is dishonest, so it is even more likely that juries will have very different views on the matter.

▼ Figure 14.7 Key cases: dishonesty (s 2)

Key cases		
Case	Facts	Law
<i>R v Small</i> (1987)	The defendant believed that an old car had been abandoned, so fixed it and took it.	The defendant honestly believed he had the legal right to take the car and so was not dishonest.
<i>R v Holden</i> (1991)	The defendant was charged with the theft of scrap tyres from his workplace.	As the test is subjective, a person is not dishonest if they believed, reasonably or not, that they had a legal right to the property, providing that belief is genuinely held.
<i>R v Robinson</i> (1977)	The defendant went to collect money he was owed. A £5 note dropped out of the debtor's husband's pocket. The defendant kept the £5.	There was no theft because the defendant had an honest belief that he was entitled to the money.
<i>R v Barton and Booth</i> (2020)	The defendants ran a nursing home and preyed on elderly and vulnerable residents.	The test for dishonesty in the criminal law is that set out in the 2017 civil case.

14.3.2 Intention of permanently depriving (s 6)

The final element that has to be proved for theft is that the defendant had the intention permanently to deprive the other of the property. In many situations, there is no doubt

that the defendant had such an intention, for example where an item is taken and sold to another person or where cash is taken and spent by the defendant. This last example is true even if the defendant intends to replace the money later, as was shown in *R v Velumyl* (1989).

CASE EXAMPLE***R v Velumyl* (1989)**

The defendant, a company manager, took £1050 from the office safe. He said that he was owed money by a friend and he was going to replace the money when that friend repaid him.

The Court of Appeal upheld his conviction for theft, as he had the intention of permanently depriving the company of the banknotes which he had taken from the safe, even if he intended to replace them later with other banknotes to the same value.

Another situation where there is a clear intention to permanently deprive is where the defendant destroys property belonging to another. This can be charged as theft, although it is also criminal damage.

There are, however, situations where it is not so clear, and s 6 of the Theft Act 1968 explains and expands the meaning of the phrase. It provides that, even though a person appropriating property belonging to another does not mean the other permanently to lose that property, they can be regarded as having the intention to permanently deprive the other of it if their intention is to treat the thing as their own to dispose of, regardless of the other's rights.

In *DPP v Lavender* (1994), the court ruled that the dictionary definition of 'dispose of' was too narrow, as a disposal could include 'dealing with' property.

CASE EXAMPLE

DPP v Lavender (1994)

The defendant took doors from a council property which was being repaired and used them to replace damaged doors in his girlfriend's council flat (public housing). The doors were still in the possession of the council but had been transferred without permission from one council property to another. Here the defendant was dealing with the doors as his own by moving them from one property to another without permission.

Borrowing or lending

A difficulty with s 6 is the point at which 'borrowing or lending' comes within the definition. Normally borrowing would not be an intention to permanently deprive, such as where a student takes a textbook from a fellow student's bag in order to read one small section and then replaces the book.

Section 6 states that borrowing is not theft unless it is for a period of time and in circumstances making it equivalent to an outright taking or disposal. In *R v Lloyd* (1985), it was held that this meant borrowing the property and keeping it until 'the goodness, the virtue, the practical value ... has gone out of the article'.

CASE EXAMPLE

R v Lloyd (1985)

The projectionist at a local cinema gave the defendant a film that was showing at the cinema, so that the defendant could make an illegal copy. The defendant returned the film in time for the next screening at the cinema. His conviction for theft was quashed because, by returning the film in its original state, it was not possible to prove an intention to permanently deprive. 'The goodness, the virtue, the practical value' of the film had not gone out of it.

If someone dishonestly takes property belonging to another, does it matter whether he or she intends permanently to deprive that person of the property? This would make it possible to convict of theft in situations such as *R v Lloyd* (1985) above, where a film was copied and then returned. On the present law, Lloyd was not guilty, yet he had appropriated property belonging to another, was being dishonest (as the only reason for the appropriation was to take an illegal copy) and temporarily deprived the other of their property. For this reason, there is other legislation such as the Computer Misuse Act 1990.

Conditional intent

Another difficulty is where the defendant examines property to see if there is anything worth stealing. What is the position if they decide it is not worth stealing and return it? This is what happened in *R v Easom* (1971).

CASE EXAMPLE

R v Easom (1971)

The defendant picked up a handbag in a cinema, rummaged through the contents and then replaced it without having taken anything. His conviction for theft of the handbag and its contents was quashed. There was no evidence that the defendant had intended to permanently deprive the owner of the bag or the items in it, so he could not be guilty of theft.

Intention permanently to deprive and throwing things away

We have already seen this in the case of *R v Vinall* (2011). For theft, the intention permanently to deprive

could have been formed when the bicycle was first taken or at the time of the subsequent abandonment. However, if the jury found that the intention was only formed at the time of the abandonment, there was therefore no robbery as the force was not used 'immediately before' the theft, and nor was it used 'in order to' steal.

Vinall can be compared with *Easom*, in which the handbag was replaced approximately in the position from which it had been removed.

Pitchford LJ explained the situation as follows:

'If the prosecution is unable to establish an intent permanently to deprive at the moment of taking it, it may nevertheless establish that the defendant exercised such a dominion over the property that

it can be inferred that at the time of the taking he intended to treat the property as his own to dispose of regardless of the owner's rights.'

Subsequent 'disposal' of the property may be evidence of either an intention at the time of the taking or an intention at the time of the disposal. When the allegation is theft, a later appropriation will suffice; when the allegation is robbery, it almost certainly will not.

The manner in which the property was disposed of is evidence supporting the inference of the s 6(1) intention. This was shown in *Chief Constable of Avon and Somerset Constabulary v Smith* (1984), but contrast with *Easom*, where the replacement of the handbag could not support the inference.

CASE EXAMPLE

Chief Constable of Avon and Somerset Constabulary v Smith (1984)

The defendant broke into a parked car and removed two cases. Having searched them, they concealed the cases, one in a nearby hedge and the other in a public toilet cubicle. The court stated that when

the cases were taken from the car, there was plain evidence capable of establishing intention:

- permanently to deprive the owner of them, and
- to treat the cases as the respondent's own, to dispose of regardless of the true owner's rights.

The cases were in fact so disposed of – they were not taken back to the car.

COMMENT

Evaluation of the law on s 6 Theft Act 1968 Intention to permanently deprive:

The first point that can be made on this part of the definition of theft is whether it is necessary to include it as part of the law of theft. If someone dishonestly takes property belonging to another, does it matter whether they intend permanently to deprive that person of the property? This would make it possible to convict of theft in situations such as *Lloyd* (1985) where a film was copied and then returned. On the present law *Lloyd* was not guilty, yet he had appropriated property belonging to another, was being dishonest as the only reason for the appropriation was to take an illegal copy, and temporarily deprived the other of his property. Abolishing the need for an intention permanently to deprive would include this behaviour within the law of theft.

The other problem is what can be called 'conditional' intention to deprive. In *Easom* (1971) where the defendant picked up a handbag, looked in it, could not find anything worth stealing and put the bag back. *Easom* was not guilty of theft because a conditional intention to deprive is not enough to convict the defendant of theft. Again, if in the definition of theft, the word 'permanent' were replaced with the word 'temporary', defendants behaving in this way could be convicted.

This would also bring the law into line with the law on burglary where the courts have ruled that a conditional intention to steal anything worth stealing in the building which the defendant is entering, is sufficient for the defendant to be guilty of burglary under s 9(1)(a) Theft Act 1968.

▼ Figure 14.8 Key cases: intention to permanently deprive (s 6)

Key cases		
Case	Facts	Law
<i>R v Velumyl</i> (1989)	The defendant took cash from the office safe. He was going to replace the money later.	The defendant had the intention of permanently depriving the company of the banknotes which he had taken from the safe, even if he intended to replace them later with other banknotes to the same value.
<i>DPP v Lavender</i> (1994)	The defendant took doors from a council property which was being repaired and used them to replace damaged doors in his girlfriend's council flat.	The defendant was dealing with the doors as his own by moving them from one property to another without permission.
<i>R v Lloyd</i> (1985)	The projectionist at a local cinema gave the defendant a film that was showing at the cinema so that he could make an illegal copy.	By returning the film in its original state, it was not possible to prove an intention to permanently deprive.
<i>R v Easom</i> (1971)	The defendant picked up a handbag in a cinema, rummaged through the contents and then replaced it without having taken anything.	The defendant had not intended to permanently deprive the owner of the bag or items in it, so he could not be guilty of theft.
<i>Chief Constable of Avon and Somerset Constabulary v Smith</i> (1984)	The defendant broke into a parked car and removed two cases. They inspected the contents and hid the cases away from the car.	The defendant had intended to permanently deprive the owner of the bag or items in it, and so was guilty of theft.

TARGET SKILLS

- 1 Define the offence of theft.
- 2 When his neighbour is out, Jake holds an auction of the neighbour's garden tools. The neighbour returns before any of the tools are taken away. Explain whether the offence of theft has been committed in this scenario.
- 3 Discuss the effectiveness of the law with respect to the definition of dishonesty.

14.4 Sentencing for theft

Theft offences are classified as either:

- » theft from a shop or stall, or
- » theft (general).

All theft offences are triable either way, with a maximum penalty in the Crown Court of seven years' imprisonment and/or an unlimited fine, and in the Magistrates' Court of six months' imprisonment and/or an unlimited fine (low-value shoplifting is treated as a summary-only offence, where the maximum is six months' imprisonment).

General sentencing principles are set out in Chapter 22.

Theft offences may be categorised according to the value of the goods stolen and additional harm suffered by the victim, for example due to the size or type of their business. This is outlined in Figure 14.9.

▼ Figure 14.9 Categorisation of theft offences according to the value of the goods stolen and harm caused to the victim

Category of offence	Value of the goods stolen and harm caused to the victim
Category 1	• High-value goods (above £1000), or • Medium-value goods (£200 to £1000) with significant additional harm to the victim
Category 2	• Medium-value goods (£200 to £1000) and no significant additional harm, or • Low-value goods (up to £200) with significant additional harm to the victim
Category 3	• Low-value goods (up to £200), and • Little or no significant additional harm to the victim

Internet research

Visit the following link for further details on sentencing guidelines for theft from a shop or stall: www.sentencingcouncil.org.uk/offences/crown-court/item/theft-from-a-shop-or-stall

Use the guidance to give examples of culpability and harm that affect the severity of the sentence.

STRETCH AND CHALLENGE

Consider the argument that bribery is no different to theft, except that both parties to the bribe should be convicted of an offence.

TEST YOURSELF

- 1 The owner of a shop asks Parvati, a lorry driver, to pick up a load of computer equipment and take it to a warehouse. Parvati agrees to do this but, after collecting the equipment, she decides not to take it to the warehouse but to sell it for cash.
Has there been an appropriation in this situation?
- 2 Della discovers the exam papers she is due to sit next week in the next-door office. She writes out the questions from the first paper on her own notepad. The second paper is very long, so she uses the office photocopier to take a copy, using paper already in the machine.
Would the item in this situation be property for the purposes of theft?
- 3 Explain the meaning of 'belonging to another' in the context of theft.
- 4 What is meant by 'intention to permanently deprive' in the law of theft?
- 5 State the test for dishonesty set out in *R v Barton and Booth* (2020).

EXAM-STYLE QUESTIONS

- 1 Conrad works in an electronics shop. At the end of his shift, he takes £100 out of the cash register as he is going on a night out. He plans to replace the money in the morning before the shop opens.

On his way home, Conrad goes into a clothes shop and finds a pair of designer jeans he likes. They cost £120, but Conrad swaps the label with that on another pair of jeans which cost £65.

Discuss Conrad's liability for theft in relation to the £100 and the pair of jeans.

- 2 Explain the *actus reus* and *mens rea* of theft.

15

Robbery

Introduction

Robbery is an offence under s 8 of the Theft Act 1968. It is a theft which is aggravated by the use or threat of force.

Section 8 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.'

A robber is often depicted in cartoons as running away with a bag of swag (stolen goods), and is generally not distinguished from the thief or the burglar. However, robbery can be seen as theft with violence, such as in the Great Train Robbery in 1963 where the driver of the London to Glasgow train suffered severe head injuries at the hands of the robbers. This chapter links to the key concept of liability.



▲ **Figure 15.1** The three men arrested in connection with the Great Train Robbery leave Linslade Court

15.1 Actus reus of robbery

The elements of the *actus reus* which must be proved for robbery are:

- » theft
- » force, or putting or seeking to put any person in fear of force.

There are two conditions on the force:

- 1 It must be immediately before or at the time of the theft.
- 2 It must be in order to steal.

15.1.1 There must be a completed theft

We have already considered what amounts to theft in Chapter 14. This means that all the elements of theft have to be present. If any one of them is missing then, just as there would be no theft, there is no robbery. For example:

- » There is no theft in the situation where the defendant takes a car, drives it for a mile and abandons it, if it can be shown that there is no intention permanently to deprive.
- » There is no robbery where the defendant uses force to take that car, as there was no theft. Case examples to illustrate this include *R v Zerei* (2012) and *R v Waters* (2015).

CASE EXAMPLES***R v Zerei* (2012)**

The defendant pulled a knife and punched the victim, whom he knew, and took his car keys. He then drove the car away. The car was found abandoned (undamaged) not far away. The defendant was convicted of robbery but the conviction was quashed on appeal, as the trial judge had misdirected the jury on the issue of intention to permanently deprive. The judge had given the jury the incorrect impression that a forcible taking was enough to show an intention to permanently deprive and also failed to deal with the fact that the defendant had abandoned the car not far away.

***R v Waters* (2015)**

A group of young people met in a park. There was animosity between some of those present. The defendant snatched the victim's phone from her and told her that she could have it back if one of her friends would speak to him. The police were immediately called to the scene and the defendant was charged and convicted of robbery. The Court of Appeal quashed the conviction because the evidence did not establish an intention to permanently deprive the victim of her phone. The defendant's condition for returning the phone could have been 'fulfilled in the near future'. This meant that there was no theft and, therefore, no robbery.

Where force is used in order to steal, then the moment the theft is complete there is a robbery. This is demonstrated by the case of *Corcoran v Anderton* (1980).

CASE EXAMPLE

Corcoran v Anderton (1980)

One of the defendants hit a woman in the back and tugged at her bag. She let go of the bag and it fell to the ground. The defendants ran off without the bag (because the woman was screaming and attracting attention). It was held that the theft was complete so the defendants were guilty of robbery.

However, if the theft is not completed, for instance if the woman in the case of *Corcoran v Anderton* had not let go of the bag, then there is an attempted theft and the defendant could be charged with attempted robbery.

15.1.2 There must be force or threat of force

As well as theft, the prosecution must prove force or the threat of force. The amount of force can be small, as shown by the case of *R v Dawson and James* (1976) and confirmed in *R v Clouden* (1987).

CASE EXAMPLES

R v Dawson and James (1976)

One of the defendants pushed the victim, causing him to lose his balance which enabled the other defendant to take his wallet. They were convicted of robbery. The Court of Appeal held that 'force' was an ordinary word and it was for the jury to decide if there had been force.

R v Clouden (1987)

The Court of Appeal held that the defendant was guilty of robbery when he approached a woman who was carrying a shopping basket in her left hand from behind and wrenched it down and out of her grasp with both hands and ran off with it. It was also stated that the question of whether the defendant had used force on a person was a question to be answered by the jury.

It can be argued that using force on the basket was effectively using force on the victim, as it was wrenched from her hand. However, if a thief pulls a shoulder bag so that it slides off the victim's shoulder, would this be considered force? It would certainly not be force if a thief snatched a bag which was resting (not being held) on the lap of someone sitting on a park bench. This can be seen in *P v DPP* (2012).

CASE EXAMPLE

P v DPP (2012)

The defendant snatched a cigarette from the victim's hand, without touching the victim in any way. The court stated:

'The unexpected removal of a cigarette from between the fingers of a person is no more the use of force on that person than would be the removal of an item from her pocket. This offence is properly categorised as simple theft.'

The situation in *P v DPP* is similar to pickpocketing (stealing from a pocket or bag), where the victim is unaware of any contact. However, where the pickpocket (or accomplice) jostles the victim to distract them while the theft is taking place, as in *R v Dawson and James* above, there is force which could support a charge of robbery rather than theft.

The definition of robbery makes clear that robbery is committed if the defendant puts or seeks to put a person in fear of force. It is not necessary that the force be applied. Putting the victim 'in fear of being there and then subjected to force' is sufficient for robbery. This covers threatening words, such as 'I have a knife and I'll use it unless you give me your wallet', and threatening gestures, such as holding a knife in front of the victim.

Robbery is also committed even if the victim is not actually frightened by the defendant's actions or words. If the defendant seeks to put the victim in fear of being then and there subjected to force, this element of robbery is present. So, if the victim is a plain-clothes police officer put there to trap the defendant and is not frightened, the fact that the defendant sought to put the victim in fear is enough.

A case illustrating the fact that the victim does not have to be frightened, and also that the amount of force does not have to be great, is *B and R v DPP* (2007).

CASE EXAMPLE

B and R v DPP (2007)

The victim, a schoolboy aged 16, was stopped by five other school boys. They asked for his mobile phone and money. As this was happening, another five or six boys joined the first five and surrounded the victim. No serious violence was used against him, but he was pushed and his arms were held while he was searched.

The court upheld the convictions for robbery on the grounds that:

- there was no need to show that the victim felt threatened; the defendant only has to seek to put any person in fear of being then and there subjected to force
- there could be an implied threat of force; in this case, so many people surrounding the victim created an implied threat
- in any event, there was some limited force used by holding the victim's arms and pushing him.

15.1.3 On any person

This means that the person threatened does not have to be the person from whom the theft occurs. An obvious example is an armed robber who enters a bank, seizes a customer and threatens to shoot that customer unless a bank official gets money out of the safe. This is putting a person in fear of being then and there subjected to force. The fact that it is not the customer's property which is being stolen does not matter.

15.1.4 Force immediately before or at the time of the theft

The force must be immediately before or at the time of the theft. This raises two problems:

- 1 How immediate does 'immediately before' have to be? There have been no decided cases on this point.
- 2 Deciding the point at which a theft is completed, so that the force is not 'at the time of stealing'. This was considered in *R v Hale* (1979), and the decision there was followed in *R v Lockley* (1995).

CASE EXAMPLES

R v Hale (1979)

The defendants forced their way into the victim's house. One put his hand over the victim's mouth to stop her screaming, while the other went upstairs and took a jewellery box. Before they left the house, they tied up the victim. Here there was force immediately before the theft, when one of the defendants put his hand over the victim's mouth. Tying up the victim could also be force in order to steal, as the theft was still continuing.

R v Lockley (1995)

The defendant was caught shoplifting cans of beer. He used force on the shopkeeper who tried to stop him from escaping. The court stated that for the purposes of robbery, appropriation is a continuing act and it is for the jury to decide whether the theft is complete prior to the use of force.

As shown in the cases of *R v Hale* and *R v Lockley* above, the courts have been prepared to view appropriation as a continuing act. In *Lockley*, the defendant used force to escape after he had stolen. Despite the fact that the appropriation for the theft occurred before the force, the Court of Appeal still held that the defendant was guilty of robbery.

This conflicts with the courts' approach in theft cases, particularly *R v Atakpu and Abrahams* (1994) (see Chapter 14, Section 14.2.1).

However, there must be a point when the theft is complete, and so any force used after this point does not make it robbery. What if in *Lockley* the defendant had left the shop and was running down the road when a passer-by (alerted by the shouts of the shopkeeper) tried to stop him, and the defendant then used force on the passer-by to escape? Surely the theft is completed before this use of force. The force used is a separate act to the theft and does not make the theft a robbery. The force will, of course, be a separate offence of assault.

15.1.5 Force in order to steal

The force must be used in order to steal. So, if the force was not used for this purpose, then any later theft will not make it into robbery.

Take the situation where the defendant has an argument with the victim and punches them, knocking them out. The defendant then sees that some money has fallen out of the victim's pocket and decides to take it. The force was not used for the purpose of that theft, so the defendant is not guilty of robbery. He is instead guilty of two separate offences: an assault and theft.

ACTIVITY

A bank official is attacked at their home by a gang, in order to steal keys and security codes. The gang then drives to the bank and steals money. The theft has taken place an hour after the use of force. Was the force used 'immediately before' the theft?

Questions

- 1 List arguments for and against the situations in this scenario being robbery.
- 2 What if the time delay were longer? What if the attack on the manager was on Saturday evening and the theft of the money 24 hours later? Does this still come within 'immediately before'?

▼ Figure 15.2 Key facts for robbery

Key facts		
Element	Law	Case
Theft	There must be a completed theft; if any element is missing, there is no theft and therefore no robbery.	<i>R v Robinson</i> (1977)
	The moment the theft is completed (with the relevant force) there is robbery.	<i>Corcoran v Anderton</i> (1980)
Force or threat of force	The jury decides whether the act amounted to force, using the ordinary meaning of the word.	<i>R v Dawson and James</i> (1976)
	Force includes wrenching a bag from a victim's hand.	<i>R v Clouden</i> (1987)
On any person	The force can be against any person.	
	The force does not have to be against the victim of the theft.	
Immediately before or at the time of the theft	For robbery, theft has been held to be a continuing act.	<i>R v Hale</i> (1979)
	Using force to escape can still be at the time of the theft.	<i>R v Lockley</i> (1995)
In order to steal	The force must be used in order to steal.	
	Force used for another purpose does not become robbery if the defendant later decides to steal.	
<i>Mens rea</i>	This is the <i>mens rea</i> for theft plus an intention to use force to steal.	

15.2 Mens rea of robbery

There are two elements to the *mens rea* of robbery:

- » The defendant must have the *mens rea* for theft, i.e. they must be dishonest and intend to permanently deprive the other of the property.
- » The defendant must intend to use force in order to steal. For example, if a defendant punched a victim and knocked them out, and then decided to steal the victim's watch, this would be theft but not robbery. If the victim was punched so that his watch could easily be stolen, this would be robbery.

TARGET SKILLS

- 1 State the legal principle from the case of *R v Lockley* (1995).
- 2 Explain how the case of *R v Hale* (1979) could be used to help obtain a conviction in *R v Lockley* (1995).
- 3 Evaluate the application of the principles set out in the precedents of *R v Hale* (1979) and *R v Lockley* (1995).

15.3 Sentencing for robbery

Robbery is triable on indictment only and has a maximum sentence of life imprisonment or an unlimited fine or both.

Robberies are divided into three categories for sentencing purposes:

- » street and less-sophisticated commercial
- » professionally planned commercial
- » dwelling.

Each of these categories reflects varying degrees of seriousness, and the guidelines then set out the steps to follow in determining the appropriate sentence.

Internet research

Find a news report of a robbery that has occurred in your locality. Take note of the facts reported and assume the report is accurate and all facts can be proved in court.

Look up the sentencing guidelines online at www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-definitive-guideline-Web.pdf

Decide what sentence you would give the offender(s).

COMMENT

Evaluation of the law relating to robbery

There are two major difficulties with the law on robbery: the element of theft and the level of force.

Element of theft

Robbery requires a theft to be completed. However, there is a difference between the way that the law on theft is applied in robbery and the way the courts have applied it in theft cases. In theft cases, it has been held that appropriation occurs at one point in time. However, in the robbery cases of *R v Hale* (1979) and *R v Lockley* (1995), the courts have been prepared to view appropriation as a continuing act. In *Lockley*, the defendant used force to escape after he had stolen. Despite the fact that the appropriation for the theft occurred before the force, the Court of Appeal still held that the defendant was guilty of robbery. This conflicts with the courts' approach in theft cases.

It can be argued that a completed theft should not be necessary for robbery. This would bring the law into line with burglary.

Level of force

The level of force required for robbery is very low. In *Dawson and James* (1976), the Court of Appeal held that 'force' was an ordinary word and it was for the jury to decide if there had been force.

There are not likely to be any problems in deciding whether there had been force where higher levels of force have been used, such as pointing a gun at the victim or punching them. The problems arise where the force is minimal, and different juries may come to different decisions as to whether or not there has been force. The fact that the force must facilitate the robbery means that it is arguable that accidental contact with someone as the defendant runs away with stolen goods should not amount to robbery.

STRETCH AND CHALLENGE

The *mens rea* for robbery includes evidence that the defendant intended to use force in order to steal. Outline decided cases where the defence argued that

any force used was accidental, or was not used to enable the theft. In each case, consider whether the verdict appears to be just.

TEST YOURSELF

Explain whether or not a robbery has occurred in each of the following situations.

- 1 Albert holds a knife to the throat of a three-year-old girl and orders the child's mother to hand over her purse or he will 'slit the child's throat'. The mother hands over her purse.
- 2 Brendan threatens staff in a post office with an imitation gun. He demands that they hand over the money in the cash register. One of the staff presses a security button and a grille comes down in front of the counter, so that the staff are safe and Brendan cannot reach the cash register. He leaves without taking anything.
- 3 Carla snatches a handbag from Delia. Delia is so surprised that she lets go of the bag and Carla runs off with it.
- 4 Ellie breaks into a car in a car park and takes a briefcase out of it. As she is walking away from the car, the owner arrives, realises what has happened and starts to chase after Ellie. The owner catches hold of Ellie, but she pushes him over and makes her escape.
- 5 Freya tells Hamid to hand over his Rolex watch and that if he does not she will send her friend Grant round to beat Hamid up. Hamid knows that Grant is a very violent man. Hamid takes off his watch and gives it to Freya.

EXAM-STYLE QUESTIONS

- 1 Blake is angry with Conroy. He lies in wait and attacks Conroy, knocking him unconscious. While Conroy is unconscious, Blake notices that he is wearing a very expensive watch and decides to steal it.
Discuss Blake's liability for robbery.
- 2 Does the law on robbery conflict with the law on theft?

16

Burglary

Introduction

There are two separate burglary offences under s 9 of the Theft Act 1968:

- ★ Section 9(1)(a) – entering a building or part of a building as a trespasser with intent to commit theft, grievous bodily harm or criminal damage

- ★ Section 9(1)(b) – having entered as a trespasser, stealing or inflicting or attempting to inflict grievous bodily harm.

This chapter links to the key concept of liability.

16.1 Common elements of s 9(1)(a) and s 9(1)(b)

Although s 9(1)(a) and s 9(1)(b) create different ways of committing burglary, they do have common elements. There must be:

- » entry
- » of a building or part of a building
- » as a trespasser.

The difference between the subsections is the intention at the time of entry:

- » For s 9(1)(a), the defendant must intend to carry out one of the three listed offences (known as ulterior offences) at the time of entering. However, there

is no need for the ulterior offence to take place or even be attempted.

- » For s 9(1)(b), what the defendant intends on entry is irrelevant, but the prosecution must prove that the defendant actually committed or attempted to commit theft or grievous bodily harm.

16.1.1 Entry

Entry is not defined in the Theft Act 1968, but there have been several cases on the meaning of the word. In *R v Brown* (1985), entry was said to mean an effective entry. However, in *R v Ryan* (1996), it was suggested that a partial entry is enough to amount to entry. If a defendant puts any part of their body within the building, this is capable of amounting to burglary.

▼ Figure 16.1 Common elements of burglary

Key facts			
Offence	Common elements	Underlying offences	Key distinctions
Section 9(1)(a)	• Entry • Of a building or part of a building • As a trespasser	Intent to commit: • theft • grievous bodily harm • criminal damage	The defendant enters the building with intent to commit the listed offences. None of these offences need in fact be committed.
Section 9(1)(b)	• Entry • Of a building or part of a building • As a trespasser	Commits theft or attempts to commit theft Or Commits or attempts to commit grievous bodily harm	The defendant, having already entered the building, then commits the listed offences. The intent to commit the offences occurs after entry to the building. Criminal damage is not a listed offence for s 9(1)(b).

CASE EXAMPLES

R v Brown (1985)

The defendant was standing on the ground outside but leaning in through a shop window, rummaging through goods. His feet and the lower part of his body were outside the shop, but the top part of his body and his arms were inside the shop. His conviction for burglary was upheld, as clearly in this situation his entry was effective.

R v Ryan (1996)

The defendant became trapped when trying to get through a window into a house in the early hours of the morning. His head and right arm were inside the house but the rest of his body was outside. The fire brigade had to be called to release him. He was convicted of burglary as there was sufficient evidence on which the jury could find that the defendant had entered the building.

16.1.2 Building or part of a building (s 9(4))

Section 9(4) of the Theft Act 1968 gives an extended meaning to the word 'building', so that it includes inhabited places such as houseboats or caravans, which would otherwise not be included in the offence. However, it does not give any basic definition for 'building'.

Usually there is no problem. Clearly houses, blocks of flats, offices, factories and so on are buildings. The word also includes outbuildings and sheds. The main problems for the courts have occurred where a structure such as a portacabin has been used for storage or office work, as opposed to a dwelling.

There are two cases on whether a large storage container is a building, and the court came to different decisions after looking at the facts. We can compare the cases of *B and S v Leathley* (1979) and *Norfolk Constabulary v Seekings and Gould* (1986).

CASE EXAMPLES

B and S v Leathley (1979)

A 25-foot-long freezer container had been kept as a storage unit in a farmyard for over two years. It rested on sleepers (plank-shaped supports from a railway), had doors with locks and was connected to the electricity supply. This was held to be a building.

Norfolk Constabulary v Seekings and Gould (1986)

A lorry trailer with wheels had been used for over a year for storage. Although it had steps up to it and was connected to the electricity supply, it was held not to be a building as it still had wheels, meaning that it remained a vehicle.

Part of a building

The phrase 'part of building' is used to cover situations in which the defendant may have permission to be in one part of the building (and therefore is not a trespasser in that part) but does not have permission to be in another part. This is demonstrated in *R v Walkington* (1979).

CASE EXAMPLE

R v Walkington (1979)

The defendant went into a counter area in a shop and opened a cash register. This area was clearly marked by a three-sided counter. The defendant's conviction for burglary under s 9(1)(a) was upheld, as he had entered part of a building (the counter area) as a trespasser with the intention of stealing.

The critical point in *Walkington* was that the counter area was not an area where customers were permitted to go. It was an area for the use of staff, so he was a trespasser.

Other examples include storerooms in shops where shoppers would not have permission to enter, or a student residence where one student would be a trespasser if they entered another student's room without permission.

The courts view domestic burglary more seriously and therefore give a broad interpretation of what amounts to a dwelling. This was specifically considered by the Court of Appeal in the case of *R v Rodmell* (1994).

CASE EXAMPLE

R v Rodmell (1994)

The defendant was convicted of burglary of a garden shed, and the theft of power tools in it. The shed stood in the large grounds of a house, and was about 50 metres from the property. The court made the following sentencing remarks:

'A garden shed is part of a person's home. Burglars should be under no illusion that burglary of outbuildings is just as much burglary of domestic premises as breaking into the front door, although it can be said to be not quite as serious as breaking onto the place where people live.'



▲ Figure 16.2 In *R v Rodmell* (1994), a garden shed was considered part of the victim's home for the purpose of burglary

16.1.3 As a trespasser

In order for the defendant to commit burglary, they must enter as a trespasser. If a person has permission to enter, they are not a trespasser. The prosecution must

prove that the defendant knew they were trespassing or that the defendant was subjectively reckless as to whether they were trespassing.

Where the defendant is given permission to enter but then goes beyond that permission, they may be considered a trespasser. This was decided in *R v Jones and Smith* (1976).

CASE EXAMPLE

R v Jones and Smith (1976)

Smith and his friend, Jones, went to Smith's father's house in the middle of the night and took two television sets without the father's knowledge or permission. The father stated that his son would not be a trespasser in the house; he had a general permission to enter. The Court of Appeal upheld the convictions for burglary, stating:

'A person is a trespasser for the purpose of s 9(1)(b) of the Theft Act 1968 if he enters premises of another knowing that he is entering in excess of the permission that has been given to him to enter, or being reckless whether he is entering in excess of that permission.'

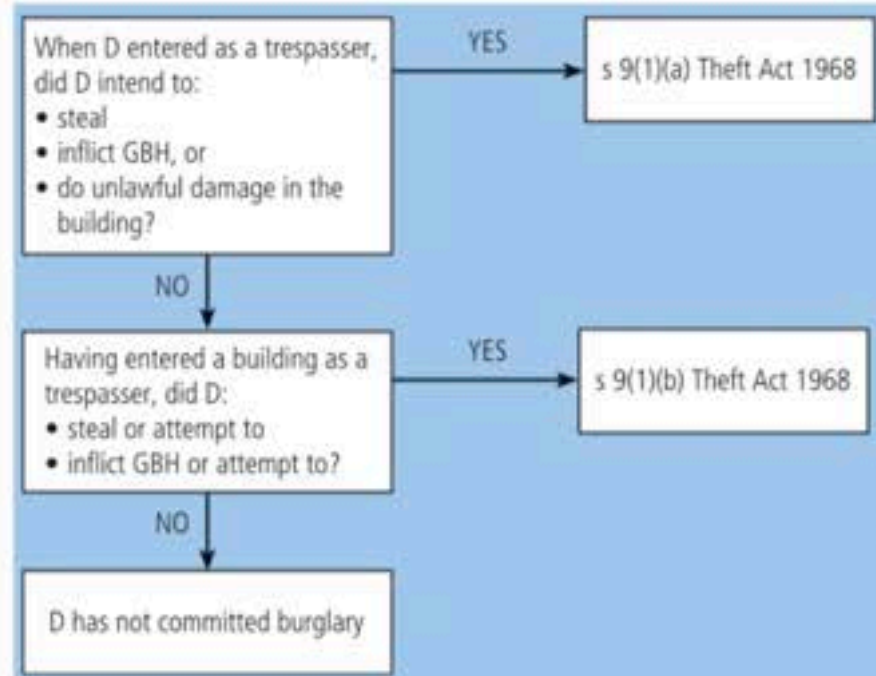
There are many situations where a person has permission to enter a place for a limited purpose. For example, someone buys a ticket to attend a concert in a concert hall, or to look round a historic building or an art collection. The ticket is a licence (or permission) to be in the building for a very specific reason and/or time. If the defendant buys a ticket intending to steal one of the paintings from the art collection, he is probably guilty of burglary.

Shoppers have permission to enter a shop. It is obvious that if a person has been banned from entering a shop, they will be entering as a trespasser if they go into that shop. Such a person would be guilty of burglary if they intended to steal goods (s 9(1)(a)) or if, having entered, they then stole goods (s 9(1)(b)).

The case of *R v Jones and Smith* (1976) takes matters further than this, as it means that any person who enters a shop intending to steal is going beyond the permission to enter the shop in order to buy goods. They will be

guilty of burglary under s 9(1)(a). However, it is rare for anyone to be charged with this as, unless the defendant admits they intended to steal when they entered, it is difficult for the prosecution to prove the intent.

The law is also clear where the defendant gains entry through fraud, such as falsely claiming to be an electricity meter reader. There is no genuine permission to enter and the defendant is a trespasser.



▲ Figure 16.3 Different ways of committing burglary

16.1.4 Mens rea for burglary

There are two parts to the *mens rea* in burglary. These are in respect of entering as a trespasser and the ulterior offence.

- 1 For both s 9(1)(a) and s 9(1)(b), the defendant must know, or be subjectively reckless, as to whether they are trespassing.
- 2 For s 9(1)(a), the defendant must have the intent to commit one of the three offences at the time of entering the building. Where the defendant is entering intending to steal anything they can find which is worth taking, then this is called a conditional intent. This is sufficient for the defendant to be guilty under s 9(1)(a), even if there is nothing worth taking and they do not actually steal anything.

For s 9(1)(b), the defendant must also have the *mens rea* for theft or grievous bodily harm when committing (or attempting to commit) the *actus reus* of one of these offences.

▼ Figure 16.4 Key facts for burglary

Elements	Comment	Case/Section
Entry	This has changed from: • 'effective and substantial' entry to • 'effective' entry to • evidence for the jury to find D had entered.	<i>Collins</i> (1972) <i>Brown</i> (1985) <i>Ryan</i> (1996)

Elements	Comment	Case/Section
Building or part of a building	Must have some permanence. Includes inhabited vehicle or vessel. Can be entry of part of a building.	<i>B and S v Leathley</i> (1979) <i>Norfolk Constabulary v Seekings and Gould</i> (1986) s 9(4) of the Theft Act 1968 <i>Walkington</i> (1979)
As a trespasser	If D has permission he is not a trespasser. If D goes beyond permission then he can be a trespasser.	<i>Collins</i> (1972) <i>Smith and Jones</i> (1976)
<i>Mens rea</i>	D must know or be subjectively reckless as to whether he is a trespasser PLUS EITHER Intention at point of entry to commit: • theft, or • grievous bodily harm, or • criminal damage OR <i>Mens rea</i> for theft or grievous bodily harm at point of committing or attempting to commit these offences in a building.	s 9(1)(a) of the Theft Act 1968 s 9(1)(b) of the Theft Act 1968

TARGET SKILLS

- 1 State the differences between burglary under s 9(1)(a) and burglary under s 9(1)(b) of the Theft Act 1968.
- 2 Section 9(4) of the Theft Act 1968 gives an extended meaning to the word 'building', so that it includes inhabited places such as houseboats or caravans, which would otherwise not be included in the offence. However, it does not give any basic definition for 'building'. Explain how the law has dealt with this problem.
- 3 How effective has the law been in defining the term 'building or part thereof'?

16.2 Aggravated burglary (s 10)

Aggravated burglary is defined in s 10 of the Theft Act 1968:

'A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive.'

There must be a burglary within the meaning of s 9(1)(a) or s 9(1)(b) of the Theft Act 1968. Once that is established, the additional requirements of the offence must be proved by the prosecution:

- » at the time
- » has with him
- » any firearm or imitation firearm
- » any weapon of offence
- » any explosive.

16.2.1 At the time

The relevant time is when the offence is committed. For a s 9(1)(a) offence, this is when the defendant enters the building as a trespasser. For a s 9(1)(b) offence, it is when the theft or assault takes place. This can be seen in the case of *R v O'Leary* (1986).

CASE EXAMPLE

R v O'Leary (1986)

The defendant picked up a knife after entering the premises as a trespasser but before he confronted the householders and demanded their cash and jewellery.

The Court of Appeal decided that the time at which the offence of burglary was completed was the time at which a defendant must be proved to have with him a weapon of offence. He was therefore guilty of aggravated burglary as he was charged with a s 9(1)(b) offence.

It would have been different if the charge had been aggravated burglary based on burglary with intent to steal under s 9(1)(a). The burglary would have been completed as soon as he entered with the intention to steal. Therefore if he picked up a knife *after* he had entered, he could not have been guilty of an aggravated burglary based on s 9(1)(a).

16.2.2 Has with him

The courts have interpreted this phrase to extend beyond physical carrying of the weapon. The court will consider how immediately accessible the item is, i.e. how close it is to the defendant. This might include a remote control for an explosive device being placed nearby.

16.2.3 Any firearm or imitation firearm

Section 10(1)(a) of the Theft Act 1968 states that:

"Firearm" includes an airgun or air pistol, and "imitation firearm" means anything which has the appearance of being a firearm, whether capable of being discharged or not.

16.2.4 Any weapon of offence

Section 10(1)(b) of the Theft Act 1968 states that:

"Weapon of offence" means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use.

In the case of *R v Kelly* (1993), we can see that something not normally considered a weapon of offence can become a weapon of offence.

CASE EXAMPLE

R v Kelly (1993)

The defendant used a screwdriver, which he had taken with him in order to break into a property, to assault the occupant who had surprised him during the burglary.

ACTIVITY

Consider the case of *R v Kelly* (1993). If a screwdriver can be used as a weapon, list the arguments for and against the following being classified as a weapon of offence:

- the defendant's belt
- the defendant's house key
- a stone the defendant had used in order to break into a house.

16.2.5 Any explosive

Section 10(1)(c) of the Theft Act 1968 states that:

"Explosive" means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

16.3 Sentencing for burglary

Burglary is a triable-either-way offence, except in particular circumstances, when it is indictable only. These circumstances include where the burglary was in a dwelling and any person in the dwelling was subjected to violence or the threat of violence, or the burglary was a domestic burglary and the 'three strike rule' applies. The maximum penalty at the Crown Court is 14 years' imprisonment in the case of burglary of a dwelling, or in other cases 10 years' imprisonment.

Aggravated burglary is triable only on indictment with a maximum sentence of life imprisonment.

Internet research

Look at the information on crime statistics in England and Wales:

www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingdecember2019#long-term-trends-in-theft-offences

Note why there might be accurate reporting of these offences. Make arguments as to how the trends may change and what factors are likely to influence those changes.

COMMENT

Evaluation of the law relating to burglary

There are anomalies between the different ways of committing burglary under s 9(1)(a) and s 9(1)(b). Under s 9(1)(a), the defendant at the time of entering must have specific intention to carry out certain criminal acts. For s 9(1)(b), there is no need to prove the defendant's intention at the time of entry, but it must be shown that once in the building they committed certain crimes.

Does the law primarily protect people or property? The defendant need only intend some damage (even slight) to be guilty under s 9(1)(a). Yet so far as injuring a person is concerned, the prosecution must prove an intention to inflict grievous bodily harm (really serious injury). This difference appears to be placing the protection of property above the protection of people. However, under s 9(1)(b) only theft or inflicting grievous bodily harm will trigger the required elements for burglary. Thus, a defendant who enters a building as a trespasser with the intention of causing damage is guilty of burglary, while a defendant who enters a building as a trespasser with no particular intention and then, when in the building, damages it or other property, has not committed burglary.

It is easier to prove s 9(1)(b) burglary than s 9(1)(a). This is because for s 9(1)(a) the defendant's intention has to be proved, while for s 9(1)(b) the commission of one of the 'trigger' offences has to be proved. Proving a fact is easier than proving intention or conditional intention, as in *R v Walkington* [1979].

The Theft Act 1968 does not define key elements of the offence of burglary. There is no definition of 'entry', 'trespasser' or 'part of a building'. 'Building' is only defined to extend its meaning to include inhabited places such as houseboats and caravans. This has created difficulty in some cases and inconsistent decisions, especially on what is meant by 'entry'.

Another criticism of the law on burglary is where judges have decided that a person who is not a trespasser can become one when they go beyond the permission given to them; this was seen in *R v Jones and Smith* [1976].

Aggravated burglary under s 10 is a useful offence to ensure a more severe sentence can be applied upon conviction. This is particularly appropriate for domestic burglaries and giving comfort to victims of the offence.

STRETCH AND CHALLENGE

'There is no reason why there should be two separate offences of burglary.'

Write points for and against this motion.

TEST YOURSELF

- 1 What offences underlie s 9(1)(a) burglary?
- 2 What offences underlie s 9(1)(b) burglary?
- 3 Explain the meaning of the terms 'entry' and 'building or part thereof'.
- 4 Outline the *mens rea* of burglary.
- 5 Distinguish the offences of burglary and aggravated burglary.

EXAM-STYLE QUESTIONS

- 1 Bilal was friendly with Mo and was allowed to go into Mo's house to use his games console even when Mo was away, providing he used his own controller and not Mo's controller. Bilal became increasingly annoyed that Mo always did better than he did, and became convinced it was because Mo's controller was better than his.

Bilal decided to go to Mo's house and smash Mo's controller. When he got inside the house, he could not find the controller, so he took a cup that Mo had won in a competition. He intended to taunt Mo about the missing cup and then marvellously 'find' and return it to Mo.

Discuss the liability of Bilal for burglary.

- 2 Explain the meaning of the term 'trespasser' in the law of burglary.

Introduction

The common idea of blackmail is where the defendant threatens to reveal some information about the victim unless the victim pays them money.

This, of course, is blackmail, but the offence also covers many more situations. This chapter links to the key concept of liability.

17.1 Definition of blackmail

Blackmail is defined in s 21 of the Theft Act 1968:

'(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief –

- (a) that he has reasonable grounds for making the demand; and
- (b) that the use of the menaces is a proper means of reinforcing the demand.

(2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.'

From this, it can be seen that there are four points to be proved:

- » a demand
- » which is unwarranted and
- » made with menaces
- » and with a view to gain or intent to cause loss.

17.2 Actus reus of blackmail

The *actus reus* of blackmail is the making of an unwarranted demand with menaces.

17.2.1 Demand

The demand may take any form, for example words, conduct, writing, email or any other form. It need not even be made explicitly to the victim, as in *R v Collister and Warhurst* (1955).

CASE EXAMPLE***R v Collister and Warhurst* (1955)**

The defendants were two policemen. They said they would be reporting the victim for an offence, but that they would hold back the report until they met him again the next day. At that meeting, the policemen asked if he had anything for them, saying 'Remember, sir, I am now making an appeal to your benevolence'. The victim handed over £5. This amounted to a demand sufficient for the offence of blackmail.

Making the demand is the *actus reus* of the offence. Once it is made, the *actus reus* is complete.

The demand does not have to be received by the victim. Where a demand is sent through the post, the demand is considered made at the point the letter is posted, as decided in *Treacy v DPP* (1971). Where the demand is made by a defendant outside England and Wales to somebody inside England and Wales, an offence is also committed in England and Wales, as in *R v Pogmore* (2017).

CASE EXAMPLES***Treacy v DPP* (1971)**

The defendant posted a letter containing a demand with menaces in England to someone in Germany. Even though the letter with the demand in it would not be opened until it arrived in Germany, the defendant could be guilty of blackmail in England as this was where he posted the letter.

***R v Pogmore* (2017)**

The defendant was a self-employed commercial balloon pilot for an English company. His contract was terminated by the company in a manner he considered inadequate. He started a campaign against the company and its directors by email from abroad. The court decided the demand with menaces could be sent either from or to a place in England and Wales.

In making the demand, the blackmailer can pose as the victim rather than the aggressor and be guilty of blackmail, as in *R v Lambert* (2009).

CASE EXAMPLE

R v Lambert (2009)

The defendant rang someone's grandmother, pretending to be a victim and asking for money saying, 'Nana, this is Aaron [the name of the grandson]. They've got me tied up. They want £5000, Nana'. The caller, who made two phone calls, was speaking about a grandson who had clearly got into financial difficulties. The caller was convicted of blackmail.

17.2.2 The demand must be unwarranted

Section 21 of the Theft Act 1968 explains that any demand made with menaces is unwarranted unless two tests set out in s 21(1) are fulfilled. The defendant has to show that they believed:

- (a) they had reasonable grounds for making the demand, and
- (b) the use of the menaces was a proper means of reinforcing the demand.

These two tests focus on the defendant's belief and so give a subjective element to what is an unwarranted demand. If the defendant really thought they had reasonable grounds for making the demand and that the use of menaces was the proper way of reinforcing the demand, then they are not guilty of blackmail. This was shown by *R v Harvey* (1981).

CASE EXAMPLE

R v Harvey (1981)

The defendants had paid the victim £20 000 for what was claimed to be a specific illegal product. In fact, it was not the illegal product and the defendants wanted their money back. As the deal was an illegal contract, there was no right in law to recover the money. They kidnapped the victim, his wife and his child and made threats including murder if the money was not returned. They were convicted of blackmail.

When they appealed against their conviction, it was necessary for the defendants to show both of the following:

- 1 They believed they had reasonable grounds for making the demand – on this point, the court

held that it could be accepted that they did so believe, but it was a matter for the jury to decide.

- 2 They believed the use of the menaces was a proper means of reinforcing the demand – on this point, the court upheld the defendants' convictions, as they could not have believed that making threats including murder was 'a proper means of reinforcing the demand'.

The two tests mean that, even though the defendant has a genuine claim, they can still be guilty of blackmail if they do not believe that the use of the menaces was a proper means of reinforcing the demand. If the defendant is aware that they are threatening to commit a crime, they cannot claim that the demand is reasonable.

For example, if the defendant has lent the victim money, they are entitled to demand its return – this is no different to a bank lending money to its customer. The person owed the money certainly has reasonable grounds for making the demand under the first test in s 21(1). However, if the defendant threatens to beat up the victim unless the victim repays the money by the next day, and the defendant knows that this is not a proper means of reinforcing their demand, then the defendant can be guilty of blackmail.

17.2.3 The unwarranted demand must be made with menaces

'Menaces' has been held to mean a serious threat, but it is wider than just a threat. In *R v Lawrence and Pomroy* (1971), it was held that 'menaces' was an ordinary English word which any jury can be expected to understand.

CASE EXAMPLE

R v Lawrence and Pomroy (1971)

The two defendants had carried out building repairs on the victim's house. The victim was refusing to pay, because he claimed the repairs had been poorly done. The defendants went to victim's house and the first defendant said 'Step outside the house and we will sort this out'. The second defendant said in a threatening way 'Come on mate, come outside'. Later it was found that the first defendant was carrying a flick knife in his coat. The Court of Appeal upheld the defendants' convictions for blackmail.

In *R v Clear* (1968), it was stated that the menace must be 'of such a nature and extent that the mind of an ordinary person of normal stability and courage might be influenced or made apprehensive by it so as to unwillingly accede to it'. It is not necessary to prove that the victim was actually intimidated. So, if the menaces would affect an ordinary person this is sufficient, but if they would not, then blackmail cannot usually be proved. This was shown in *R v Harry* (1974).

CASE EXAMPLE

R v Harry (1974)

The defendant was the organiser of a student appeal, a traditional annual charity fundraising event featuring pranks by university and college students at that time. He wrote to local shopkeepers asking for donations to charity and offering 'immunity' from any 'inconvenience' arising from threatened activities. The letter sent out indicated that paying for a poster would avoid 'any activity which could in any way cause you inconvenience'.

Of the 115 shopkeepers who received that letter only five complained. The trial judge pointed out that as a group the shopkeepers who had received the letter were unconcerned about the supposed 'threat'. He therefore ruled that according to the definition given in *R v Clear*, blackmail was not proved. There had not been any 'threat' which influenced or made them apprehensive so as to unwillingly accede to the demand.

However, in *R v Garwood* (1987) the Court of Appeal said that where a threat is made which would not affect a normal person, this can still be 'menaces' if the defendant was aware of the likely effect on the victim. This is similar to the idea that a defendant takes a person as they find them, but requires an element of knowledge on the defendant's part that the victim would likely be affected by their actions or words, for example if they knew the victim was very timid.

The fact that the victim does not give into the menaces does not prevent the defendant from being guilty. For example, the victim may refuse to pay up and instead go to the police to report the menaces. The defendant can still be guilty of blackmail.

ACTIVITY

Review the cases on blackmail that you have studied in this chapter.

- 1 List examples of menaces and unwarranted demands from those cases.
- 2 Do you know of any recent blackmail cases? What were the menaces and unwarranted demands?

17.3 Mens rea of blackmail

The *mens rea* of blackmail has three aspects:

- 1 An intention to make an unwarranted demand with menaces.
- 2 Doing so with a view to gain for oneself or another or with intent to cause loss to another.
- 3 Either not believing one has reasonable grounds for making the demand or not believing that the use of the menaces is a proper means of reinforcing the demand.

17.3.1 Intention to make an unwarranted demand with menaces

The defendant must have intended to perform the *actus reus* of making a demand with menaces. Intention is explained in Chapter 13.

There is no requirement of dishonesty for the offence of blackmail.

17.3.2 With a view to gain or intent to cause loss

Section 34(2)(a) of the Theft Act 1968 defines 'gain' and 'loss':

'For the purposes of this Act –

(a) "gain" and "loss" are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and –

(i) "gain" includes a gain by keeping what one has, as well as a gain by getting what one has not; and

(ii) "loss" included a loss by not getting what one might get, as well as a loss by parting with what one has.'

So, the view to gain for oneself, or the intent to cause loss to another, has to involve money or other property. The gain or loss may be temporary or permanent and include gain by keeping what one already has and loss by not getting what one might otherwise get. Property has the same meaning as for theft.

Even where the defendant does not succeed in making the gain or causing the loss they intended, they are still guilty of blackmail. The important point is that they made the unwarranted demand with a view to gain or an intent to cause a loss.

An unusual case on this is *R v Bevans* (1988).

CASE EXAMPLE

R v Bevans (1988)

The defendant, who was suffering from severe osteoarthritis, pointed a gun at his doctor and demanded a morphine injection for pain relief. The doctor gave him the injection. It was held that the morphine was property, and also that it was both a gain for the defendant and a loss to the doctor from whom it was demanded.

17.3.3 Not believing one has reasonable grounds for making the demand or not believing that the use of the menaces is a proper means of reinforcing the demand

The defendant will not be guilty of blackmail if they believe they are justified in making the demand and if they believe that the use of threats is the proper way of enforcing the demand. The belief must be genuinely held and can be a moral rather than a legal belief, although a belief that would generally be viewed as immoral is no defence.

This can be seen from the case of *R v Harvey* (1981) (above), where a drug deal left the defendant having

paid £20 000 for something worthless. He then kidnapped the seller's wife and child and threatened to maim and rape them if the money was not returned. He was convicted of blackmail, even though he believed he was justified in making the threats.

17.4 Sentencing for blackmail

Blackmail is triable only on indictment and carries a maximum penalty of 14 years' imprisonment.

There are no specific sentencing guidelines, so the general guidelines in Chapter 22 apply.

▼ Figure 17.1 Summary chart for the offence of blackmail

Key facts	
Actus reus	Relevant cases
A demand	<i>R v Collister and Warhurst</i> (1955) <i>Treacy v DPP</i> (1971) <i>R v Pogmore</i> (2017) <i>R v Lambert</i> (2009)
Which is unwarranted	<i>R v Harvey</i> (1981)
Made with menaces	<i>R v Lawrence and Pomroy</i> (1971) <i>R v Harry</i> (1974)
With a view to gain or intent to cause loss	<i>R v Bevans</i> (1988)
Mens rea	Comment
An intention to make an unwarranted demand with menaces	Intention can be direct or oblique
Doing so with a view to gain for oneself or another or with intent to cause loss to another	No need for dishonesty
Not believing one has reasonable grounds for making the demand	A question of fact
Not believing that the use of the menaces is a proper means of reinforcing the demand	A question of fact
Sentencing	
Maximum 14 years' imprisonment	

Internet research

An example of blackmail sentencing can be seen at:
<https://ukcrime.wordpress.com/2013/02/26/derek-rose-sentenced-for-blackmail>

- 1 Read the blog. What factors do you think should be relevant in sentencing such a case?
- 2 Make a list of culpability and harm points as you have seen with respect to other crimes.

TARGET SKILLS

- 1 Define the offence of blackmail.
- 2 Explain the meaning of the term 'unwarranted demand' in the offence of blackmail.
- 3 How well has the law dealt with the question of whether a defendant in a blackmail case has used menaces?

COMMENT

Evaluation of the law relating to blackmail

A number of criticisms emerge from the law on blackmail.

There is no requirement to show that a demand had been made expressly. If a demand is implied, this may be enough to prove blackmail, although such proof could be difficult.

A demand via post will be deemed to have been made the moment it is posted. This is consistent with the posting rules in contract law. The demand will have been made before the victim was even aware of it occurring, and it remains in existence as a continuous demand until it has been withdrawn.

There is no requirement to show that the individual who is making the demand is the same individual carrying out the menaces. Neither is it a requirement to show that the person making the demand is in a position to undertake the threatened action. Equally, menaces may be interpreted differently by persons who are not of 'average firmness'.

There is always difficulty for a defendant to prove they believed the two factors required for the defence of reasonable grounds. The test is subjective, so when looking at the two factors, it is the belief of the defendant which is important. Whether they are actually entitled to the money or property demanded is irrelevant.

Section 34 of the Theft Act 1968 defines 'gain' and 'loss' exclusively in terms of money or other property. This means things of economic value only, and therefore probably not something intangible such as companionship. However, actual gain or loss is not essential in blackmail.

The reporting rate for blackmail offences will be affected by the fact that blackmail is often hidden, because it is undertaken in the context of relationships of dominance and subordination. A person who is blackmailed may be terrified to speak out because they do not wish to expose themselves to criminal liability or to damage their reputation.

STRETCH AND CHALLENGE

Consider the offences of robbery and blackmail. Set out the arguments that the two offences overlap. How might this relate to cybercrime?

TEST YOURSELF

- 1 Which section of which Act defines the offence of blackmail?
- 2 What has to be proved for the *actus reus* of blackmail?
- 3 Explain what is meant by 'unwarranted' in the definition of blackmail.
- 4 Explain what is meant by 'menaces' in the definition of blackmail.
- 5 The defendant must intend to make a gain or cause loss of money or other property. Give three examples of 'other property'.

EXAM-STYLE QUESTIONS

- 1 Adam obtained a large sum of money by defrauding Rishi and boasted of his new wealth to his friend, Carlos. Carlos wanted money for a holiday. He threatened Adam that he would tell Rishi that Adam had defrauded him, unless Adam gave him £5000. Discuss Carlos' liability for the offence of blackmail.
- 2 Describe the *mens rea* required for the offence of blackmail.

18

Handling stolen goods

Introduction

Everyone loves a bargain, and people often seek out the best deals for goods. Sometimes though, these 'bargains' may involve stolen goods. Once stolen, goods are often quickly sold on using social media, via online marketplaces, on the street and even door to door.

Even if someone pays a 'fair' price for stolen goods, it does not mean they become the legal owner. This is likely to be handling stolen goods. As the true owner is deprived of what is rightfully theirs, the law has to balance the interests of the victim of the original theft and the apparently innocent purchaser of the stolen goods.

The offence of handling stolen goods is considered more serious than theft, as the existence of professional handlers (fences) encourages theft. Many thefts would not occur if there were no outlet for the stolen goods, so sentencing reflects the encouragement to steal from the existence of people willing to buy stolen goods from the thief for resale.

Goods obtained through blackmail or fraud are also considered stolen goods for the purposes of this offence, as cash is dishonestly withdrawn from an account which has received a wrongful credit. This chapter links to the key concept of liability.

18.1 Definition of handling stolen goods

Section 22 of the Theft Act 1968 defines the offence:

'(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.

(2) A person guilty of handling stolen goods shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years.'

Internet research

Visit www.fsp-law.com/buying-stolen-property-some-cautionary-tales

Write down arguments for and against the law being fair in the circumstances of the case described.

18.2 *Actus reus* of handling stolen goods

The elements of the *actus reus* which must be proved for handling stolen goods are:

- » stolen
- » goods and their proceeds
- » handling.

All three elements of the *actus reus* must be proved by the prosecution.

18.2.1 *Stolen*

The goods must already be stolen goods at the time of the handling. Therefore, the original thief is not liable for handling stolen goods, unless they have disposed of them and then reacquired them or held onto them.

If a person handling goods believes them to be stolen, but they are not in fact stolen goods, that person cannot be guilty of handling (but may be guilty of attempted handling). This can be seen in *Haughton v Smith* (1975).

CASE EXAMPLE

Haughton v Smith (1975)

A large amount of corned beef was stolen. Later, the police stopped a van and found the corned beef inside. Some was removed, but the van was then allowed to go on with the remainder of the load and with two policemen concealed inside, and one disguised policeman beside the driver. The aim was to catch the receivers of the stolen goods by using the van, and its load, as a decoy.

The defendant played a prominent part in assisting in the disposal of the van and its load. However, since the goods were no longer stolen, having returned to lawful custody, there was no handling offence.

For the purposes of this offence, stolen goods include those stolen outside the UK, where the stealing was an offence in the jurisdiction where it took place.

Goods obtained by blackmail or by fraud under the Fraud Act 2006 are also considered stolen.

Goods cease to be stolen goods when:

- » they are returned to their lawful owner, or
- » they are in the custody and protection of the police, as in *Haughton v Smith* (1975), or
- » the person to whom the goods formerly belonged no longer considers the goods to be their property.

18.2.2 Goods and their proceeds

Money or other goods received by the thief or handler from the sale of stolen goods are themselves considered stolen goods, but only to the extent that they have been in the hands of the thief or handler.

The effect of this is that a thief or handler cannot wash away the taint of goods being stolen by simply selling on the goods. The proceeds of the sale will still be stolen goods. However, the taint will not transfer to any proceeds obtained by an innocent purchaser, if they later sell the goods.



▲ Figure 18.1 Chain of events for handling stolen goods

18.2.3 Handling

Handling can be committed in various ways:

- » receiving stolen goods, or
- » undertaking in their retention, removal or realisation by another person or for the benefit of another person, or
- » arranging to do either of the above.

Receiving and arranging to receive stolen goods

Receiving

'Receiving' is not defined in the Theft Act 1968 but means taking possession or control of the stolen property.

It does not have to be physical possession, as property includes intangible property such as credit in a bank account as well as goods. Helping to remove stolen goods from a van is not sufficient to amount to receiving, as the element of taking possession or control is not complete. This would be different if the helper were to then take the goods they had unloaded away in order to hide them.

Arranging to receive

Arranging to receive stolen goods occurs where the arrangements concerned are no more than merely preparatory and so do not amount to the offence of attempting to handle stolen goods.

However, any arrangements must be in respect of goods which are in fact stolen. If the goods have yet to be stolen, there may be the offence of conspiracy to handle stolen goods, but no actual receiving.

For example, members of a pickpocket gang who pass a stolen wallet from one to another would raise the possibility of receiving stolen goods, but only when the stolen wallet is passed from the pickpocket (thief) to the next person in the gang. Merely negotiating with a thief to purchase stolen goods is not arranging to receive until an agreement to receive the stolen items is made.

ACTIVITY

A second-hand dealer was sentenced to a community punishment order after pleading guilty to one charge of handling stolen goods. He was ordered to pay a £60 victim surcharge and carry out 120 hours of unpaid work over the next 12 months.

Electrical items were seized from his business premises, which comprised an internet café, computer repair service and second-hand shop. A Mac Book Pro laptop (valued at £1300) was identified as having been stolen during a burglary a few weeks earlier. The defendant told police he suspected the item had been stolen but paid £90 or £100 for it, knowing its second-hand value to be between £600 and £700.

Questions

- 1 Explain how this case shows that the law safeguards rights and freedoms, and imposes obligations on how citizens behave.
- 2 Give reasons why you consider (or do not consider) the law has achieved justice in this case.

Undertaking or arranging to undertake in their retention, removal or realisation by another person or for the benefit of another person
In *R v Bloxham* (1983), the meaning of 'another person' was considered. The House of Lords decided this meant that something could only be done for the benefit of another if that other person could have done it for themselves.

This is the case so that every sale by a thief is not also an offence of handling stolen goods.

CASE EXAMPLE

R v Bloxham (1983)

Bloxham bought a car for £1200, paying £500 immediately and the remainder when he received the registration document. He later realised that the car was stolen, as the seller failed to give him the registration document. He then sold the car to someone else for £200 as there was no registration document.

While he had clearly disposed of stolen goods, he had not done so for the benefit of another. The buyer may have benefited, but he had not sold the car for the buyer's benefit.

There are four possible activities which can amount to handling within the offence:

- » retention of the goods
- » removal of the goods
- » disposal of the goods
- » realisation of the goods.

Retention of the goods

Retention of the goods means keeping possession of them, continuing to have them and not losing possession of them. In the following cases, there was retention by:

- » keeping the goods once the defendant knew they were stolen – *R v Pitchley* (1972)
- » doing something to enable the goods to be retained – *R v Kanwar* (1982).

CASE EXAMPLES

R v Pitchley (1972)

The defendant was given £150 by his son to look after. The son told him it was money he was owed, and the defendant put the money in a savings account. A few days later, he discovered that in fact his son had stolen the money. He left the money in the account.

He was guilty of handling stolen goods [the money] by taking no action and retaining it when he knew it was stolen.

R v Kanwar (1982)

Mr Kanwar brought stolen goods into the family home while his wife was in hospital. After she returned from hospital, the police searched the house looking for stolen goods. Mrs Kanwar told the police that nothing in the house was stolen and that two items in particular that the police believed were stolen had been bought by her. This was untrue.

She was convicted of handling stolen goods, as her statements to the police had enabled the retention of the stolen goods by making it more difficult for the police to identify them.

It should be noted that the critical evidence in *Kanwar* was that the defendant lied to the police; if she had refused to answer the police questions at all she would not have been convicted of handling stolen goods, as merely using them is not assisting in their retention.

Removal of the goods

This simply involves carrying or transporting stolen goods for the benefit of someone else, typically the thief.

Disposal of the goods

This includes transforming stolen goods, for example changing a stolen car's identity or melting down stolen metal. Similarly, destroying or throwing away stolen goods would be classified as disposal, as would giving them away.

Merely benefiting from a disposal is not sufficient to amount to handling, where, for example, some benefit accrues from the use of stolen money but the beneficiary does not assist in the disposal in any way.

Realisation of the goods

This involves selling or exchanging the stolen goods for something else of value. This includes selling the goods for another person (the thief or another handler), introducing a purchaser or arranging a meeting for the thief to meet a handler.

18.3 Mens rea

The elements of the *mens rea* are:

- » knowledge and belief
- » dishonesty.

Both elements of *mens rea* must be proved by the prosecution.

18.3.1 Knowledge and belief

The defendant must either know or believe that the goods are stolen at the time they carry out the *actus reus* of handling them.

- » Where the offence is one of receiving or arranging to receive, this knowledge or belief must be present when the defendant receives the goods or makes the arrangement.

- » Where the offence is undertaking or assisting in the prohibited acts, the defendant will be liable when they learn the truth and continue their undertaking or assisting.

What amounts to knowledge or belief?

To handle stolen goods, a defendant must subjectively be aware of the theft or believe the goods to be stolen. A mere suspicion does not amount to knowledge or belief, as can be seen in *R v Moys* (1984) where suspicion, even coupled with the fact that the defendant shut his eyes to the circumstances, was not enough.

CASE EXAMPLE

R v Moys (1984)

A horse worth £700 was stolen from her stables. The defendant sold her the next day for £480. The Court of Appeal stated that the test as to whether a defendant knew or believed the goods to be stolen is subjective. A suspicion that the goods were stolen, even with a deliberate shutting of the eyes to the circumstances, is insufficient to amount to a belief. A jury may take this into account in considering whether the defendant had knowledge or belief.

As this is a subjective test, it is not fulfilled by proving that any reasonable person would have realised the goods were stolen. In this context, stolen includes obtained through blackmail or fraud, as well as by theft and its related offences of robbery or burglary.

The defendant does not need to know the details of the actual goods stolen; it would be sufficient if they were given a backpack that they knew contained stolen goods.

▼ Figure 18.2 Summary chart for the offence of handling stolen goods

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
Stolen	The goods must already be stolen goods at the time of the handling. This includes goods obtained by blackmail or by fraud.	<i>Haughton v Smith</i> (1975)
Goods and their proceeds	A thief or handler cannot wash away the taint of goods being stolen by simply selling on the goods.	
Handling	This can be committed in three ways: • receiving stolen goods, or • undertaking in their retention, removal or realisation by another person or for the benefit of another person, or • arranging to do either of the above.	<i>R v Bloxham</i> (1983) <i>R v Pitchley</i> (1972) <i>R v Kanwar</i> (1982)
<i>Mens rea</i>	Comment	Relevant cases
Knowledge and belief	The defendant must subjectively be aware of the theft or believe the goods to be stolen.	<i>R v Moys</i> (1984)
Dishonesty	This is the same as for theft.	<i>R v Barton and Booth</i> (2020)
Sentencing		
Maximum 14 years' imprisonment		

18.3.2 Dishonesty

This is the same as for theft: see Chapter 14.

TARGET SKILLS

- 1 State three ways that the offence of handling stolen goods can be committed.
- 2 Jan is concerned she may be accused of handling stolen goods because she is in possession of a second-hand computer. It turns out that the computer had been taken during a burglary. Advise Jan.
- 3 To be guilty of the offence of handling stolen goods, the defendant must either know or believe that the goods were stolen at the time they carry out the *actus reus* of handling them. Is the law on this aspect of the offence satisfactory?

18.4 Sentencing for handling stolen goods

Handling stolen goods is a triable-either-way offence and the maximum penalty at the Crown Court is 14 years' imprisonment.

The following webpage sets out the full guidelines for sentencing for this offence:

www.sentencingcouncil.org.uk/offences/magistrates-court/item/handling-stolen-goods-2

COMMENT

Evaluation of the law relating to handling stolen goods

The handling of stolen goods is closely linked to other forms of dishonesty offences, including those of a serious nature such as robbery or burglary. There are various activities that come under the general heading of handling: receiving stolen goods; undertaking in their retention, removal or realisation by another person or for the benefit of another person; arranging to do so. This is a catch-all offence.

Typically, the offence is committed by someone receiving stolen goods to use or to sell. The theory is that there would be fewer thieves if there were no handlers.

To be guilty of the offence of handling stolen goods, the defendant must either know the goods are stolen

or believe them to be stolen at the time of handling the goods. They will be taken to know that the goods were stolen if that was made aware to them when they were handling the goods, for example by the thief telling them. This is not a problem.

However, if the defendant could not say for certain that the goods were stolen but there was no other reasonable conclusion in the light of all the circumstances, it will also be assumed that they knew that the goods were stolen. This is a question for the jury.

Additionally, s 27 of the Theft Act 1968 states that evidence that a defendant has been involved in or convicted of handling stolen goods can be used to prove whether they knew or believed the goods to be stolen. Evidence such as this would not normally be admissible under the law of evidence, and is unfair to the accused.

Internet research

There are many ways of committing the offence of handling stolen goods. It is arguable that the law does not know when to stop finding offenders when something of great value is stolen. An invading army will take his enemy's weapons. The army may well take private property or even crops or minerals and send them home. Explain how you could argue that the law on handling stolen goods applies to such property used by an invading army or members of society in the invaders' home country.

TEST YOURSELF

- 1 What are the three elements of the *actus reus* of handling stolen goods?
- 2 What is the test for dishonesty used in the offence of handling stolen goods?
- 3 Give an example of what amounts to knowledge or belief in the *mens rea* of the offence of handling stolen goods.
- 4 Outline three factors which may affect the sentencing of a person convicted of handling stolen goods.
- 5 Explain the difference between retention of the goods, removal of the goods, disposal of the goods and realisation of the goods.

EXAM-STYLE QUESTIONS

- 1 Amina has a business selling vintage clothes online. She is contacted by Bhupinda, who Amina knows has criminal convictions for shoplifting. Despite this knowledge, she agrees to sell 20 pairs of trousers that Bhupinda claims were her late mother's. They were in fact stolen from a shop storeroom. The trousers were delivered to Amina by Bhupinder's husband, Chan.

Discuss whether Amina and Chan are likely to be found guilty of the offence of handling stolen goods.
- 2 Explain what is meant by the terms 'handling' and 'receiving' in the offence of handling stolen goods.

19

Making off without payment

Introduction

The offence of making off without payment occurs when a person fails to pay at the time payment is expected. Examples include getting out of a taxi and not paying the driver or failing to pay for a meal in a restaurant.

This offence was created when it became obvious that the Theft Act 1968 left gaps in the law where the

defendant was not guilty of any existing offence, even though their conduct would be seen as 'criminal' by most people.

It is important to note that the offence of making off without payment comes under the Theft Act 1978 and not the Theft Act 1968. This chapter links to the key concept of liability.

19.1 Definition of making off without payment

Section 3 of the Theft Act 1978 states:

'(1) Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.

(2) For purposes of this section "payment on the spot" includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.

(3) Subsection (1) above shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.'

19.2 Actus reus of making off without payment

There are several points which have to be proved for the *actus reus* of this offence:

- » The defendant makes off.
- » Goods have been supplied or a service has been done.
- » Payment is required on the spot.
- » The defendant has not paid as required.

19.2.1 The defendant makes off

This means that the defendant leaves the place where payment was expected. Typically, this might be a shop or restaurant. This is a question of fact, as shown in *R v McDavitt* (1981).

CASE EXAMPLE

R v McDavitt (1981)

The defendant had an argument with the manager of a restaurant and refused to pay his bill for a meal. He got up and started to walk out but was advised not to leave as the police had been called. He then went into the toilet and stayed there until the police arrived. He had not 'made off' as he was still in the restaurant.

19.2.2 Goods have been supplied or a service has been done

If the service has not been completed or the goods have not been supplied in accordance with the contract, then there is no offence. This was shown in the case of *Troughton v Metropolitan Police* (1987).

CASE EXAMPLE

Troughton v Metropolitan Police (1987)

A taxi driver agreed to drive the drunken defendant home. He stopped to get better directions from the defendant. There was an argument and the defendant accused the taxi driver of taking a diversion to increase the fare. The taxi driver, being unable to obtain a proper destination, drove the defendant to the police station.

As the journey was not yet complete (the defendant had not been driven home), the taxi driver was in breach of contract in not taking the defendant home, and therefore the service had not been supplied.

19.2.3 Payment is required on the spot

- » Payment on the spot does not become due until the goods or services have been provided – *R v Wilkinson* (2018).
- » It has to be proved that payment on the spot was required or expected. If it is not, then the offence is not committed – *R v Vincent* (2001).

CASE EXAMPLES

R v Wilkinson (2018)

A taxi driver refused to let a passenger out of his cab as he had had an argument with her. He drove her back to where he had first picked her up, rather than to her destination. As he had not provided the service for which she had asked, which was to be taken to her home address, she was under no obligation to pay, so payment on the spot was not required.

R v Vincent (2001)

The defendant stayed at two hotels and did not pay his bills. He said that he had arranged with each hotel to pay when he could. This meant that payment on the spot was not required or expected. His conviction was quashed, as s 3 merely states that payment on the spot must be required or expected. If there had been an agreement not to expect payment on the spot, it was irrelevant that that agreement had been dishonestly obtained. Note that there may be an offence under the Fraud Act 2006.

19.2.4 The defendant has not paid as required

This is a question of fact. The payment must be of the amount due, so a smaller payment would mean that the defendant has not paid as required.

19.3 Mens rea of making off without payment

The *mens rea* of the offence is:

- » dishonesty
- » knowledge that payment on the spot is required
- » an intention to avoid payment.

19.3.1 Dishonesty

The test for dishonesty is the same as for theft, as set out in Chapter 14.

19.3.2 Knowledge that payment on the spot is required

If the defendant does not know that payment is required on the spot, then they are not guilty of this offence.

ACTIVITY

Anita wandered out from a café without paying as she had been taken ill. She had suffered a mini stroke (TIA) and became severely disorientated.

List arguments as to why she should or should not be charged with making off without payment.

19.3.3 Intention to avoid payment

The Theft Act 1978 only states 'with intent to avoid payment of the amount due', but in *R v Allen* (1985) it was decided that there must be an intent permanently to avoid payment. This must be to make permanent default. If the defendant's intent was simply to defer payment, the offence has not been committed.

CASE EXAMPLE

R v Allen (1985)

The defendant owed £1286 for his stay at a hotel. He left without paying, but his defence was that he genuinely intended to pay in the near future as he was expecting to receive sufficient money to cover the bill from business transactions. His conviction was quashed because it had not been proved that he intended to evade payment altogether.

It has been argued that the decision in *Allen* allows defendants to put forward fictitious defences of what they hoped to be able to do about payment in the future. However, there have been no further cases on this point, so presumably the law is working satisfactorily.

TARGET SKILLS

- 1 Name the Act of Parliament that defines making off without payment.
- 2 Sol leaves a restaurant at the end of his meal to make a phone call and then returns to pay his bill. Is he guilty of making off without payment?
- 3 Analyse the reasons why it was necessary to create the offence of making off without payment.

19.4 Sentencing for making off without payment

Making off without payment is a triable-either-way offence, and the maximum penalty at the Crown Court is two years' imprisonment.

▼ Figure 19.1 Summary chart for the offence of making off without payment

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
The defendant makes off.	They must leave the place where payment was expected.	<i>R v McDavitt</i> (1981)
Goods have been supplied or a service has been done.	There is no offence until the contract is completed.	<i>Troughton v Metropolitan Police</i> (1987)
Payment is required on the spot.	Payment on the spot does not become due until the goods or services have been provided.	<i>R v Wilkinson</i> (2018) <i>R v Vincent</i> (2001)
The defendant has not paid as required.	This is the full payment required.	
<i>Mens rea</i>	Comment	Relevant cases
Dishonesty	This is the same as for theft.	<i>R v Barton and Booth</i> (2020)
Knowledge that payment on the spot is required		
Intention to avoid payment	This must be to make permanent default.	<i>R v Allen</i> (1985)
Sentencing		
Maximum two years' imprisonment		

Internet research

Read further about this topic at www.sentencingcouncil.org.uk/offences/magistrates-court/item/making-off-without-payment-2

Harm is assessed with reference to the actual loss that results from the offence and any significant additional

harm suffered by the victim. Suggest arguments that the sum of £200 is too high to distinguish different types of offence in sentencing a defendant for making off without payment.

COMMENT

Evaluation of the law relating to making off without payment

There are the usual discussions with respect to the meaning of dishonesty; these are covered in Chapter 14.

With respect to making off without payment specifically, there is a need for clarity as to the difference between an intention to permanently avoid payment (a similar expression as to permanently deprive in theft) and merely to defer payment. This can be seen as a similar set of arguments as in *R v Vinall* (2011). The offence is not within the offence of fraud, as there is no requirement for deception.

Where the defendant agrees some time before the 'making off' to pay later, or when they can, there

cannot be an offence of making off without payment. This means an offence under the Fraud Act 2006 would have to be considered. In *R v Vincent* (2001), the Court of Appeal made it clear that this situation would not be considered making off. This is entirely different to the situation in a restaurant or with a taxi driver, where the intention is formed at the end of the meal or ride. In such cases, the offence could be totally subsumed by a general fraud offence. This would avoid the argument that there was an honest belief that credit would be given and the difficulty of refuting the defendant's claims to that effect.

There remains an issue with taxi drivers and what duties exist between driver and passenger.

STRETCH AND CHALLENGE

Research arguments for and against the proposal that making off without payment is an unnecessary crime as it has all the elements of theft or robbery [where, for example, a waiter has been brushed aside while the defendant leaves a restaurant without paying].

TEST YOURSELF

- 1 Which four points must be proved for the *actus reus* of making off without payment?
- 2 What is the test for dishonesty used in the offence of making off without payment?
- 3 Apart from dishonesty, what are the other two elements to be proved for the *mens rea* of making off without payment?
- 4 In *R v McDavitt* (1981), why was the defendant found not guilty?
- 5 Name and explain a case that illustrates the issues raised by failure to pay on the spot or as expected.

EXAM-STYLE QUESTION

Umar took his car to Yusuf's car preparation shop for repair of minor paintwork damage. Yusuf told him that the work would cost £500. When Yusuf told Umar the work was complete, Umar went to collect his car.

Umar was infuriated by what he considered to be the poor quality of Yusuf's work. He refused to pay Yusuf and drove off from Yusuf's premises using his spare car key to start the car.

Discuss Umar's liability for the offence of making off without payment.

Introduction

Criminal damage consists of three separate offences that cover a range of activities from minor vandalism to arson. All the offences are dealt with in the Criminal Damage Act 1971.

The three offences are basic criminal damage, aggravated criminal damage (correctly called destroying or damaging property with intent to endanger life) and arson. This chapter links to the key concept of liability.

20.1 The basic offence of criminal damage (s 1(1))

The basic offence is set out in s 1(1) of the Criminal Damage Act 1971 as:

'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.'

20.1.1 Actus reus of criminal damage

The *actus reus* of criminal damage has the following elements:

- » destroy or damage
- » property
- » belonging to another
- » without lawful excuse.

Destroy or damage

Destruction or damage is a question of fact in each case. Damage is not defined by the Act.

What constitutes damage is a matter of fact and degree and it is for the court, using its common sense, to decide whether what occurred is damage.

It includes:

- » temporary physical damage
- » permanent physical damage
- » temporary impairment of value or usefulness
- » permanent impairment of value or usefulness

There are a number of examples of this. In *Hardman v Chief Constable of Avon and Somerset* (1986) there was damage even though the markings would be washed away by rain.

CASE EXAMPLE

Hardman v Chief Constable of Avon and Somerset (1986)

Members of the Campaign for Nuclear Disarmament painted human silhouettes on the pavement using water soluble paint which would be washed away by rain. The council spent money cleaning the pavement of the paint and the painter was convicted.

In *Morphitis v Salmon* (1990), the court decided that a mere scratch to a scaffold pole was insufficient for there to be damage.

CASE EXAMPLE

Morphitis v Salmon (1990)

A scaffold pole was used to block an access road. When the barrier was dismantled by the defendant, the pole was scratched. The scratch could not amount to criminal damage because it did not reduce its usefulness or value. However, the removal of the roadblock would amount to criminal damage.

Dumping of rubbish on land can be criminal damage if the owner of the land will be put to expense in removing it. Temporary water damage to cloth can amount to criminal damage if work has to be done to make the item usable again as in the case of *Fiak* (2005).

CASE EXAMPLE

R v Fiak (2005)

The defendant had, with some difficulty, been arrested and placed in a police cell. The cell contained clean bedding. He used the blanket to block the toilet of the cell, causing a flood in his and other cells. The blanket could not be used again until it had been cleaned. The flooded cells remained out of action until the water had been cleared. Both the blanket and the cell had sustained temporary damage sufficient for conviction.

Criminal damage to computers is mostly dealt with by the Computer Misuse Act 1990. Physical damage to the machine remains criminal damage.

Destruction of property includes removing parts from a car, killing an animal or killing plants or crops.

Property

Section 10(1) of the Criminal Damage Act 1971 defines property as:

'... property of a tangible nature, whether real or personal, including money and

(a) including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; but

(b) not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.

For the purposes of this subsection "mushroom" includes any fungus and "plant" includes any shrub or tree.'

This is different to the definition of property under s 4 of the Theft Act 1968 (see Chapter 14).

The offence requires proof that tangible property has been damaged, not necessarily that the damage itself should be tangible. Property includes land but not wild plants. For example, land can be damaged by dumping waste on it. Property does not, however, include intangibles or things in action.

An example of damage to land can be seen in *R v Henderson and Batley (1984)*.

CASE EXAMPLE

R v Henderson and Batley (1984)

A land site had been cleared in preparation for building. The defendants had dumped, or been paid to allow to be dumped, a large quantity of rubble on a development site which cost a substantial sum to clear. This was damage to land.

Belonging to another

This is much the same as in s 5 of the Theft Act 1968 (see Chapter 14) and is set out in s 10 of the Criminal Damage Act 1971.

However, criminal damage requires custody and control of property rather than possession or control. This means there can be an offence of criminal damage whenever some person has any rights over property, but it is not possible to cause criminal damage to abandoned property. For example, an owner can damage his own property if, at the same time, another has rights over it such as a bank holding a mortgage on a house or a finance company owning a car leased to someone.

Without lawful excuse

Lawful excuse forms a defence to a charge of criminal damage. It does not apply to the offence of aggravated criminal damage discussed later in this chapter. Lawful excuse is set out in s 5 of the Criminal Damage Act 1971:

'A person ... shall ... be treated for those purposes as having a lawful excuse –

(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; or

(b) if ... 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 belief is subjective and must be honestly held. This defence protects persons in the emergency services effecting a rescue or neighbours who demolish a dangerous wall before it falls down.

The main problem here is not the defendant's belief that the means used were reasonable, but the immediacy of the necessity which is objective. Thus, removing a wheel clamp on a car which has been illegally parked is criminal damage as in the case of *Lloyd v DPP (1992)*.

CASE EXAMPLE

Lloyd v DPP (1992)

Lloyd had parked in a private car park without permission and his car was clamped. He refused to pay the £25 fee to have the clamp removed. Later that night he removed it with a disc cutter. He was convicted of criminal damage to the wheel clamp as there was no lawful excuse.

▼ Figure 20.1 Summary chart for the basic offence of criminal damage

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
Destroy or damage	This is a question of fact and degree, including temporary or permanent physical harm to property, as well as reduction in value or usefulness.	<i>Hardman v Chief Constable of Avon and Somerset</i> (1986) <i>Morphitis v Salmon</i> (1990) <i>R v Fiak</i> (2005)
Property	Section 10(1) of the Criminal Damage Act 1971 defines property.	<i>R v Henderson and Batley</i> (1984)
Belonging to another	Criminal damage requires custody and control of property rather than possession or control which is required under the Theft Act 1968.	
Without lawful excuse	Section 5 of the Criminal Damage Act 1971 sets out lawful excuse. This defence does not apply to the offence of aggravated criminal damage.	<i>Lloyd v DPP</i> (1992)
<i>Mens rea</i>	Comment	Relevant cases
Intention to destroy or damage property belonging to another, or recklessness as to whether such property is destroyed	Intention and recklessness are defined in Chapter 13.	
Sentencing		
Value of damage	Type of offence	Sentence
Value not exceeding £5000	Summary-only offence	Three months' imprisonment
Value exceeding £5000	Triable-either-way offence	Ten years' imprisonment

20.1.2 *Mens rea* of criminal damage

This is either intention to destroy or damage property belonging to another or recklessness as to whether such property is destroyed. In both cases the recklessness is *Cunningham* subjective recklessness. Intention and recklessness have been discussed in Chapter 13.

Recklessness for the purposes of the Criminal Damage Act is defined within the House of Lords decision in *R v G* (2004):

- 'A person acts recklessly within the meaning of s 1 Criminal Damage Act 1971 with respect to:
- A circumstance when he is aware of a risk that it exists or will exist;
 - A result when he is aware of a risk that it will occur; and
 - It is, in the circumstances known to him, unreasonable to take the risk.'

20.2 Arson (s 1(3))

Section 1(3) of the Criminal Damage Act 1971 states:

'An offence committed under this section by destroying or damaging property by fire shall be charged as arson.'

This offence is the same as the basic offence but requires that the damage is caused by fire. The lawful excuse defence is available, as seen in *R v Denton* (1982).

CASE EXAMPLE

R v Denton (1982)

The defendant set fire to machinery in his employer's factory, having been asked to do so as part of an insurance fraud. The way that the employer put it was: 'There is nothing like a good fire for improving the financial circumstances of a business.'

The defendant was not guilty of arson, as he was asked to set fire to the machinery and therefore had the owner's consent. (He could have been found guilty of other offences relating to the fraud.)

▼ Figure 20.2 Summary chart for the offence of arson

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
As for the basic offence of criminal damage, except that the damage must be caused by fire	The differences are in the cause of the damage (fire) and the maximum sentence.	<i>R v Denton</i> (1982)
<i>Mens rea</i>		
As for the basic offence of criminal damage		
Sentencing		
Maximum life imprisonment		

20.3 The aggravated offence of criminal damage (s 1(2))

Aggravated criminal damage is set out in s 1(2) of the Criminal Damage act 1971:

'A person who without lawful excuse destroys or damages any property, whether belonging to himself or another –

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and

(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.'

The key aspects of this more serious offence are the intention or recklessness as to endanger life. This offence can be committed even if a person destroys or damages his own property with intent to endanger life. This could be by deliberately making an electric drill unsafe before lending it to someone. There is no need to prove that a life was in fact endangered.

The *mens rea* is not just the intention to damage or destroy property or be reckless thereto, the defendant must also be shown to have intended or been reckless as to endangering life by that damage. This can be seen in the case of *Steer* (1998).

CASE EXAMPLE

R v Steer (1987)

The defendant fired three shots at the home of his former business partner, causing damage to the house. There were no grounds for conviction for endangering life by causing criminal damage as the danger came from the shots not from any damage done to the house through those shots. The prosecution had to prove that the danger to life resulted from the actual damage to property. Here, the shooting, not the damage to the house, endangered life, so the defendant was not guilty of the aggravated offence.

However, the defendant may be guilty if they either intended to endanger life by the damage, which was intended to be done, or were reckless that life would be endangered by the damage. This can be seen in *R v Warwick* (1995).

CASE EXAMPLE

R v Warwick (1995)

The defendant was in a car which rammed a police car. He threw bricks at it, causing the rear window to smash and shower the officers with broken glass. He was convicted of endangering life through criminal damage. They pointed out that, if a defendant throws a brick at a windscreen of a moving vehicle and causes some damage to the vehicle, whether he is guilty under s 1(2) does not depend on whether the brick hits or misses the windscreen, but whether he intended to hit it and intended or was reckless that the damage from this should endanger life.

Remember, the defence of lawful excuse does not apply to the aggravated offence.

▼ Figure 20.3 Summary chart for the aggravated offence of criminal damage

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
As for the basic offence of criminal damage	There is no need to prove that a life was in fact endangered.	
<i>Mens rea</i>	Comment	Relevant cases
As for the basic offence of criminal damage, with the addition of intention or recklessness as to endangering life	The defence of lawful excuse does not apply to the aggravated offence.	<i>R v Steer</i> (1998) <i>R v Warwick</i> (1995)
Sentencing		
Maximum life imprisonment		

20.4 Threats to destroy or damage property (s 2)

Section 2 of the Criminal Damage Act 1971 creates two offences:

'A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, –

(a) to destroy or damage any property belonging to that other or a third person; or

(b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or third person

shall be guilty of an offence.'

For both of these offences, intention is required that the person threatened would fear that the threat would be carried out.

The *actus reus* is:

- » The defendant makes an unlawful threat to destroy or damage property belonging to another, or
- » makes a threat to damage their own or the user's property in a way which they know is likely to endanger life

The *mens rea* is an intention that the other would be put in fear the threat would be carried out.

20.5 Possessing anything with intent to destroy or damage property (s 3)

Section 3 of the Criminal Damage Act 1971 creates two offences:

'A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it—

(a) to destroy or damage any property belonging to some other person; or

(b) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person;

shall be guilty of an offence.'

Section 3(a) is confined to damaging property belonging to another.

Section 3(b), which is the offence in aggravated form, applies to the defendant's own property or the property of the user.

The *actus reus* is the possession of the article to be used, the *mens rea* is the intention to use it to damage property.

This offence is appropriate where there is insufficient evidence for a charge under s 2. The Crown Prosecution Service gives the example of when a defendant is stopped with petrol and matches before they have had a chance to set fire to anything. It is usually used for a preventative purpose, as in the case of *R v Hill* (1989), where a hacksaw blade was intended to be used to cut a fence around an airbase to allow access to protestors.

ACTIVITY

Jack was caught on CCTV spray painting his name on railway carriages. Some days later, he is stopped by police as he is trying to enter a railway carriage storage shed. When searched, he has two aerosol cans of spray paint that are the exact colour he always uses to paint his name.

Which offences might he be charged with and why might any prosecutions be successful?

20.6 Sentencing for criminal damage

This section sets out specific guidelines for sentencing offenders who have committed the offences within this chapter. General sentencing principles are set out in Chapter 22.

Sentencing proceeds based on guidelines, not case law. It requires courts to take account of the following:

- » the full impact of the criminal damage or arson on national heritage assets, including listed buildings, historic objects or unique parts of national heritage and history
- » the economic or social impact of damaging public amenities and services, such as a fire at a school or community centre, or criminal damage at a train station, which can adversely affect local communities or cause economic hardship to neighbouring houses or businesses
- » the effect on communities when an area's emergency services or resources are diverted to deal with an incident of criminal activity.

▼ Figure 20.4 Sentencing for criminal damage

Offence	Section of the Criminal Damage Act 1971	Type of trial	Maximum sentence	Typical sentence range
Criminal damage (other than by fire), value not exceeding £5000	s 1 (1)	Triable only summarily	Fine and/or three months' imprisonment	Discharge – three months' imprisonment
Criminal damage (other than by fire), value exceeding £5000	s 1(1)	Triable either way	Ten years' imprisonment	Discharge – four years' imprisonment
Arson (criminal damage by fire)	s 1(1) and s 1(3)	Triable either way	When tried summarily: six months' imprisonment When tried on indictment: life imprisonment	Discharge – eight years' imprisonment
Arson/criminal damage with intent to endanger life or reckless as to whether life is endangered	s 1(2) and s 1(3)	Triable only on indictment	Life imprisonment	High-level community order – 12 years' imprisonment
Threats to destroy or damage property	s 2	Triable either way	Ten years' imprisonment	Discharge – four years' imprisonment
Possessing anything with intent to destroy or damage property	s 3	Triable either way	Ten years' imprisonment	Discharge – four years' imprisonment

Internet research

Visit the webpage below and read the article carefully:

<https://standpointmag.co.uk/issues/november-2008/criminal-damage-to-the-law-november>

Consider whether the arguments made are still valid today in the light of climate change and other worldwide issues.

TARGET SKILLS

- 1 Name the Act of Parliament that defines the offence of criminal damage.
- 2 Distinguish between the basic and aggravated offences of criminal damage.
- 3 Discuss whether the different potential offences of criminal damage have an appropriate balance in the maximum sentences available to the courts.

COMMENT

Evaluation of the law relating to criminal damage offences

The first criticism of criminal damage is that the meaning of 'destroy' or 'damage' is vague. For example, it has been taken to include things that will naturally disappear without any damage over a short period of rain.

Where a jury trial is concerned, juries can produce perverse verdicts as to whether the damage was done to protect from immediate danger.

With respect to *mens rea*, the offence can be committed recklessly. Recklessness is a subjective test. This makes it clear that the defendant is at fault. It makes people take responsibility where they are aware there is a risk of the consequence occurring.

This is fair on the defendant, as they are only guilty if they realise the risk. So, is a defendant guilty of arson if they throw away a cigarette end that is still alight? The defendant claims they thought the cigarette was extinguished before they threw it away. Would it matter whether there were no lasting consequences of their action, or if the consequence was destruction of a school?

STRETCH AND CHALLENGE

If the police were to break down the door of a house in order to find a wanted criminal, should the police officers involved be prosecuted for criminal damage if they went to the wrong house? Discuss.

TEST YOURSELF

- 1 What are the four elements of the *actus reus* of criminal damage?
- 2 What are the two elements of the *mens rea* of criminal damage?
- 3 What is the main distinguishing feature of the offence of arson?
- 4 What is the main distinction of the offence of aggravated criminal damage or aggravated arson?
- 5 Outline three factors which may affect the sentencing of a person convicted of criminal damage.

EXAM-STYLE QUESTIONS

- 1 Dave got into a race with another car and threw a bottle at it as it passed. The bottle broke the car's window. The other driver, Kamala, swerved across the road and onto the grass on the opposite side. Fortunately, she managed to stop the car without further damage and without injury to her. Discuss the offences under the Criminal Damage Act 1971 with which Dave might be charged.
- 2 Gary had a grudge against Hasan. While Hasan was at work, Gary loosened the wheel nuts on Hasan's bicycle. When Hasan next rode the bicycle, the wheel came loose and he fell off the bicycle. Hasan was unhurt, but the wheel of his bicycle was damaged beyond repair. Discuss the offences under the Criminal Damage Act 1971 with which Gary might be charged.

21

Fraud

Introduction

Fraud can occur in many different ways. The four sections of the Fraud Act 2006 you will be studying cover many types of situation. Fraud can be committed against individual people, businesses, tax authorities, governments, other public bodies or charities – the list is endless.

All fraud has the common aim of trying to dishonestly deprive a person of something which belongs to them or to which they might be entitled. In many cases,

fraud will also be theft. However, the *actus reus* of fraud is often easier to prove. It is not necessary to prove or show any actual consequences such as gain or loss in fraud cases, and Fraud Act offences do not require an intent permanently to deprive.

Section 1 of the Fraud Act 2006 creates a general offence of fraud, and introduces three ways of committing it which are set out in ss 2, 3 and 4. This chapter links to the key concept of liability.

21.1 Fraud by false representation (s 2)

Section 2 of the Fraud Act 2006 states:

- (1) A person is in breach of this section if he –
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation –
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A representation is false if –
 - (a) it is untrue or misleading, and
 - (b) the person making it knows that it is, or might be, untrue or misleading.
- (3) “Representation” means any representation as to fact or law, including a representation as to the state of mind of –
 - (a) the person making the representation, or
 - (b) any other person.
- (4) A representation may be express or implied.
- (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).¹

21.1.1 Actus reus of fraud by false representation

For the *actus reus* of fraud by false representation, the defendant must make a representation which is false.

This has been set out in subsections 2–5 of s 2, shown above. From this, it can be seen that ‘representation’ covers many things:

- » A representation as to fact clearly covers situations where someone uses a false identity or states that they own property when they do not. It also covers situations such as someone stating that a car has only done 22 000 miles when they know it has done double that amount.
- » A representation as to law covers any situation where the defendant states the law knowing that what they say is not true.
- » A representation as to state of mind covers such matters as a customer saying they will pay their bill when they have no intention of doing so.
- » The Act also states that a representation may be express or implied (s 2(4)).
- » The representation can be made to a person or to a machine. Section 2(5) specifically covers all devices and systems.

Examples include where a person enters a number into a bank ATM or gives false credit card details to voice-activated software or to a website to obtain goods.

This section is designed to cover situations that exist or may exist in the future where it is possible to obtain property via a machine or the internet or other automated system such as cash dispensers or automated telephone services. The provision in the Act is wide enough to cover putting a false coin into a machine such as a parking meter or submitting a pay claim on the internet.

The explanatory notes to the Fraud Act 2006 make it clear that there is no limit on the way in which the representation must be expressed. The notes point out that it could, for example, be written or spoken or posted on a website. A written statement includes where a defendant shows a false identity card or provides a false reference for a job or a college place.

It is not relevant whether the false representation is believed or has any effect on any other person.

An example of a case where the defendant was charged under the Fraud Act 2006 and in which the defendant made an express representation is *R v Hamilton* (2008).

CASE EXAMPLE

R v Hamilton (2008)

The victim's son bought some new fence panels for his garden, but as they turned out to be the wrong size he left them leaning up against the side of the house until such time as he was able to replace them.

The defendant and his brother called at the victim's house, claiming that they had come to collect payment for the panels. In fact, the victim's son had already paid for them in full. The defendant said once that sum was paid they would arrange for replacement panels to be delivered. The victim paid them £60. This was clearly an express representation that the panels had not been paid for when they had.

The explanatory notes to the Act also point out that the offence can be committed by 'phishing' on the internet. An example would be where a person sends out an email to a large number of people falsely representing that the email has been sent by a legitimate bank. The email asks the receiver to provide information such as credit card and bank numbers so that the 'phisher' can gain access to others' assets.

There can be an implied representation. An example would be standing on a street corner with a collecting box labelled 'Guide Dogs for the Blind'. This is implying that the defendant is collecting on behalf of the charity. If the defendant intends to pocket the money, he is guilty under s 2 of the Fraud Act 2006.

Although there is no definition in the Fraud Act of what is meant by implied false representation by conduct, the explanatory notes to the Act state that:

'An example of a representation by conduct is where a person dishonestly misuses a credit card to pay for items. By tendering the card to make a payment, he is falsely representing that he has the authority to use it.'

As with all the offences under ss 2, 3 and 4, there need be no consequences to the offending. However, the existence and extent of consequences will have an effect on the sentence of someone found guilty of the offence.

21.1.2 *Mens rea of fraud by false representation*

There are three parts to the *mens rea*:

- » dishonestly
- » knowing that the representation was or might be untrue or misleading
- » with intent to make a gain for himself or another, to cause loss to another or to expose another to risk of loss.

Dishonestly

Dishonesty is tested as in theft – see *R v Barton and Booth* (2020) in Chapter 14.

Knowing that the representation was or might be untrue or misleading

Actual knowledge by the defendant that the representation might be untrue is required. This means not merely an awareness of a risk that the representation might be untrue.

Intent to make a gain for himself or another, to cause loss to another or to expose another to risk of loss

The meaning of 'gain' or 'loss' that the defendant must intend is the same as in s 34 of the Theft Act 1968:

"Gain" and "loss" are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and –

- (i) "gain" includes a gain by keeping what one has, as well as a gain by getting what one has not; and
- (ii) "loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has.'

An example of gain or loss can be seen in *Kapitene* (2010).

CASE EXAMPLE

Kapitene (2010)

The defendant, an illegal immigrant, applied for a job at a cleaning company. He signed a declaration stating that he was legally entitled to remain in the UK, and showed his employers a Congolese passport containing his details, his photograph and an immigration stamp indicating that he had 'indefinite leave' to remain in the UK. He began work as a cleaner. His 'gain' was the wages he was paid by the company. The victim's 'loss' was the wages paid out.

ACTIVITY

Discuss in groups why insurance fraud affects everyone, not just the individual victims of fraud such as those in *R v Barton and Booth* (2020).

▼ **Figure 21.1** Summary chart for the offence of fraud by false representation (s 2)

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
The defendant must make a representation which is false.	Representations may be express or implied. Representations may be made to a machine. There need be no consequences as a result of the representation.	<i>R v Hamilton</i> (2008)
<i>Mens rea</i>	Comment	Relevant cases
Dishonesty	The same test as in theft	<i>R v Barton and Booth</i> (2020)
Knowledge or belief that the representation is untrue or misleading		
An intention to make a gain or cause a loss		<i>Kapitene</i> (2010)
Sentencing		
Maximum ten years' imprisonment		

21.2 Fraud by failing to disclose information (s 3)

Section 3 of the Fraud Act 2006 states:

'A person is in breach of this section if he –

- (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
- (b) intends, by failing to disclose the information –
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.'

21.2.1 Actus reus of fraud by failing to disclose information

The *actus reus* is the failure to disclose information where a legal duty to do so exists. This can be seen in *R v D* (2019).

CASE EXAMPLE

R v D (2019)

The defendant was charged with dishonestly failing to disclose her residence to the council so that council tax could be levied. The defendant was found not guilty, as at the time there was no legal duty to disclose the information.

As with all the offences under ss 2, 3 and 4, there need be no consequences to the offending. However, the existence and extent of consequences will have an effect on the sentence of someone found guilty of the offence.

21.2.2 Mens rea of fraud by failing to disclose information

The *mens rea* for this offence occurs where an individual dishonestly fails to disclose information where a legal duty to do so exists, with an intention to make a gain or cause a loss. The requirements of dishonesty and intention to make a gain or cause a loss are as explained in s 2.

An unusual example can be seen in *R v Blight and Ingham* (2019).

CASE EXAMPLE

R v Blight and Ingham (2019)

Two wreck divers were convicted of fraud through a dishonest failure to disclose the information that they had taken possession of a wreck, as required by the Merchant Shipping Act 1995. The items taken by the defendants came from shipwrecks of commercial vessels which had been lost at sea or from naval warships lost during the First World War. They sold items taken from the wrecks and kept the proceeds.

It is no defence that the defendant did not know of the existence of the duty. The only likely defence is an absence of dishonesty.

▼ Figure 21.2 Summary chart for the offence of fraud by failing to disclose information (s 3)

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
The defendant must fail to disclose information where a legal duty to do so exists.	The defendant did not need to know of the existence of the duty. There need be no consequences as a result of failing to disclose information.	<i>R v D</i> (2019)
<i>Mens rea</i>	Comment	Relevant cases
Dishonesty	The same test as in theft	<i>R v Barton and Booth</i> (2020)
An intention to make a gain or cause a loss		<i>R v Blight and Ingham</i> (2019)
Sentencing		
Maximum ten years' imprisonment		

21.3 Fraud by abuse of position (s 4)

Section 4 of the Fraud Act 2006 states:

- '(1) A person is in breach of this section if he –
- (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and
 - (c) intends, by means of the abuse of that position –
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.'

So, this offence occurs where someone occupies a position in which they are expected to safeguard, or not to act against, the financial interests of another person. They then abuse that position, dishonestly intending by that abuse to make a gain or cause a loss.

The offence therefore requires the following proof:

- » The defendant was in a position in which they were expected to safeguard, or not to act against, the financial interests of another person. (*Actus reus*)
- » They abused that position. (*Actus reus*)
- » They did that dishonestly. (*Mens rea*)
- » They intended by that abuse to make a gain or cause a loss. (*Mens rea*)

21.3.1 *Actus reus* of fraud by abuse of position

The position is one where the defendant is trusted to deal with another's financial interests. In many cases, there will be a legal fiduciary duty, although a duty is not essential. This can be seen in *R v Valujevs* (2014).

CASE EXAMPLE

R v Valujevs (2014)

The question was whether a s 4 offence applied to an unlicensed gangmaster (someone who provides labourers for farmers). The defendant and another were accused of fraud by abuse of position on the basis of having undertaken the payment of the labourers' wages, from which they had been making exorbitant deductions.

The court stated that the actions fell within the scope of the offence. The offence does not require a 'fiduciary duty' in the strict legal sense, but it did require 'an obligation that is akin' to one. Therefore the offence would not apply to those who simply supply accommodation, goods, services or labour, whether on favourable or unfavourable terms and whether or not they have a stronger bargaining position.

It must be a position that carries something more than a moral obligation. Examples include company directors, trustees, business partners, employees, carers or voluntary workers. An example can be seen in *R v Marshall* (2009).

CASE EXAMPLE

R v Marshall (2009)

The defendant was the joint manager of a residential care home where the victim was a resident. The victim had severe learning difficulties. She had a bank account over which she could not exercise any proper control. The defendant made several withdrawals and used the money for her own benefit. She was convicted under s 4.

Similarly, in *R v Gayle* (2008), an employee could be found guilty of an offence under this section by using his work authority to facilitate a criminal offence.

CASE EXAMPLE

R v Gayle (2008)

The defendant was a transport manager for one of DHL's divisions at Heathrow airport. He used that position to send a large crate from Heathrow to New York. He certified the crate as 'known cargo' containing empty plastic pots. It was passed through without the usual X-ray screening. In fact, the crate contained 500 kilos of khat, a drug that was not illegal in England but was illegal in USA.

The abuse may arise from an omission rather than an act.

As with all the offences under ss 2, 3 and 4, there need be no consequences to the offending. However, the existence and extent of consequences will have an effect on the sentence of someone found guilty of the offence.

21.3.2 *Mens rea of fraud by abuse of position*

The requirements of dishonesty and intention to make a gain or cause a loss are as explained in the previous sections.

▼ **Figure 21.3** Summary chart for the offence of fraud by abuse of position (s 4)

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
The defendant was in a position in which they were expected to safeguard, or not to act against, the financial interests of another person. They abused that position.	There is often a legal fiduciary duty.	<i>R v Valujevs</i> (2014) <i>R v Marshall</i> (2009) <i>R v Gayle</i> (2008)
<i>Mens rea</i>	Comment	Relevant cases
Dishonesty	The same test as in theft	<i>R v Barton and Booth</i> (2020)
An intention to make a gain or cause a loss		<i>Kapitene</i> (2010)
Sentencing		
Maximum ten years' imprisonment		

21.4 Obtaining services dishonestly (s 11)

Section 11 of the Fraud Act 2006 states:

'(1) A person is guilty of an offence under this section if he obtains services for himself or another –

(a) by a dishonest act, and

(b) in breach of subsection (2).

(2) A person obtains services in breach of this subsection if –

(a) they are made available on the basis that payment has been, is being or will be made for or in respect of them,

(b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and

(c) when he obtains them, he knows –

(i) that they are being made available on the basis described in paragraph (a), or

(ii) that they might be,

but intends that payment will not be made, or will not be made in full.'

21.4.1 *Actus reus of obtaining services dishonestly*

The *actus reus* of this offence has several parts:

- » an act (the offence cannot be committed by omission)
- » obtains
- » services
- » payment not made or not made in full.

An act ('he obtains')

The offence requires that the services are actually obtained. This is unlike the offence of fraud by false representation which we considered above. For that offence, it was not necessary for anything to be obtained; in s 2, making the false representation intending to make a gain or cause a loss was sufficient.

Services

Services are not defined by the Act, but the explanatory notes to the Act give examples of situations where services are obtained. These include:

- » using false credit card details to obtain services on the internet
- » climbing over a wall and watching a football match without paying the entrance fee.

There are many other situations which would be offences under this section, for example using a false bus pass to get a free or reduced-price journey or using a stolen or cloned decoder card to receive satellite television programmes.

Payment not made or not made in full

The offence is only committed if the defendant does not pay anything or does not pay in full for the service.

Even if the defendant has made a false statement, but pays full price for the service, then they have not committed the offence of obtaining services dishonestly. This might occur where, for example, a person falsely claims to be an adherent to a particular religion so that they might have a wedding ceremony on the religion's premises for which they pay the full price asked.

21.4.2 Mens rea of obtaining services dishonestly

The *mens rea* consists of three parts:

- » dishonesty
- » knowledge that the services are, or might be, being made available on the basis that payment has been or will be made for them
- » intention not to pay or not to pay in full.

Dishonesty

The defendant only has to obtain the service dishonestly. It is not necessary to show that they have deceived anyone. This is shown by the example of climbing over a wall to watch a football match without paying for entry. The defendant has not shown any false ticket or deceived anyone, but they are still guilty of the offence of obtaining services dishonestly.

Knowledge

The defendant must also know that the services are, or might be, available only on the basis that payment has been or will be made for them.

Intention

The prosecution must also prove that the defendant intended not to pay or not to pay in full for the services. If the defendant thought that someone else had already paid, then they would not be guilty of this offence.

TARGET SKILLS

- 1 Section 1 of the Fraud Act 2006 creates a general offence of fraud and introduces three ways of committing it set out in ss 2, 3 and 4. Name those specific offences.
- 2 Sam leaves a calling card at a number of properties, saying that delivery of a parcel was attempted. The property owner is asked on the card to call a number in order to rearrange delivery of the parcel. In reality, any person responding as asked is calling a premium-rate phone number in order to claim a parcel which does not exist. Does this constitute an offence?
- 3 Discuss whether the Fraud Act 2006 has too many different offences and would be better with one generic offence of fraud.

21.5 Sentencing for fraud offences

All the fraud offences are triable either way. The maximum penalty at the Crown Court is ten years' imprisonment, except in the case of s 11 offences where it is five years' imprisonment.

▼ **Figure 21.4** Summary chart for the offence of obtaining services dishonestly

Key facts		
<i>Actus reus</i>	Comment	Relevant cases
There must be an act – the offence cannot be committed by omission The defendant obtains services that are not paid for or not paid for in full.	Typically, this is done by use of a credit card.	For example, using false credit card details to obtain services on the internet
<i>Mens rea</i>	Comment	Relevant cases
Dishonesty	The same test as in theft	<i>R v Barton and Booth</i> (2020)
Knowledge that the services are, or might be, being made available on the basis that payment has been or will be made for them		
An intention to make a gain or cause a loss.		<i>Kapitene</i> (2010)
Sentencing		
Maximum five years' imprisonment		

COMMENT

Evaluation of Fraud Act 2006 offences

The Fraud Act 2006 is complex and lengthy, even though it purports to set out one offence – fraud. Terms used in the Act are quite specific and yet are not defined. For example, there is no definition of what is meant by ‘implied false representation by conduct’ in the Fraud Act, although the explanatory notes to the Act give an example. This gives plenty of scope for legal argument and judicial legal development.

Many fraud cases also include a charge of theft. The overlap is potentially confusing to prosecution and defendant alike. Examples of overlap can be seen in *R v Barton and Booth* [2020].

There is an argument that the provisions of the Act are too general, and have the potential to extend criminal liability too far, criminalising lying and ignoring moral subtleties. Trivial disputes may be elevated into criminal matters. Who are to be the gatekeepers?

The s 2 offence seems likely to be capable of the most widespread use when charging, precisely because it is the broadest. For example, under s 2(5), a representation can arise before it is released from the defendant’s control. This would occur when a defendant has typed a false representation into a computer, intending to send it later. They will still have an intention to gain, eventually, and so would be guilty.

Under s 2(2), a statement will be considered false if it is untrue or misleading and the person making it knows that it is, or might be, untrue or misleading. An auction house selling a painting as an original, which later turns out to be a forgery, may have genuinely believed that its attribution was correct, but was nevertheless aware that there is always a risk of error in such situations. Action is often taken to stop this, but sometimes things may slip through the net, for example: www.theguardian.com/culture/2020/jun/14/christies-withdraws-allegedly-looted-greek-and-roman-treasures

S 11 is a result crime and it must be established that a service was in fact obtained whereas for s 2 there is no need to actually achieve a gain or loss. S 11 only relates to services that require payment, whereas s 2 could apply where the fraud is used to acquire something of benefit that is free.

Internet research

Read the following article:

www.theguardian.com/law/2013/may/23/fraud-case-lapses-judges-lawyers

Do you think the defendant should have been prosecuted for fraud?

What other points are made some years later in Archbold Review, 18 December 2017? Search the internet for this and list the criticisms made.

STRETCH AND CHALLENGE

‘There is no reason why there should be separate offences of theft and fraud.’

Write points for and against the motion.

TEST YOURSELF

- 1 What are the elements of the *actus reus* for each of the four fraud offences set out above?
- 2 What is the test for dishonesty used in fraud offences?
- 3 Give an example of what amounts to an abuse of position.
- 4 Outline the legal principle in the case of *Kapitene* [2010].
- 5 Explain what is meant by a fiduciary duty.

EXAM-STYLE QUESTION

Ahad has no money but wants to buy a present for Dewi. He knows his mother’s credit card details, as he has been permitted to make a few purchases online in the past. Without his mother’s consent, Ahad uses the details online to try to buy a present for Dewi. The transaction is declined because the card is already over its credit limit.

Discuss the liability of Ahad for offences under the Fraud Act 2006.

22

Adult offenders, young offenders and aims of sentencing

Introduction

Whenever a defendant is found guilty of a criminal offence, the court must impose a sentence as punishment for the wrongful behaviour. In the Magistrates' Courts, the magistrates will decide the sentence. In the Crown Court, the judge will decide the sentence.

There are guidelines on what type and level of sentence is appropriate for each offence. Both judges and magistrates will have to take account of the guidelines and the general aims of sentencing in their decision making. This chapter links to the key concept of rights, duties and responsibilities, and freedoms.

22.1 Adult offenders

The main types of sentence that can be imposed on adult offenders are custodial sentences, community orders, fines and discharges.

22.1.1 Custodial sentences

A custodial sentence is the most serious punishment that a court can impose. Custodial sentences for adults range from a short period in custody to life imprisonment. The different custodial sentences are:

- » mandatory life sentences
- » discretionary life sentences
- » fixed-term sentences
- » suspended sentences.

Custodial sentences are meant to be used only for serious offences. This is confirmed by s 152 of the Criminal Justice Act 2003, which says:

'The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.'

Mandatory life sentences

The only sentence a judge can impose for a murder conviction is a life sentence.

However, after imposing the mandatory life sentence, the judge is required to set the minimum number of years' imprisonment that the offender must serve before being eligible for release on licence. The judge can state a period that is considered appropriate, starting with a minimum of 12 years to a whole-life order.

- » Aggravating factors that can increase the minimum term ordered by the judge include whether the victim was particularly vulnerable because of age or disability, or any mental or physical suffering inflicted on the victim before death.

- » Mitigating factors include that the offender had an intention to cause grievous bodily harm rather than an intention to kill, a lack of premeditation, or that the offender acted to some extent in self-defence (though not sufficient to give them a defence).

A further type of mandatory life sentence was introduced by s 122 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. If an offender aged 18 or over commits a second serious offence, then the court must impose a life sentence on the offender. Serious offences include manslaughter, ss 18 and 20 of the Offences Against the Person Act 1861, robbery and burglary.

Whole-life order

This is imposed for an offence of murder where the sentencing judge decides that the offender is so dangerous that they should never be released from prison. There are approximately 75 prisoners currently serving whole-life sentences in England and Wales and include some of the UK's most notorious criminals.

Internet research

Research a list of prisoners serving whole-life sentences. Choose one of those offenders. Why was a whole-life sentence imposed on that offender?

Release on licence

When sentencing the offender, the judge will impose a minimum term of imprisonment that has to be served – this is called the 'tariff' period. At the end of this time, the Parole Board will decide whether the offender is fit for release back into the community. It will take into account:

- » whether the offender admits the crime
- » whether the offender is still considered to be a danger
- » the offender's behaviour during the tariff period.

If the offender is considered fit for release, this will be subject to conditions, such as where they will live, what

job they can take, wearing a tag and whom they can associate with.

Discretionary life sentences

For the first commission of a serious offence, such as manslaughter, rape and robbery, the maximum sentence set by statute is life imprisonment, but the judge does not have to impose the maximum. The judge has discretion in sentencing and can give any sentence less than the maximum if it is considered appropriate.



▲ Figure 22.1 Inside a prison

Fixed-term sentences

For other, less serious, crimes, the maximum length of the sentence will again be set by statute. For example, the maximum sentence for theft, imposed by the Theft Act 1968, is seven years.

The sentence imposed by a judge or by magistrates will depend on several factors, including the seriousness of the crime and the defendant's previous record. The length of a sentence can be increased if it is racially or religiously aggravated.

Imprisonment for a set number of months or years is called a 'fixed-term' sentence. Prisoners do not serve the whole of the sentence passed by the court. Only offenders aged 21 and over can be given a sentence of imprisonment. Anyone sent to prison is released on licence after they have served one half of the sentence. For terrorism offences, the government introduced release on licence after the service of two-thirds of the sentence.

Release on licence has to be approved by the Parole Board and may be subject to conditions such as residence and the need to report to a police station or probation service.

Suspended prison sentences

A suspended sentence of imprisonment is one where the offender will only serve the custodial period if there is a breach of one of the terms of the suspension.

- » The prison sentence can only be between 14 days and two years.
- » The period of suspension can be between six months and two years.

The idea is that the threat of prison during this period of suspension will deter the offender from committing further offences. If the offender complies with the requirements of the suspended sentence, they will not serve the term of imprisonment.

The suspended sentence can be combined with any of the requirements used in a community order (see Section 22.1.2). If the offender fails to meet the requirements, the suspended sentence may be 'activated'. This means that the offender will be made to serve the term of imprisonment.

A suspended sentence should only be given where the offence is so serious that an immediate custodial sentence would have been appropriate, but there are exceptional circumstances in the case that justify suspending the sentence.

ACTIVITY



▲ Figure 22.2 The prison population of England and Wales from 1900 to 2018/19

There has been an explosion in the prison population between 1900 and 2018/19, quadrupling in size (half of this increase has taken place since 1990). If we calculate the number of prisoners per 100 000 people in the general population, by 2018/19 there were:

- 173 prisoners per 100 000 of the population in England and Wales
- 162 per 100 000 in Scotland
- 96 per 100 000 in Northern Ireland.

In 2015, England and Wales had the eighth highest rate of imprisonment among EU countries and the highest rate among western European jurisdictions.

Adapted from a report in the House of Commons Library (3 July 2020) (<https://commonslibrary.parliament.uk/research-briefings/sn04334>)

Questions

- 1 Why do you think that the prison population has increased so much since 1990?
- 2 Why do you think that England and Wales have the highest prison population in western European countries?
- 3 Suggest ways in which the prison population could be reduced.

22.1.2 Community orders

Community orders can be imposed when the judge or magistrates do not think that the offence is serious enough to warrant imposing a sentence of imprisonment. The theory behind them is to help offenders address the reasons for committing offences and to rehabilitate themselves. The sentence is available for offenders aged 18 and over.

The Criminal Justice Act 2003 created one community order, under which the court can combine any requirements it thinks are necessary. The judge or magistrates can 'mix and match' requirements, allowing them to fit the restrictions and rehabilitation to the offender's needs. The full list of requirements available to the courts is set out in s 177 of the Criminal Justice Act 2003, but include the following:

- » an unpaid work requirement
- » a programme requirement
- » a prohibited activity requirement
- » a curfew requirement
- » an exclusion requirement
- » a residence requirement – to live at a certain address
- » a mental-health treatment requirement
- » a drug rehabilitation requirement
- » an alcohol treatment requirement
- » in the case where the offender is aged under 25, an attendance centre requirement.

Each of these requirements is defined in the Criminal Justice Act 2003. Most are self-explanatory from their name, but some are explained below:

- » Unpaid work requirement – this requires the offender to work for between 40 and 300 hours on a suitable project organised by the probation service.
 - The type of work involved will vary, depending on what schemes the local probation service is running. Examples include painting school buildings, helping build a play centre or working on conservation projects. When Eric Cantona, the French footballer, was found guilty of assaulting a football fan in 1995, the court ordered that he help at coaching sessions for young footballers.
 - One criticism is that the number of required hours is not enough – other countries that run similar schemes can impose much longer hours. However, reoffending rates for offenders receiving this punishment are lower than for other community sentences.
- » Programme requirement – this requires the offender to undertake a course, either educational or practical.
- » Prohibited activity requirement – this requirement allows a wide variety of activities to be prohibited. The idea is to try to prevent the offender from committing another crime of a similar type.

- Often, the offender is forbidden to go into a certain area such as a town centre, or banned from wearing a 'hoodie'. In one case, an offender who was found guilty of criminal damage was banned from carrying paint, dye, ink or marker pens.

- » Curfew requirement – an offender can be ordered to remain at a fixed address for 2–16 hours in any 24-hour period. This order can last for up to twelve months and may be enforced by electronic tagging (where suitable).
 - Courts can only make such an order if there is an arrangement for monitoring curfews in their area. Such monitoring can be done by spot checks, by security firms sending someone to make sure that the offender is at home, or offenders may be electronically tagged.
 - It is also possible to use satellite technology to track those who are tagged. The cost of tagging is quite expensive. However, it is much less expensive than the cost of keeping an offender in prison.
- » Exclusion requirement – offenders are ordered not to go to certain places. The order can specify different places for different periods or days. This is intended to keep offenders away from areas where they are most likely to commit crime; for example, a persistent shoplifter could be banned from certain shopping areas. The order can last for up to two years.
- » Mental-health treatment is aimed at the cause of the offender's behaviour.
- » Drug rehabilitation or alcohol treatment requirement – much crime is linked to drug and/or alcohol abuse, and the idea behind these two requirements is to tackle the causes of crime, and hopefully prevent further offences being committed.

Internet research

Research the arguments in favour of, and against, the use of electronic tagging. Do you think electronic tagging a good idea?

22.1.3 Fines

This is the most common sentence imposed in the Magistrates' Court, where about 70 per cent of offenders are dealt with in this way. In the Crown Court, only a small percentage of offenders are dealt with by way of a fine. When deciding the amount of a fine, the courts must take into account the income and assets of the offender.

22.1.4 Discharge

This may be either a conditional discharge or an absolute discharge. A conditional discharge means that

the court discharges an offender on the condition that no further offence is committed during a set period of up to three years. It is intended to be used where it is thought that punishment is not necessary. If an offender reoffends within the time limit, the court can then impose another sentence in place of the conditional discharge, as well as imposing a penalty for the new offence. Conditional discharges are widely used by Magistrates' Courts for first-time minor offenders.

An absolute discharge means that, effectively, no penalty is imposed. Such a sentence is likely to be used where an offender is technically guilty but morally blameless.

▼ **Figure 22.3** Sentencing powers of the courts for adult offenders

Key facts	
Type of sentence	Comment
Custodial sentence	• Mandatory life sentence for murder • Discretionary life sentence for other serious offences • Fixed-term sentence • Suspended sentence – can be combined with conditions
Community order	• Sentence served in the community • Court can impose suitable requirements, e.g. unpaid work, curfew, exclusion, drug rehabilitation
Fine	• Used in 70% of cases in the Magistrates' Courts • Offender's income and assets must be taken into account
Discharge	• Conditional: for a set length of time the offender must not reoffend • Absolute: effectively no penalty imposed

22.1.5 Factors in sentencing

Before sentencing an adult offender, the judge or magistrates will weigh up any relevant aggravating and mitigating factors. Aggravating factors will have the effect of increasing a sentence, whereas mitigating factors will reduce a sentence.

The court will usually consider both the offence and the background of the offender, as well as one or more of the aims of sentencing. In order to do this, the court must know details of the offence, so where the offender pleads guilty the prosecution will outline the facts of the case. The offender is asked to agree with those facts and, if not, a Newton hearing will be held for the facts to be established. This is important, as the details of the offence can affect the sentence.

Where the offender has pleaded not guilty and been convicted after a trial, the judge or magistrates will have heard full information about the case during the trial. However, they may still require a pre-sentence report to be prepared.

Pre-sentence reports

These are prepared by the probation service. The court does not have to (but usually will) consider such a report before deciding to impose a custodial sentence, though for very serious offences such a report may not be relevant.

Where the court is considering a community sentence, it is likely to order a report before it decides on the sentence. The report will give information about the offender's background and suitability, or otherwise, for a community-based sentence. This may be important in showing both why the offender committed a crime and indicating the likely response to a community-based penalty.

Medical reports

Where the offender has medical or psychiatric problems, the court will usually ask for a report to be prepared by an appropriate doctor. Medical conditions may be important factors in deciding the appropriate way of dealing with the offender; the courts have special powers where the offender is suffering from mental illness.

Sentencing guidelines

The Sentencing Council was established in 2010 to bring greater consistency and transparency to sentencing practice. It has responsibility for:

- » developing sentencing guidelines and monitoring their use
- » assessing the impact of guidelines on sentencing practice, and
- » promoting awareness among the public regarding the realities of sentencing and publishing information regarding sentencing practice in Magistrates' and Crown Courts.

Judges and magistrates are now under a duty to impose a sentence that is within the offence range set out by the council. They should only depart from the range when it is in the interests of justice to do so. This should ensure that guidelines can help produce consistent sentencing.

The Sentencing Council has issued guidelines on sentencing for specific offences. These guidelines include aggravating factors and mitigating factors that could result in a higher or lower sentence. In looking at the offence, the most important point to establish is how serious it was, of its type. This is now set out in s 143(1) of the Criminal Justice Act 2003, which states that:

'In considering the seriousness of the offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, or was intended to cause or might reasonably foreseeably have caused.'

The Act goes on to give aggravating factors that make an offence more serious:

- » previous convictions for offences of a similar nature or relevant to the present offence
- » if the offender was on bail when the offence was committed
- » any racial or religious hostility in the offence
- » any hostility to disability or sexual orientation in the offence
- » if the offender pleaded not guilty.

Other points the sentencing judge or magistrates may want to know include, for example:

- » in a case of theft, how much was stolen and whether the offender was in a position of trust (abuse of trust will merit a longer sentence)
- » in a case of assault, what injuries were inflicted, whether the assault was premeditated and whether the victim was particularly vulnerable (young or elderly)
- » where several offenders are convicted of committing a crime jointly, if any of them played a greater part than the others, and who was involved in planning it; the sentence that each receives will reflect the part they played in the offence.

Examples of mitigating factors include:

- » no previous convictions
- » showing genuine remorse
- » taking a minor part in the offence
- » pleading guilty.

Internet research

Read the sentencing guidelines for domestic burglary at www.sentencingcouncil.org.uk/offences/crown-court/item/domestic-burglary

What is the range of sentence for the following?

- 1 A first-time offender who reaches into an open window of an empty house and takes a bottle of beer.
- 2 A couple of friends who enter an empty house at night as they know the owners are on holiday, disable the alarm and steal a quantity of valuable jewellery.
- 3 A group of four knife-carrying burglars who break into a house by smashing patio doors and trash the house looking for a safe which they think contains a quantity of cash. The houseowner is threatened and tied up.

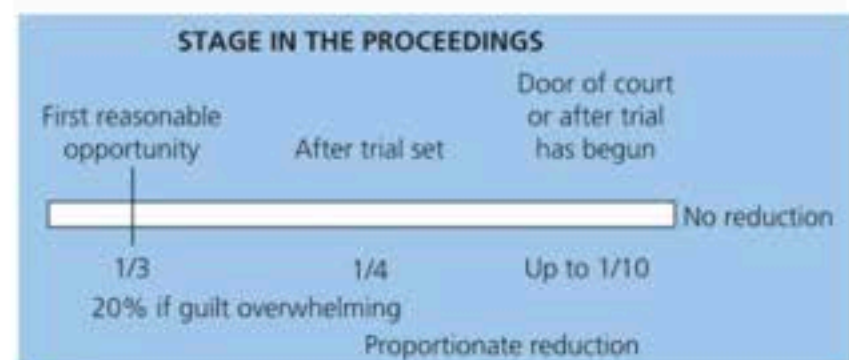
Reduction in sentence for a guilty plea

There can be a reduction in sentence for a guilty plea, particularly when made early in the proceedings:

- » A guilty plea at the first reasonable opportunity should attract a reduction of up to one-third, but where the prosecution case is overwhelming, only 20 per cent.
- » A guilty plea after the trial has started would only be given a 10 per cent reduction.

The amount of reduction is on a sliding scale, as shown in Figure 22.4. The reason for this is set out by the Sentencing Council:

'A reduction in sentence is appropriate because a guilty plea avoids the need for a trial, shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence.'



▲ Figure 22.4 Maximum reduction in sentence for a guilty plea

The offender's background

Previous convictions are treated as an aggravating factor and include:

- » failure to respond to previous sentences
- » the past record of the offender
- » whether the offender was on bail when the offence was committed.

If there are no previous convictions and the offence was not committed while on bail, this will be treated as a mitigating factor.

Where the judge or magistrates consider that a fine is a suitable penalty, the financial circumstances of the offender must be investigated and taken into account when setting the level of the fine.

22.2 Young offenders

The term 'young offenders' includes all offenders under the age of 21. However, there are considerable variations in the different sentences available for those under 18, under 16, under 14 and under 12.

As with adult offenders, the courts have, in general, powers to order custodial sentences, community orders, fines and discharges, but different sentences are

available, and there are also restrictions on what the courts can order (especially for the youngest offenders).

As with adults, custodial sentences are meant to be used only for serious offences. The age of the offender is particularly important, as young offenders should only be given a custodial sentence as a last resort. Where young offenders are given a custodial sentence, they are always held in separate units from adults. The court must state its reason for imposing a custodial sentence, and in the case of the Magistrates' Court, that reason must be written on the warrant of commitment and entered in the court register.

22.2.1 Custodial sentences

There has been considerable debate whether young offenders, particularly those under the age of 15, should be given custodial sentences. Government policy has changed frequently on this issue.

It is argued that many young offenders need help rather than punishment, and that this is best provided by sentencing orders that keep the offender in the community. Custodial units for young offenders have often been called 'universities of crime'. However, there are at the moment several different types of custodial sentence that can be given, depending on the type of offence, the age of the offender and whether they have offended before.

Detention at Her Majesty's Pleasure

Any offender aged between 10 and 17 who is convicted of murder must be ordered to be detained during Her Majesty's Pleasure with a minimum term of 12 years. This is an indeterminate sentence that allows the offender to be released on licence after serving the minimum term. If an offender reaches the age of 21 while still serving a sentence, they will be transferred to an adult prison.

Detention for serious crimes

For very serious offences, there are additional powers to order that the offender be detained for longer periods. It will apply if the young offender is convicted of an offence for which an adult aged 21 or over could receive a custodial sentence of 14 years or more, or if they commit certain sexual or firearms offences. The length of detention imposed on the young offender cannot be more than the maximum sentence available for an adult.

Further, if the young offender is convicted of a serious offence such as robbery or burglary or certain firearms offences, and the court regards them as dangerous, they could receive an indeterminate sentence or an extended custodial sentence.

Young offender institutions

Offenders aged between 15 and 20 can be sent to a young offender institution to serve a custodial sentence. The minimum sentence is 21 days and the maximum is the maximum allowed for the particular offence. If the offender reaches the age of 21 while serving the sentence, they will be transferred to an adult prison.

Detention and training orders

The Crime and Disorder Act 1998 created a new custodial sentence for young offenders called a detention and training order. The sentence must be for a specified period, with a minimum of four months and a maximum of 24 months. The first half of the period is spent in custody and the other half in the community. A detention and training order can be imposed on young offenders as follows:

- » For offenders aged 15–17 if convicted of an offence for which an adult would be sentenced to a prison
- » For offenders aged 12–14 if the court considers they are persistent offenders.

Offenders aged 10 and 11 cannot be given this sentence.

22.2.2 Community orders

Youth rehabilitation order

The youth rehabilitation order was introduced by the Criminal Justice and Immigration Act 2008. It works on the same principle as a community order for an adult offender. It can be imposed on a young offender under the age of 18 and will last for a maximum of three years. The court can 'mix and match' requirements to suit the circumstances. The requirements that can be attached to a youth rehabilitation order are:

- » an activity requirement
- » a supervision requirement if the offence was so serious that the offender could be imprisoned (supervision, curfew, electronic monitoring and activity must be part of this order)
- » in a case where the offender is aged 16–17 at the time of the conviction, an unpaid work requirement
- » a programme requirement to take part in set activities
- » an attendance centre requirement; this orders the offender to go to a centre, usually on a weekend morning, once a week for a period of time, where they are expected to participate in activities and attend lectures
- » a prohibited activity requirement to refrain from taking part in specified activities at certain times
- » a curfew requirement
- » an exclusion requirement
- » a residence requirement to live at a certain address

- » a local authority residence requirement to live in provided accommodation
- » a mental-health treatment requirement
- » a drug treatment requirement
- » a drug testing requirement
- » an intoxicating substance treatment requirement
- » an education requirement.

Many of these orders are similar to those imposed for adults, but there is greater emphasis on supervision and education.

ACTIVITY

Suggest a suitable sentence for the following offenders. Explain the aim of each sentence you choose.

- 1 Kevin, aged 16, has been found guilty of two charges of criminal damage. The amount of damage involved is estimated at £600. He is living at home, not in training or education, and has no previous convictions.
- 2 Melanie, aged 15, has appeared before the Youth Court and admitted five charges of shoplifting. She has also admitted two charges of taking and driving a car without the owner's consent. She has appeared before the Youth Court on two previous occasions for similar offences.
- 3 Rishi, aged 17, has been found guilty at the Crown Court of an aggravated burglary. He committed this offence while on bail charged with another offence of violence. He has no fixed address as he is 'sofa surfing' among friends. He is due to start an apprenticeship shortly.

22.2.3 Parental responsibility

If the parents agree, they can be bound over to keep their child under control for a set period of up to one year. If the child commits an offence during this period, the parents will forfeit a sum of money up to a maximum of £1000. When a parent unreasonably refuses to be bound over, the court has the power to fine that parent instead.

Parents can also be bound over to ensure that a young offender complies with a community sentence. Where an offender under the age of 16 is fined or ordered to pay compensation, the court must require the offender's parents to pay, and the financial situation of the parents is taken into account in deciding the amount of the order.

The court can issue a Parenting Order containing conditions up to a maximum of 12 months where a

child under the age of 16 has been convicted of an offence. The youth offending team has responsibility for obtaining compliance, which can ultimately be enforced against the parents by the court.

22.2.4 Factors in sentencing young offenders

According to the Sentencing Council's 2017 report 'Sentencing Children and Young Persons', the main aims of sentencing young offenders should be to prevent further offending and ensure the welfare of the child.

The court should take into account all or any of the following conditions, if the child:

- » is suffering any mental-health issues or has learning difficulties
- » has suffered any traumatic life experiences
- » has any speech or language difficulties
- » is likely to self-harm
- » has experienced any loss, neglect or abuse
- » has issues such as the misuse of drugs and/or alcohol (or their family has).

The court should, when sentencing, focus on the needs of the child and aim, where possible, on their rehabilitation. It should consider any of the following factors that may be relevant:

- » the age and maturity of the child, and whether the child is fully developed for their age (lack of maturity could affect the child's decision making; they may be more prepared to take risks or they may take greater account of negative influences around them)
- » the seriousness of the offence committed
- » their family circumstances, including whether they are in care
- » any previous record of offending
- » whether the child admits the offence
- » the likely effect of a sentence on the child, including the possible effect on their future education and training.

There should be an attempt to encourage the child to take responsibility for committing their actions and to reintegrate them back into society. Restorative justice where they meet the victim and discuss the effect of the crime should be considered. It should be considered whether the child can learn from their experience without undue penalisation.

A custodial sentence should only be considered for a child as a last resort and where the crime is so serious that no other sentence is appropriate. The aim of deterrence should only be considered where a serious offence has been committed, but this can be outweighed by consideration for the needs and welfare of the child.

Internet research

Look at the Sentencing Council guidelines for sentencing children and young persons at www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-Young-People-definitive-guideline-Web.pdf

Do you think there are any factors missing from those set out in the report?

Do you agree that the welfare of the child offender and the prevention of reoffending are the most important factors to be considered by a court?

22.3 Aims of sentencing: adult offenders

When judges or magistrates have to pass a sentence, they will not only look at the sentences available, but they will also have to decide what they are trying to achieve by the punishment they give.

Section 142 of the Criminal Justice Act 2003 sets out the purposes of sentencing for those aged 18 and over, saying that a court must have regard to the:

- » punishment of offenders
- » reduction of crime (including its reduction by deterrence)
- » reform and rehabilitation of offenders
- » protection of the public
- » making of reparation by offenders to persons affected by their offences.

22.3.1 Punishment of offenders

Punishment is often known as retribution. The idea of punishment is that the offender deserves a penalty for carrying out a criminal act or acts. It does not seek to reduce crime or alter the offender's future behaviour. This idea was expressed in the nineteenth century by Kant in *The Metaphysical Elements of Justice* when he wrote:

'Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime.'

Retribution contains an element of revenge: society and the victim are being avenged for the wrongdoing. It is on the basis of revenge that long prison sentences for serious offences are justified. The crudest form of retribution can be seen in the old saying, 'an eye for an eye and a tooth for a tooth and a life for a life'. This was one of the factors used to justify the death penalty for the offence of murder.

Tariff sentences

Retribution, today, is based more on the idea that punishment for each offence should have a set tariff. The Sentencing Council produces guidelines on sentencing for the most common crimes. These include a starting point and a range for the sentence. They also set out factors that make an offence more serious or less serious.

22.3.2 Reduction of crime including deterrence

Individual deterrence

Individual deterrence is intended to ensure that the offender does not reoffend through fear of future punishment.

Penalties such as a prison sentence, a suspended sentence or a heavy fine can be imposed with the aim of deterring the offender from committing similar crimes in the future. Critics of the theory of deterrence point out that it assumes that an offender will stop to consider what the consequences of their action will be. In fact, most crimes are committed on the spur of the moment, and many are committed by offenders who are under the influence of drugs or alcohol. These offenders are unlikely to stop and consider the possible consequences of their actions.

General deterrence

General deterrence is aimed at preventing other potential offenders from committing crimes. The value of this aim is more doubtful, as potential offenders are rarely deterred by severe sentences passed on others. However, judges do occasionally resort to making an example of one offender in order to warn other potential offenders of the type of punishment they face.

Educative deterrence

Educative deterrence is used to send a message to those in society likely to offend, by encouraging them to behave in a more law-abiding way. This can be done through the use of punitive or harsh sentencing. Examples of offences treated in this way include several driving offences, such as not wearing a seat belt, using a mobile telephone and drink- and drug-driving.

However, critics argue that it is ineffective, as many of those caught drink-driving are older drivers who have not grown up with the same deterrent message as younger drivers.

22.3.3 Reform and rehabilitation

Reforming the offender and rehabilitating them into society is a forward-looking aim, with the hope that the offender's behaviour will be altered by the penalty imposed, so that they will not offend in the future (thus reducing crime).

This principle of sentencing came to the fore in the second half of the twentieth century with the development of community sentences. As use of drugs is the cause behind the commission of many offences, there are also community orders, especially drug testing and treatment orders and drug abstinence orders, aimed at trying to rehabilitate drug abusers.

Rehabilitation is an important element in the sentencing philosophy for young offenders, but it is also used for some adult offenders. Judges or magistrates will be given information about the defendant's background, usually through a pre-sentence report prepared by the probation service. Where relevant, the court will consider other factors, such as school reports for young offenders, job prospects or medical issues.

22.3.4 Protection of the public

The public needs protection from violent or prolific offenders. Therefore, imposing a custodial sentence meets this aim, as an offender cannot commit further crimes or harm the public when detained in prison. This raises questions such as:

- » For how long should the public be protected?
- » Should the offender serve all the sentence imposed or should they be released early, on licence?

As seen above, a life sentence will be imposed for those who commit murder or other serious crimes. If the offender is a serial killer or commits horrific acts, they can be ordered to spend the rest of their lives in prison for public protection.

If the imprisoned offender is no longer considered to be a danger, they may be considered for release on licence by the parole board, who will take into account the offender's record in prison, acceptance for the original offence and the likelihood of causing harm.

There are ways of protecting the public in some less serious offences. These include imposing a curfew order or imposing disqualification for certain driving offences.

22.3.5 Making reparation

Reparation is aimed at compensating the victim of the crime, usually by ordering the offender to pay a sum of money to them. Sometimes reparation may involve acts such as returning stolen property to its rightful owner.

The idea that criminals should pay compensation to the victims of their crimes is long established. Judges and magistrates are required to consider ordering compensation to the victim of a crime, in addition to any other penalty they may think appropriate. Under s 130 of the Powers of Criminal Courts (Sentencing) Act

2000, courts are under a duty to give reasons if they do not make a compensation order.

Restorative justice is where offenders and victims are brought together, so that the offenders may see the effect of their crimes and make direct reparation, perhaps by decorating or gardening at the victim's home. This concept also includes making reparation to society as a whole, by the use of an unpaid work requirement where offenders are required to do a number of hours' work on a community project under the supervision of the probation service.

22.4 Aims of sentencing: young offenders

The main aim in sentencing young offenders is reformation and rehabilitation. Young offenders are not treated by the criminal justice system in the same way as adult offenders, except for the most serious offences. The main difference is that young offenders' names are not usually published and the case will be dealt with in the Youth Court, to which the public is not admitted.

However, in very serious offences, or where the young person will be tried alongside an adult, it will be dealt with in the Crown Court, but again the name of the young offender will not usually be publicised.

Section 142A of the Criminal Justice Act 2003 states that the court must have regard to the principal aim of the youth justice system, which is to prevent offending (or reoffending) by persons aged under 18, and to the welfare of the offender. The court must also have regard to the aims of:

- » punishment
- » reform and rehabilitation
- » protection of the public
- » reparation.

Rehabilitation of the young offender should be the target. Any sentence imposed should be individual to that young person. It is important to avoid criminalising young people unnecessarily; the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their actions and to promote reintegration into society, rather than to punish.

If punishment has to be imposed, a young offender should receive a lower sentence than an adult convicted of a similar offence. This is because they should be considered less culpable than an adult as they act impulsively and lack maturity, so they are unlikely to understand the impact of their offence.

The best interests of the child should be the primary aim of the system. This may involve removing a young

person from undesirable surroundings and ensuring that proper arrangements are made for their education and training. In addition, support may be given to parents to improve their parenting skills, as this can play a large part in improving life chances and reducing reoffending. Where parents refuse to face up to their responsibilities, parenting orders can compel them to attend a programme to build their skills and to comply with requirements such as supervising their child at certain times.

TARGET SKILLS

- 1 State what is meant by a 'tariff' sentence.
- 2 Define the sentencing aim of deterrence.
- 3 Assess the factors taken into account by a judge when sentencing a defendant found guilty of burglary of a private dwelling.
- 4 Consider whether the current sentencing system effectively prevents adult offenders from reoffending.

▼ Figure 22.5 Aims of sentencing

Key facts		
Theory	Aim of theory	Suitable punishment
Retribution	Punishment imposed only on the grounds that an offence has been committed	- Tariff sentences - Sentence proportionate to the crime
Denunciation	- Society expressing its disapproval - Reinforces moral boundaries	Reflects blameworthiness of the offence
Incapacitation	- Offender made incapable of committing further crime - Society protected from crime	- Death penalty for murder - Long prison sentences - Tagging
Deterrence	- Individual: offender deterred through fear of further punishment - General: potential offenders warned as to likely punishment	- Prison sentence - Heavy fine - Long sentence as an example to others
Rehabilitation	Reform offender's behaviour	- Community sentence - Individualised sentence
Reparation	Repayment/reparation to victim or to community	- Compensation order - Unpaid work - Reparation schemes

▼ Figure 22.6 Evaluation of sentences – adult offenders

Sentence	Aim	Comment
Imprisonment	Punishment Deterrence Reduction of crime Protection of public	- Removal of liberty is severest form of punishment available - Offenders cannot commit crime or attack members of the public while imprisoned BUT - Short-term sentences are not effective in reducing crime and are expensive - Serial offenders not deterred by threat of imprisonment – 50% commit further crimes within a year of release - Few effective education or rehabilitation programmes available in prison – prisons under-resourced and understaffed – likely to be unsafe for inmates - Imprisonment likely to lead to breakdown of family relationships - Prisoners often released in debt, homeless and jobless - Expensive form of punishment
Suspended sentence	Deterrence	Imposed as a last resort – can make offenders think carefully about future behaviour

Community order	Punishment Deterrence Reform & rehabilitation	- Impacts on offender's time and requires them to carry out unwanted tasks so may be effective in deterring future criminal behaviour - Support provided for addictions and circumstances can be effective in helping offenders change their future behaviour and obtaining employment - More effective than imposing short-term prison sentence - Cheaper for state than imprisonment BUT - Public view community penalties as soft option - Issues of following up non-attendance
Fine	Punishment Deterrence	Generally linked to ability to pay so may be effective. Offenders may not be prepared to pay future penalties so may consider future behaviour
Discharge	Deterrence	Offenders may not want to receive more severe future penalty so may consider future behaviour

▼ Figure 22.7 Evaluation of sentences – young offenders

Sentence	Aim	Comment
Detention	Punishment Deterrence Reduction of crime Protection of public Reform & rehabilitation	- Relatively small numbers detained - Numbers being detained are falling over time - Crimes committed by young offenders are falling - Allows for provision of education BUT - Worrying levels of violence in youth detention centres - Many of those detained are vulnerable and troubled and come from broken homes
Community penalty	Deterrence Reform & rehabilitation	- Individually tailored to fit the needs of each offender - Impacts on young offender's time – requires them to carry out unwanted tasks so may be effective in deterring future criminal behaviour - Education, training, and support provided to help young offenders change their future behaviour and obtain qualifications and employment BUT - Requires effective monitoring, support and time commitment by professionals
Parental responsibility	Deterrence Reform & rehabilitation	- Can be effective in reducing behavioural and anti-social behaviour problems and delinquency - Can divert potential criminal behaviour away from court system and reoffending BUT - Requires parental 'buy-in' and support

TEST YOURSELF

- 1 Outline the effect of a discretionary life sentence.
- 2 Identify three conditions that can be attached to a community order.
- 3 State the most common punishment imposed in the Magistrates' Court.
- 4 Briefly explain the two forms of discharge.
- 5 Identify two aggravating factors in sentencing an adult offender.

STRETCH AND CHALLENGE

'The sentencing procedure for young people seeks to punish, rather than to reform and rehabilitate, and does nothing to reduce crime.'

Write points for and against this motion.

EXAM-STYLE QUESTIONS

- 1 Describe any three community punishments that a criminal court can impose on adult offenders.
- 2 Assess the value of custody as a punishment.

23

Nature of a contract

Introduction

Much of modern-day contract law developed in the nineteenth century and from the time of the Industrial Revolution. It was developed on the principle of *laissez-faire* economics, which favours a system free from government interference and regulation.

People make contracts all the time, whether individually or within a business context. As a result, there are many types of contract, which satisfy different purposes. This chapter links to the key concept of rights, duties and responsibilities, and freedom.

23.1 Agreement and formation of valid contracts

A contract is an agreement enforceable at law. All contracts are agreements but not all agreements are contracts. A contract needs:

- » an offer
- » an acceptance
- » consideration
- » intention
- » contractual capacity.

This is often known as the traditional approach. However, there are other approaches:

- 1 Lord Denning in *Butler Machine Tools Co. Ltd v Ex-Cell-O Corporation (England) Ltd* (1979) stated that you must view the circumstances as a whole to discover whether there was a contract.
- 2 In *New Zealand Shipping Co. Ltd v A.M. Satterthwaite & Co. Ltd, The Eurymedon* (1975), Lord Wilberforce stated:

'English Law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often to the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.'

It appears, therefore, that a contract might exist although it cannot easily be shown exactly where the offer and corresponding acceptance lie.

There are three types of contract:

- » unilateral
- » bilateral
- » collateral.

23.2 Unilateral contracts

Unilateral means one-sided, and a unilateral contract is created when one party pays another party to perform an action. Unilateral contracts can come about:

- » as a result of reward
- » through advertisements, when an advertiser promises to pay members of the general public if they take a course of action.

Carlill v The Carbolic Smokeball Co. Ltd (1893) is the authority for a number of exceptional rules that apply to unilateral contracts:

- » An advertisement is an invitation to treat (see Chapter 24, subsection 24.1.2), but if an advertisement requests the performance of an act (unilateral), it will be an offer. When the act has been performed, there will be a binding contract.
- » For other contracts, acceptance must be communicated to the offeror, but the offeror waives this in a unilateral contract.
- » The request acts both as the acceptance (see Chapter 24, section 24.2) and the consideration (see Chapter 26, section 26.1) for the promise.
- » You can only accept a unilateral offer for reward if you know that the offer has been made.
- » The acceptance of a unilateral contract happens when the required action is performed. This might be a continuing action, and the offer might be revoked at any time before the act is completed. However, it may not be possible to revoke the unilateral offer once the offeree has started to perform (see *Errington v Errington and Woods* (1952) in Chapter 24, subsection 24.1.5, for an example).

An example of a unilateral contract would be: 'I have lost my watch. I will give £50 to anyone who finds it and returns it safely.'

CASE EXAMPLE

Carlill v The Carbolic Smoke Ball Co. Ltd (1893)

The company advertised a medical cure for influenza and colds, stating that:

'£100 reward will be paid by the Carbolic Smokeball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.'

On the basis of the advertisement, Mrs Carlill bought one of the balls at the chemist and used it as directed three times a day from 20 November 1891 to 17 January 1892, when she contracted influenza.

Judgment was given in favour of Mrs Carlill. Bowen LJ said:

'Therefore it cannot be said that the statement that £100 would be paid was intended as a mere puff ... I think it was intended to be understood by the public as an offer which was to be acted upon.'

WERNER THE PALL MALL MAGAZINE LITERARY AND GENERAL ADVERTISER

CARBOLIC SMOKE BALL.

COUGHS Cured in 1 week.	THROAT DEAFNESS Cured in 2 to 4 months.	INFLUENZA Cured in 14 hours.
COLD IN THE HEAD Cured in 10 hours.	HOARSENESS Cured in 10 hours.	DIPHTHERIA Prevented.
COLD ON THE CHEST Cured in 10 hours.	LOSS OF VOICE Fully restored.	CHOLERA Believed in 5 minutes.
CATARH Cured in 1 to 2 months.	SORE THROAT Cured in 10 hours.	WHOOPING COUGH Believed the first application.
ASTHMA Believed in 10 minutes.	HAY FEVER Cured in 1 week.	NEURALGIA Cured in 10 minutes.
BRONCHITIS Cured in 1 month.	SMOKING Cured in 1 week.	HEADACHE Cured in 10 minutes.

As all the Diseases mentioned above arise from one cause, they can be Cured by one remedy: viz., THE CARBOLIC SMOKE BALL, which has been supplied to

H.R.H. The Duke of Edinburgh, R.G.	The Duke of Norfolk, R.G.	The Marquis of Ripon, R.G.
H.R.H. The Duke of Cambridge, R.G.	The Duke of Devonshire, R.G.	The Earl of Derby, R.G.
H.R.H. Prince Henry of Prussia, R.G.	The Duke of Westminster, R.G.	Lord Spencer, R.G.
The Duke of Argyll, R.G.	Richmond & Gordon, R.G.	The Earl of Albemarle, R.G.
The Duke of Fife, R.G.	The Duke of Wellington, R.G.	The Lord Chamberlain, R.G.
The Duke of Portland, R.G.	The Marquis of Salisbury, R.G.	Lord Weymouth, R.G.

The Carbolic Smoke Ball will also prevent DIPHTHERIA and INFLUENZA, as the germs of these diseases cannot live where the Carbolic Smoke (fine powder resembling smoke) is deposited.

The British Druggists, Ltd., have acquired all the rights for the United Kingdom for the manufacture and sale of the Carbolic Smoke Ball. They have satisfied themselves that this excellent remedy only requires to be better known in order to secure it a prominent place in every household.

Our Treatise on all Ailments caused by Taking Cold, containing many Testimonials from well-known persons, will be sent post free.

One CARBOLIC SMOKE BALL will last a family several months, making it the cheapest remedy in the world at the price—10/- post free; it can be re-filled when empty at a cost of 6/- post free.

BRITISH DRUGGISTS, Ltd.,
219, OXFORD STREET, LONDON, W.

SPECIAL NOTICE.
When taking over the Stock from the Carbolic Smoke Ball Co., a few gross of Smoke Balls were found to be slightly soiled, though otherwise perfect in every respect. These we will sell direct until the stock is exhausted at HALF PRICE, viz. 1/- each, post free. Address—BRITISH DRUGGISTS, Ltd., 219, Oxford Street, London. Should more orders be received than we can supply, the money will be immediately returned.

A bilateral contract is often a promise from one party to sell and a promise from the other party to buy.

For example: 'Do you want to buy my car? It is in good condition and has only had one owner. The price is £3000. Please let me know as soon as possible.'

23.4 Collateral contracts

A collateral contract can be spoken or written down, and is secondary to the main contract, but it stands independently and separate. Usually, it is made between the original parties, but it can be made with a third party. The reasons for such a contract can include the following.

- » Some terms need to be added to the main contract, as they were left out or thought about after the main contract was agreed.
- » There are errors in the main contract that need to be corrected.
- » The contracting parties are different (a third party is involved).

A collateral contract runs parallel to the main contract. It may override or supplement one or more of the main terms of the contract.

For example: 'Once you have bought the car from me, I will valet it once a month for six months for £20 a month.'

▲ Figure 23.1 The original Carbolic Smoke Ball advertisement

23.3 Bilateral contracts

A bilateral contract requires both parties to perform an action. It is a reciprocal arrangement between two parties – both parties promise to perform an act in exchange for the other party's act.

ACTIVITY

Is it possible to form a contract without offer and acceptance, and purely by the meeting of minds? Consider this question in small groups.

Internet research

There are differences between unilateral and bilateral contracts.

Search online for a report of *Carlill v The Carbolic Smoke Ball Company Ltd* (1893). Try www.bailii.org and look under the England and Wales reports and search the case citation.

▼ Figure 23.2 Types of contract

Key facts	
Type of contract	Description
Unilateral	One party pays the other party to perform an action (one-sided)
Bilateral	Each party performs an action (reciprocal)
Collateral	An addition to the main contract

TARGET SKILLS

- 1 What type of contract is an offer for reward?
- 2 Does a contract always need a formal offer and acceptance?
- 3 Analyse how you might revoke unilateral contracts.
- 4 Evaluate whether creating a new contract would be better than having a collateral contract.

COMMENT

Evaluation of the law relating to the nature of contract

It is often difficult to fix some everyday transactions within the offer and acceptance framework. The courts have a difficult job balancing the different concepts of the parties' intentions, their desire to achieve a fair result on the facts of the case and the need to establish and uphold a clear rule of law to similar cases in the past.

It has been argued that there is too much uncertainty, and yet certainty is one of the essential parts of contract law. The problem is achieving something that is practical and easy to administer but not too rigid.

Looked at holistically, the present system does achieve a result which is consistent with the intention of the parties. There is, however, an amount of flexibility by the courts, so that a conclusion can be achieved which is by and large consistent with the parties' intention and thus not so rigid that it becomes unmanageable.

STRETCH AND CHALLENGE

Is it right that in certain circumstances an acceptance can be made without the offeror knowing?

TEST YOURSELF

- 1 Can an offer be made to more than one person?
- 2 State the definition of a unilateral contract.
- 3 State the definition of a bilateral contract.
- 4 State the definition of a collateral contract.
- 5 Name the case which is the authority for a number of exceptional rules that apply to unilateral contracts.

EXAM-STYLE QUESTIONS

- 1 English contract law is based on the concept of *laissez faire*, so is it right that the law should on occasions interfere with the parties' agreement?
- 2 Jane loses her dog and offers a financial reward for its return. When she sees a person walking up the drive with her dog, she shouts from the window, 'I am no longer offering a reward for the return of the dog'. Advise whether there is a contract.

24

Offer and acceptance

Introduction

An offer is a proposition put by one person (the 'offeror') to another ('the offeree'). The offeror is willing to be bound by the terms of the proposition if the other person accepts. This is different from

an invitation to treat, which can precede an offer. An offer may be terminated before acceptance. This chapter links to the key concept of liability.

24.1 Principles and evidence

24.1.1 An offer

An offer can be made orally, in writing or by conduct, and made to a specific individual, group of people or the world at large, as seen in *Carlill v The Carbolic Smoke Ball* (1893) (see Section 23.2). To be an offer, it must be:

- » clear
- » precise
- » capable of acceptance as it stands.

The choice of words used can affect whether or not it is an actual offer.

CASE EXAMPLE

Harvey v Facey (1893)

A prospective buyer asked the seller: 'Will you sell me Bumper Hall Penn? Telegraph lowest price.' The seller's reply was: 'Lowest price acceptable £900.'

It was held that the seller's reply was merely a statement of price, not an offer open to acceptance. If the buyer had said, 'Will you accept £900 for Bumper Hall Penn?', this would have been an offer.

An offer is often a question requiring an answer of acceptance or rejection. In most situations, it is possible to withdraw an offer at any time before it is accepted.

There are, however, situations where what seems to be an offer is in fact *not* an offer. These are generally categorised as invitations to treat, and it is necessary to distinguish them from formal offers.

24.1.2 Distinguishing offers from invitations to treat

We see invitations to treat regularly in everyday life. When we go to the supermarket, there are items on the shelves; when we walk down the high street, there are

items in shop windows. These are not offers to sell but invitations to treat. As the purchaser, we are the ones who make the offer when we go to the checkout, or enter the shop and say we want to buy the item in the window.

An invitation to treat is a proposition that indicates a willingness to consider offers made by others, or invitations to enter into negotiations. An offer is binding once accepted, whereas an invitation to treat is not.

The common law has developed guidelines for commonly occurring situations, but we should always consider whether there is an intention to be bound.

The four most commonly occurring situations are:

- » advertisements
- » display of goods for sale
- » a mere statement of price
- » auction sales.

Advertisements

Normally, an advertisement will be an invitation to treat. For example: 'Good run-around car for sale. Come and have a look, only £500.'

CASE EXAMPLE

Partridge v Crittenden (1968)

A prosecution for 'offering for sale' a wild bird under the Protection of Birds Act 1954 failed.

The defendant was prosecuted for placing an advertisement stating: 'Bramblefinch cocks, bramblefinch hens, 25s each'. The court held this was not an offer but an invitation to treat.

The advertisement was the starting point of the negotiations, and the offer would only occur if a person reading the advertisement responded with an offer to buy a bird.

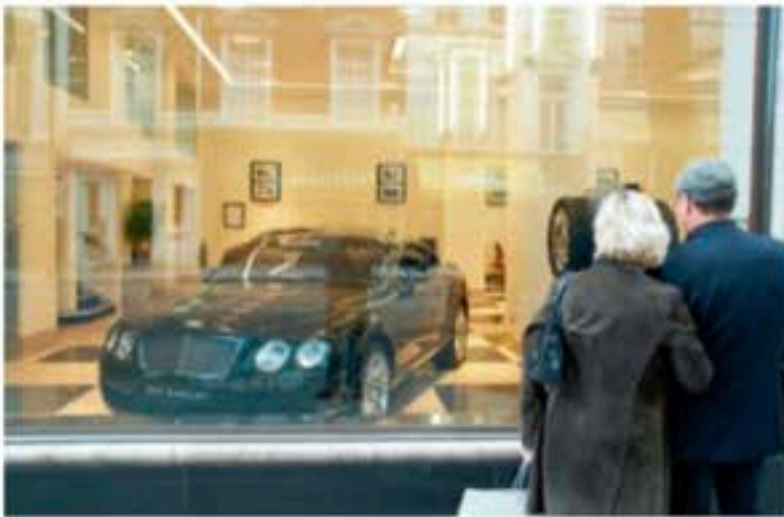
This case appears to contradict the case of *Carlill*, where the advertisement was an offer and not an invitation to treat. The distinction lies in the type of contract in issue; see sections 23.2 and 23.3, where we looked at unilateral contracts and bilateral contracts. With bilateral contracts, both parties have obligations, whereas unilateral contracts are one-sided: one party pays another to perform an action.

Internet research

Search online for the websites of national and local newspapers. Is an advertisement in a national newspaper different to one in a local newspaper?

Display of goods for sale

Goods in the supermarket and in shop windows are there to invite members of the public to offer to buy the goods. In general, the shopkeeper has the right to refuse to sell the goods.



▲ **Figure 24.1** Cars for sale in a showroom window constitute an invitation to treat

CASE EXAMPLES

Fisher v Bell (1961)

A shopkeeper who placed a flick-knife in a shop window was not guilty of offering it for sale in contravention of the Restriction of Offensive Weapons Act 1959, as the display was only an invitation to treat.

Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd (1953)

Boots, a chemist, converted one of their shops into a self-service system. Under s 18 of the Pharmacy and Poisons Act 1933, certain drugs and poisons cannot be sold other than 'under the supervision of a registered pharmacist'. When a customer removes goods from a shelf, a contract is not formed. The goods were taken to a cash desk, where a pharmacist was present, and the Court of Appeal held that the contract was formed at this point, therefore the Act was conformed with.

A mere statement of price

An example would be a man seeing a car for sale in a car showroom and asking the price.

The fact that the seller has indicated the price, which the buyer finds acceptable, does not make it an offer.

CASE EXAMPLE

Clifton v Palumbo (1944)

Negotiations were taking place for the sale of a large estate, during which the seller wrote to the buyer, saying:

'I agree to offer to you or your nominee my Lytham estate for £600 000. I also agree that a reasonable sufficient time shall be granted to you for examination and consideration of all the data and details necessary for the preparation of the schedule of completion.'

It was held that this did not amount to an offer to sell, but merely an indication of the price of the estate should all other matters be in order.

Auction sales

See Section 24.3.2.

24.1.3 Communications of offers

Once it has been confirmed that the proposition is an offer and not an invitation to treat, we must establish that it has been communicated to the offeree. If the offeree is not aware of the offer, they will be unable to accept or reject it.

It is impossible to accept something of which you have no knowledge.

It is common for offers to be made to individuals, but it is also possible for an offer to be made to a number of people, or even the whole world. Anyone who has actual knowledge of the offer can be seen to be an offeree and is entitled to accept it.

The fact that it is a unilateral offer makes no difference to the principle, and if the offeree is unaware of the existence of the offer, they will be incapable of accepting.

This is often seen in cases for reward. For example, if I lose my watch and offer a £50 reward to anyone who finds and returns it, and a person who knows of the reward finds the watch and returns it, that person is entitled to £50. If, however, another person finds my watch and returns it not knowing about the reward, that person will not be entitled to the £50, even if they subsequently hear about the reward.

24.1.4 Certainty

The terms of the offer must be certain. If there is any doubt as to the terms on which the parties are contracting, the offer would not be valid. It would be unfair on the offeree if they did not know what they were accepting, and the contract would be impossible to perform.

There can sometimes be an exception to this, where the parties have already started performing the contract. This point was seen in *Foley v Classique Coaches Ltd* (1934).

CASE EXAMPLE

Foley v Classique Coaches Ltd (1934)

The claimant contracted to sell the defendant petrol 'at a price to be agreed between the parties in writing from time to time'. Even though there were never any agreements, the courts refused to allow the defendant to repudiate the contract. The court held that a reasonable price could be implied into the contract. The fact that the contract had been running for three years would have been an influencing factor.

24.1.5 Counter offers

If the offeree adds new terms, it becomes a qualified acceptance and no contract is formed. Similarly, if the offeree accepts the offer but changes the terms, it becomes a counter offer and will amount to a rejection.

CASE EXAMPLE

Hyde v Wrench (1840)

Wrench offered to sell his farm to Hyde for £1000. Hyde offered to pay £950. Wrench rejected the counter offer. Hyde then sought to accept the original offer of £1000. Wrench sold to another party and Hyde claimed breach of contract. It was held that the counter offer amounted to a rejection of the original offer, and as a result that offer had come to an end.

In effect, Hyde's subsequent offer to buy at £1000 was in fact an offer rather than an acceptance.

For example: 'Do you want to buy my watch for £500?' 'Yes, but I want you to put a new strap on it.' (This is a counter offer, and the original offer has been rejected.)

Even if the main terms of an agreement are accepted, there can still be a counter offer and therefore rejection if some of the ancillary (additional) terms of the agreement are not agreed.

24.1.6 Requests for information

A request for further information or a mere enquiry about some part of the contract will not amount to a

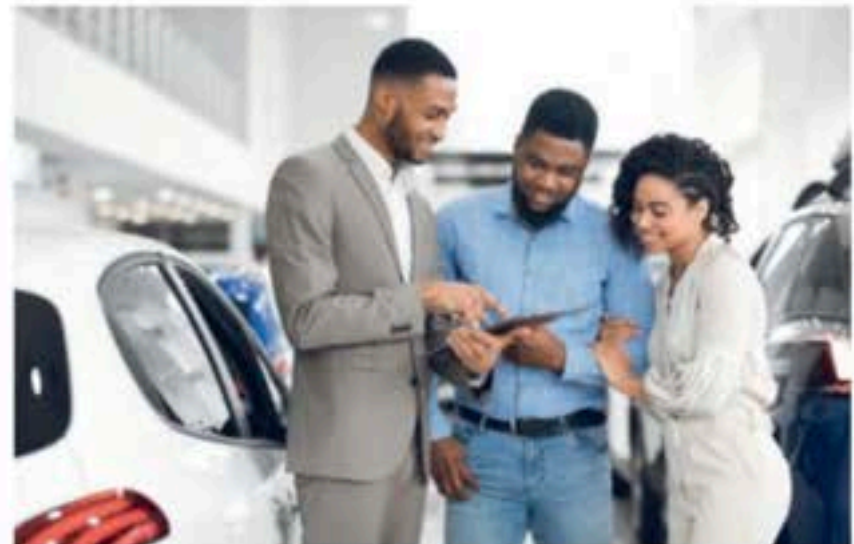
counter offer and does not destroy the offer. Clearly not everything said during negotiations will amount to a counter offer, even where it may appear contrary to the offer. Much will depend on the phrasing of the statement. The offeror will not be entitled to treat the offer as ended and make a deal elsewhere.

CASE EXAMPLE

Stevenson v McLean (1880)

The offeree enquired as to whether the iron he was buying from the offeror could be delivered in stages, rather than all at once. Having heard nothing from the offeror, he accepted the offer. By then, the iron had been sold to a third party. The offeror's claim that there had been a counter offer failed. It was held that there had been no rejection of the offer, and that it was merely an enquiry about details. The offer was still open to acceptance.

For example: 'Would it be possible to collect the car we have been negotiating over in two weeks' time, although I'll give you the money next week?' (This does not amount to a counter offer and is merely an enquiry during negotiations.)



▲ Figure 24.2 Making enquiries does not mean making a counter offer

24.1.7 Terminating an offer

Revocation of an offer can take place at any time before acceptance.

CASE EXAMPLE

Routledge v Grant (1828)

Grant made an offer to sell his house. The offer was to remain open for six weeks. He took the house off the market before the expiration of six weeks. Nevertheless, it was held that he was entitled to do so because at the time of revocation, there had been no acceptance.

A promise to keep an offer open for a certain period of time is not binding unless supported by consideration, usually in the form of a monetary payment. This is known as an option agreement.

- » If the option is exercised, the consideration usually comes off the purchase price.
- » If the option is not exercised within the given time, the consideration is lost.

If an offer is not accepted, there will come a time when the offeror wishes to withdraw the offer. It would be unfair on an offeror if they were bound to wait an indefinite period of time before the offer was accepted.

Revocation

Revocation is the legal term for the withdrawal of an offer. There are certain key principles to revocation:

- » The revocation must be communicated to the offeree.
- » Communication can be made by a reliable third party.
- » A unilateral offer cannot be withdrawn while the offeree is performing.

The revocation must be communicated to the offeree

The offer can be withdrawn at any time before acceptance, but when does the withdrawal actually take place? In order for there to be a valid revocation, it must be expressly communicated to the other side, either by specific words or conduct that shows a clear intention to revoke. Merely changing one's mind is insufficient.

CASE EXAMPLE

Byrne v Van Tienhoven (1880)

The defendants posted an offer to sell various specific goods in Cardiff on 1 October. The claimants were in New York. On 8 October, the claimants posted a revocation to the defendants. On 11 October, the claimants telegraphed (an old electronic form of communication) their acceptance, which they confirmed in a letter on 15 October. On 20 October, the revocation was received.

It was held that the revocation was ineffective and that the offer remained open until 20 October, the date on which the revocation was communicated to the defendants.

Communication can be made by a reliable third party

The communication of the revocation need not be done by the offeror personally, and third parties or agents often make the communication. However, for the communication to be valid, the third party must be a reliable source and one on whom both parties can rely. The intention to revoke can be done either by words or conduct.

CASE EXAMPLE

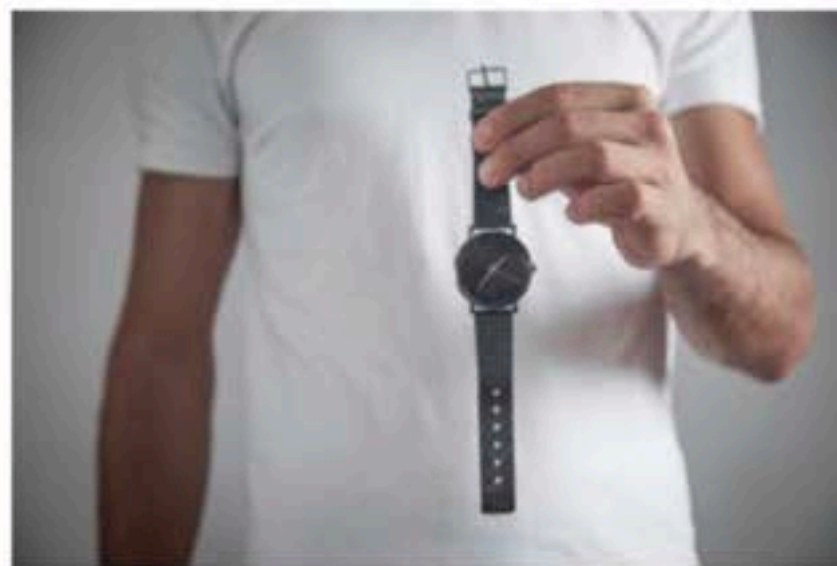
Dickinson v Dodds (1876)

On 10 June, the defendant offered to sell his house to the claimant, and the offer was to remain open until 9 a.m. on 12 June. The claimant intended to accept the offer but did not do so immediately. A third party, who was a reliable mutual friend, told the claimant that the defendant had withdrawn the offer and sold elsewhere. The claimant said there had been an unlawful revocation and breach of contract. The court held the revocation was valid.

A unilateral offer cannot be withdrawn while the offeree is performing

Unilateral contracts present difficulties in relation to revocation, as the offeror can revoke at any time up to the fulfillment by the offeree of the stated condition. The difficulty arises when the offeree starts fulfilling the condition but has not wholly fulfilled it: at what stage has the offeree gone too far to prevent the revocation?

For example, I offer a reward of £50 for anyone who finds my lost watch and I see someone walking up my front path with my watch. Before he gets to the front door, can I shout out, 'The reward has been withdrawn'? Sufficient acceptance has been carried out to prevent the offer being withdrawn.



▲ Figure 24.3 A unilateral offer cannot be withdrawn while the offeree is performing

The courts have responded by suggesting that the power to revoke may sometimes be lost by the offeror if the offeree has embarked on their fulfilment of the condition.

CASE EXAMPLE

Errington v Errington and Woods (1952)

A father bought a house for his son and daughter-in-law. Although the house and mortgage were in his name, he promised he would transfer the house to them once they had paid off the mortgage. The father died and other members of the family wanted possession of the house. It was held that as long as the couple kept paying the mortgage, the house would be theirs once the mortgage was paid.

Acceptance of the offer by the offeree

If the offer is accepted unconditionally, a contract has been formed and the offer ends.

Rejection of the offer by the offeree – counter offer

The offer can be refused outright and no contract is formed, or it can be rejected by a counter offer, when negotiations may still continue. The counter offer must be a genuine counter offer, and not just a request for further information.

For example, if you offer to sell me your watch for £50 and I say, 'I will buy it providing you pay for its service every year', this is a counter offer. But if I say, 'I will buy it; will you accept £25 today and £25 tomorrow?' this is merely an enquiry and not a counter offer.

Lapse of time

It may not be possible to accept an offer due to a lapse of time. This can occur where there is an express time limit on the duration of the offer, so that it cannot be accepted after the expiration of that limit. It can also expire where there is an implied term that it only exists for a reasonable period of time.

For example, if I offer to sell you a fully grown fruit tree, you will not be agreeing to buy it when it is a seedling.

CASE EXAMPLE

Ramsgate Victoria Hotel Co. Ltd v Montefiore (1866)

Montefiore offered to buy shares in June, but the company only issued the shares in November. The court said the offer had lapsed and that an offer could not stay open indefinitely; and where the value of goods or services could change rapidly, then a reasonable period of time would be short.

Death of one of the parties

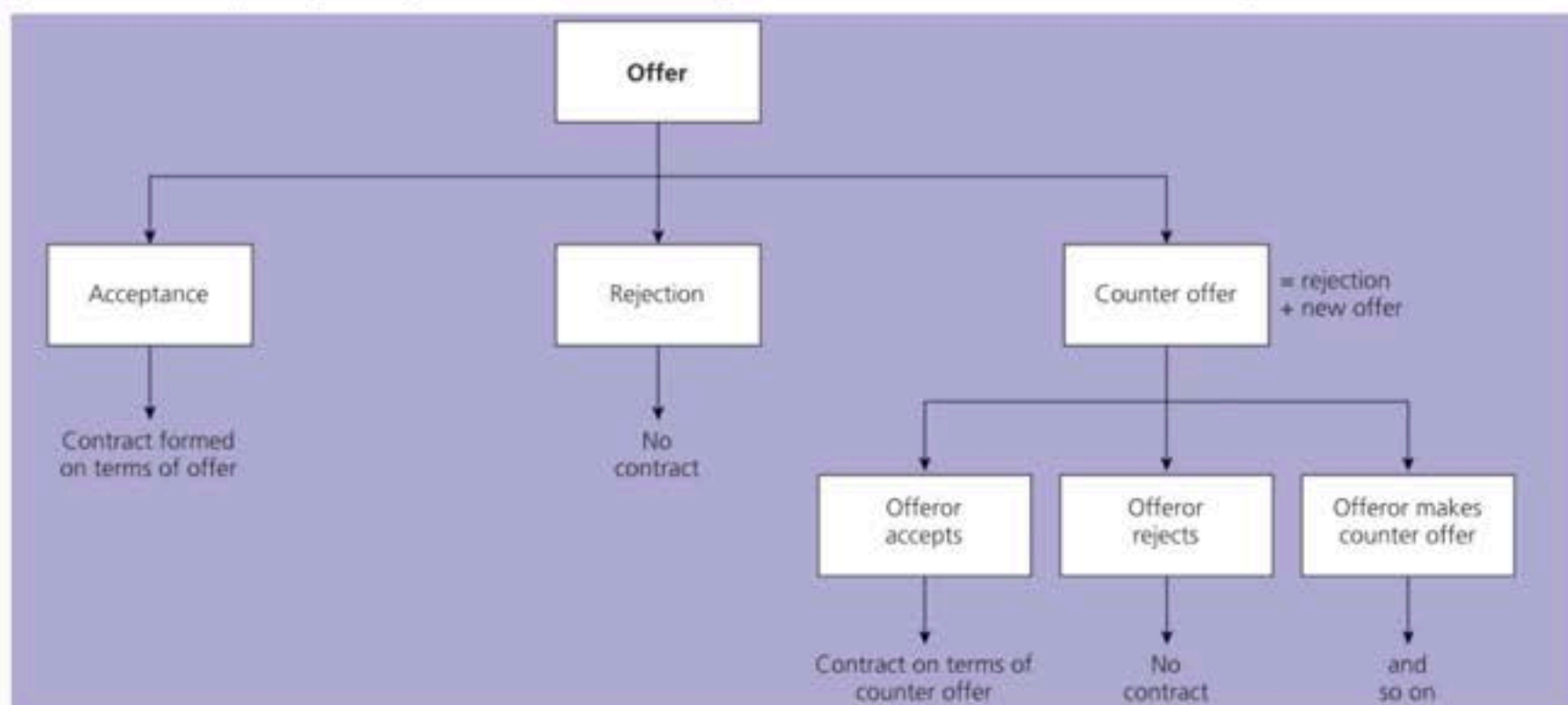
The death of either of the parties in respect of an offer may end the offer. The death of the offeree causes the offer to cease automatically, but there is no authority for this in English law. If the offeror dies, the position is less clear because, as we will see in the next section, the acceptance depends on the subject matter and knowledge of the offeree.

If the offeree knows of the death of the offeror, then the offer will have lapsed and cannot be accepted. If the offeree does not know of the offeror's death, a valid acceptance may be binding on the deceased's executors. If there is any personal element in the offer, it automatically lapses on the death of the offeror.

Failure of a condition precedent

This is where the offer is made subject to a specific condition being met by the offeree. An offer that is subject to conditions, whether express or implied, cannot be accepted if the condition fails. An offer to buy goods implies that they will be in the same state of condition from offer to acceptance.

For example, if I offer to sell my car when it has a radio, it must still have a radio at acceptance of the offer.



▲ Figure 24.4 Offer and acceptance

24.2 Acceptance

Acceptance is the positive and unqualified confirmation of all the terms of the offer. Acceptance is critically important to the enforcement of the contract, because rights and obligations usually come into force at the time of the contract.

An example of acceptance would be: 'I accept your offer to buy the car for £500.'

There are four essential points to consider when dealing with acceptance:

- 1 Does it correspond exactly with the rules of acceptance?
- 2 Is it an acceptance or counter offer?
- 3 Is it an acceptance rather than a response or request for further information?
- 4 Has it been communicated correctly?

24.2.1 Rules of acceptance

There is something known as the 'mirror-image rule': the acceptance must correspond exactly and in every detail to the offer made. If it does not, there can be no contract.

24.2.2 Acceptance or counter offer?

See subsection 24.1.5.

24.2.3 Acceptance or request for information?

See subsection 24.1.6.

24.2.4 There must be communication of the acceptance

As with offer, there must be communication of the acceptance. However, communication can be more loosely defined within the area of acceptance, and there are exceptions to the basic rule.

Only the genuine offeree can communicate acceptance of the offer, and communication by any other person will not be acceptance unless they are an authorised agent of the offeree.

Acceptance is often said to be communicated when it is actually brought to the attention of the offeror.

Unless the offeror has indicated a particular method of acceptance as being the only way an acceptance will be valid, there are no specific rules on how acceptance must be communicated. It can be in writing, verbal or even by conduct.

For example, a simple nod of the head would show acceptance when asked the question 'Do you want to buy my car for £200?'.

Silence

An offeror is unable to impose liability on an offeree by stating that silence shall be deemed to be consent.

However, there may be situations where the offeror waives the need for the offeree to communicate their decision.

CASE EXAMPLE

Felthouse v Bindley (1863)

An uncle and nephew were negotiating for the sale of a horse. The uncle concluded by saying, 'If I hear no more from you, I shall consider the horse mine at £30.15s'. At auction, the auctioneer failed to withdraw the horse as instructed to do so by the nephew. The uncle failed in his action against the auctioneer, as he could not prove the horse was his. There was no contract between the uncle and nephew, as the nephew had not actually accepted the uncle's offer to buy.

The common law approach to silence is reinforced by the Consumer Protection (Distance Selling) Regulations 2000, whereby a recipient of unsolicited goods is not bound to accept them. Regulation 24(4) makes it an offence to seek payment for the goods.

While an offeror cannot impose contractual liability on the offeree, they may nevertheless waive the need for the offeree to communicate their acceptance. Here, the offeror runs the risk of being contractually committed through silence. They cannot, however, impose the risk on others.

Such waivers can be expressed or implied, and are normally brought about through unilateral contracts, as in *Carlill v Carbolic Smoke Ball Co.* (see Section 23.2).

Acceptance by post

The general rule, known as the 'postal rule', is that acceptance by post is effected as soon as the letter is validly posted. It is the one significant exception to the general rule regarding communication of acceptance.

CASE EXAMPLE

Adams v Lindsell (1818)

The seller asked for acceptance of the sale of some wool by post. The buyer accepted by post on the same day that the offer was received. However, the letter was not received until sometime later, by which time the seller had sold elsewhere. The buyer sued for breach of contract. It was held that the letter of acceptance was effective from its time of posting and that a binding contract existed.

The letter must be properly stamped and addressed. The *Adams v Lindsell* case shows that a contract may be formed even though the actual notification of acceptance is received later than revocation of the original offer.

However, the rule will only apply where postal acceptance is specified by the offeror, or where postal communication is reasonable in the circumstances. Nevertheless, the offeror can exclude the postal rule by stating in the offer that postal acceptance will only be effective upon receipt.

CASE EXAMPLE

Holwell Securities v Hughes (1974)

The defendant sent the claimant an option to purchase some land, and such option could only be exercised by writing to the defendant before a certain date. The claimant posted an acceptance but the defendant never received it. Because the offer said there had to be notice in writing, the court held that there had to be actual communication of the acceptance and therefore the postal rule could not apply.

However, it should be noted that the postal rule, providing it meets the above-mentioned criteria and has not been excluded by the offeror, does apply even if the letter is never received rather than just delayed.

CASE EXAMPLE

Household Fire Insurance v Grant (1879)

The defendant made a written offer to buy shares. The claimant posted an allotment of shares to the defendant, which was the acceptance. This acceptance was posted but never received. The claimant went into liquidation and claimed payment for the shares.

The defendant denied he was a shareholder and owed the money for the shares. The court held that he was a shareholder and owed the money, even though he was not aware of it.

Let us use an example. Suppose I send you a letter, correctly stamped and addressed, offering to sell you my car for £500. It is dated and posted on 1 January.

I then decide to revoke the offer on 2 January and put a letter in the post box, correctly stamped and addressed to you, revoking the offer.

On 3 January you post a letter, correctly stamped and addressed to me, accepting the offer; you do not receive the letter of revocation until 4 January. The letter of revocation can only be effective when received, but the acceptance is effective when posted, and thus the contract was formed on 3 January. There is a binding contract and the revocation is ineffective.

Instantaneous forms of communication

As result of modern technology, communication is virtually instantaneous these days. However, there are clear implications as to the time and place at which the contract comes into existence, as can be seen in the cases of *Entores Ltd v Miles Far East Corporation (1955)* and *Brinkibon Ltd v Stahag Stahl (1983)*.

CASE EXAMPLES

Entores Ltd v Miles Far East Corporation (1955)

The Dutch agents of an American company accepted an offer for the sale of equipment made by a British company by telex (an old electronic form of communication). A dispute arose between the parties, and the claimant would have been unable to sue the defendant unless the contract was made in England. The Court of Appeal held that because of the method of communication, the contract was actually made in England, where the telex was received, not when it was transmitted in Holland.

Brinkibon Ltd v Stahag Stahl (1983)

The *Entores* decision was approved in this case, which had almost identical facts, but in this case the telex had been received out of working hours. The House of Lords held that acceptance could only be effective and a contract formed once the office reopened.

Although messages are often sent by instantaneous means today, this does not mean that the contents are always communicated instantaneously. If a message is left on a voicemail, it may not be heard immediately, and will therefore not be communicated until heard.

For example, you ring me up to accept my offer to buy my car for £500. Your call goes to my voicemail and you leave a message accepting my offer. There will be no binding contract until I hear the voicemail message.

Emails

There are varying views as to whether emails and other methods of contacting online are instantaneous methods of communication, and whether the general acceptance rule should apply to their acceptance. This is an important point in relation to website acceptances, as there is no actual space in time between offering and accepting.

There is much discussion on whether the postal rule applies to acceptance by email, but as yet no definitive answer. As there are so many variables, it seems sensible to avoid the postal rule expressly and to require a receipt. This is supported by *Chwee Kin Keong v Digiland.com Pte Ltd (2004)*.

CASE EXAMPLE

Thomas and Another v BPE Solicitors (2010)

The High Court said that the postal rule was inapplicable to email communications. It went on to say that it is not straightforward as to whether email acceptance is effective when it arrives, or at the time when the offeror could reasonably have been expected to read it.

The court agreed with Lord Wilberforce in the *Brinkibon* case, where he said that 'no universal rule can cover all such cases'.

was not sufficient to constitute a counter offer. The claimant's failure to reiterate their terms, by more than just reference, meant that they were not incorporated, and negated their reliance on the 'final shot' principle.

Contracts that are practised using the 'battle of the forms' can result in instances where contracting parties dispute the content of the contract, even after commitment has been displayed by both parties through delivery or commencing performance. This was shown in *G. Percy Trentham Ltd v Archital Luxfer Ltd (1993)*.

24.3 Application of the rules

24.3.1 Standard form contracts

A 'battle of the forms' takes place where both parties have a standard form contract. Conflict and confusion can arise around the exact terms upon which the contract is based, when there are two forms of contract in existence.

The conventional approach that the courts use to deal with the battle of the forms is known as the 'last shot' principle. This doctrine views communications about conditions in a contract that conflict in nature as constituting counter offers. The contract case of *Hyde v Wrench* (see above) established that a counter offer destroys the original offer, and new terms must be accepted for a contract to consequently exist. The terms set out in the final document, which may be accepted by conduct, will be incorporated into the contract.

The landmark case of *Butler Machine Tools Co. Ltd v Ex-Cell-O Corporation (England) Ltd (1979)* showed how the 'last shot' approach can be used to determine which party's standard terms prevail.

CASE EXAMPLE

Butler Machine Tools Co. Ltd v Ex-Cell-O Corporation (England) Ltd (1979)

The claimant quoted the defendants a price for industrial machinery on his standard forms, which included a price variation clause. The defendants responded with an order containing their own standard form, which did not contain a price variation clause. The return slip issued by the defendants was returned by the claimant, with a note stating that they were supplying the machine on the claimant's original terms.

The defendants' standard terms were held to be the overriding conditions because the claimant had accepted the counter offer issued by the defendant, through return of the delivery slip. The note attempting to reaffirm the claimant's terms

CASE EXAMPLE

G. Percy Trentham Ltd v Archital Luxfer Ltd (1993)

The claimants were the main contractors employed to design and build industrial units. They entered into a subcontract with the defendants to install doors and windows.

A dispute occurred after the work had been carried out and the defendants denied there had ever been a valid subcontract. The Court of Appeal held that regardless of whether an offer had been matched by an acceptance, the contract could have come into existence as a result of the performance of the work.

24.3.2 Auction sales

The rule on invitations to treat comes from the traditional practice at auctions, where there is an invitation to make a bid, which represents the offer. Acceptance occurs when the auctioneer bangs their hammer down: at this stage the contract is formed. The auctioneer is the agent for the person selling the lot. The buyer is entitled to withdraw at any time before the auctioneer hits their hammer down.

There is usually a reserve price; that is, a minimum price is set for which the article can be sold. In a situation that takes place 'without reserve', the articles are sold to the highest bidder. If the highest bid is not accepted, the auctioneer may be sued for breach of contract, as a collateral contract (see Section 23.4) is created between the highest bidder and the auctioneer.

For example, a car is a lot at a local auction with no reserve price. It will be sold to the highest bidder.

24.3.3 Tenders by contract

A request for a tender (an invitation to make an offer) is normally an invitation to treat.

However, if the request is addressed to specified parties, it can amount to a unilateral offer that consideration will be given to each tender which is properly submitted.

ACTIVITY

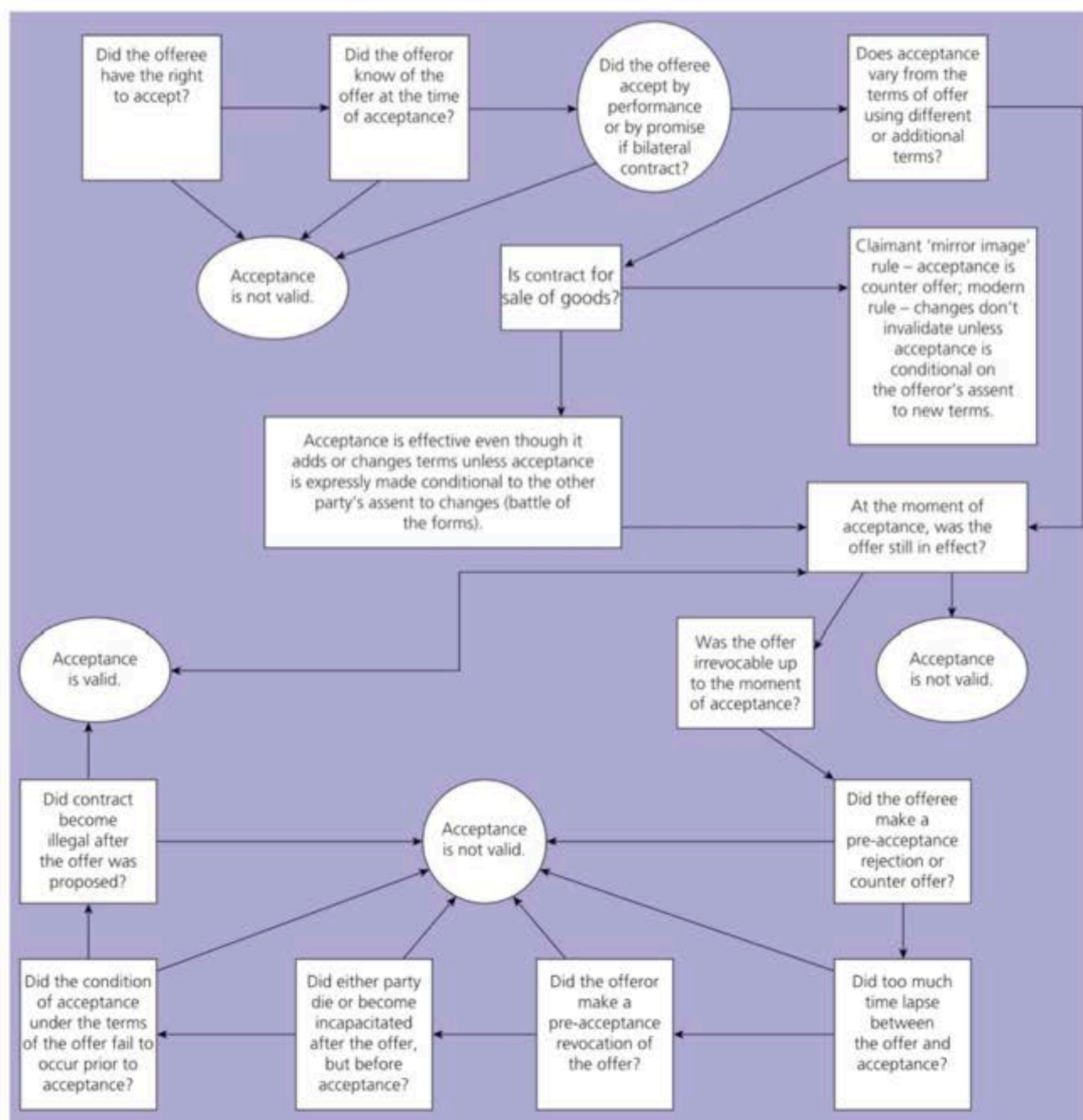
Abbi runs an interior-design business, and on 1 February she receives an enquiry from Kiran about some design work. On 2 February, she posts a proposal with a quote of £2500. On 4 February, she realises she has under-quoted, and sends a second letter with a new quote of £3000.

On 5 February, Kiran receives the first letter and immediately sends an email, confirming the

proposal and asking her to go ahead. On 6 February, he receives her second letter and ignores it.

Questions

- 1 Explain the three elements of a contract.
- 2 Explain how an offer can be revoked.
- 3 Is there a valid offer and acceptance between Abbi and Kiran? If so, at what price?



▲ Figure 24.5 Acceptance

▼ Figure 24.6 Key cases: offer and acceptance

Key cases	
Case	Summary
<i>Harvey v Facey</i> (1893)	The seller's reply was merely a statement of price, not an offer open to acceptance.
<i>Partridge v Crittenden</i> (1968)	
<i>Fisher v Bell</i> (1961)	A flick-knife in the shop window was only an invitation to treat.
<i>Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd</i> (1953)	The contract was formed when the goods were taken to the checkout where a pharmacist was present.
<i>Clifton v Palumbo</i> (1944)	The letter did not amount to an offer to sell, but was merely an indication of the price of the estate should all other matters be in order.
<i>Foley v Classique Coaches Ltd</i> (1934)	A contract cannot be repudiated if the parties have started to perform the contract.
<i>Hyde v Wrench</i> (1840)	The counter offer amounted to a rejection of the original offer, and as a result that offer had come to an end.
<i>Stevenson v McLean</i> (1880)	An enquiry about details is not a rejection of the offer; the offer was still open to acceptance.
<i>Routledge v Grant</i> (1828)	Revocation of an offer can take place at any time before acceptance.
<i>Byrne v Van Tienhoven</i> (1880)	Revocation was ineffective because it was not communicated.
<i>Dickinson v Dodds</i> (1876)	Communication can be made by a reliable third party.
<i>Errington v Errington and Woods</i> (1952)	The power to revoke was lost because the offerees had embarked on their fulfillment of the condition.
<i>Ramsgate Victoria Hotel Co. Ltd v Montefiore</i> (1866)	The offer had lapsed: the courts held an offer could not stay open indefinitely.
<i>Felthouse v Bindley</i> (1863)	Silence cannot be deemed to be consent. There was no contract between the uncle and nephew, as the nephew had not actually accepted the uncle's offer to buy.
<i>Adams v Lindsell</i> (1818)	The postal rule: a letter of acceptance is effective from its time of posting and a binding contract exists.
<i>Holwell Securities v Hughes</i> (1974)	The postal rule did not apply: the offer said there had to be notice in writing, so the court held that there had to be actual communication of the acceptance.
<i>Household Fire Insurance v Grant</i> (1879)	The postal rule applies even if the letter is never received rather than just delayed.
<i>Entores Ltd v Miles Far East Corporation</i> (1955)	Because of the method of communication, the contract was actually made in England where the telex was received, not when it was transmitted in Holland.
<i>Brinkibon Ltd v Stahag Stahl</i> (1983)	Acceptance can only be effective and a contract formed when the office is open.
<i>Thomas and Another v BPE Solicitors</i> (2010)	The postal rule is inapplicable to email communications. The case said, all be it obiter, that getting the communication through should be the responsibility of the communicator.
<i>Butler Machine Tools Co. Ltd v Ex-Cell-O Corporation (England) Ltd</i> (1979)	The 'last shot' approach can be used to determine which party's standard terms prevail.
<i>G. Percy Trentham Ltd v Archital Luxfer Ltd</i> (1993)	Regardless of whether an offer has been matched by an acceptance, the contract can come into existence when performance of the work begins.

TARGET SKILLS

- 1 What is the difference between an offer and an invitation to treat?
- 2 When does a contract become legally binding?
- 3 Analyse the difficulties with instantaneous communications in terms of contract acceptance.
- 4 Are requests for further information difficult to differentiate from counter offers?

COMMENT

Evaluation of the law on offer and acceptance

The traditional view is that a contract requires:

- the identification of a valid offer, and
- valid acceptance of that offer.

A bilateral contract consists of an exchange of promises, whereas with a unilateral contract the offeror alone makes a promise and the offer is accepted by doing what is set out in the promise.

Offers should be distinguished from invitations to treat, which are indications that the invitor is willing to enter into negotiations but is not prepared to be bound immediately.

STRETCH AND CHALLENGE

Kodak placed on its website details of a digital camera, which customers could buy online. The camera was priced at £100. Customers were asked to fill in and submit an order form to Kodak. Five thousand such orders were placed before Kodak realised that the purchase price should have been £329.

Advise Kodak as to whether it has to supply the cameras ordered for £100.

TEST YOURSELF

- 1 What is a counter offer?
- 2 When does a request for more information amount to a rejection of the offer?
- 3 When can an offer be accepted by means other than verbal or written communication?
- 4 What is the postal rule?
- 5 Does a revocation always have to be communicated?

EXAM-STYLE QUESTIONS

- 1 On Monday, Angela telephoned Barney in response to an advertisement in the *Weekly Chronicle*, a local newspaper. Barney's telephone was answered by Clara, his wife. Angela introduced herself and stated, 'I agree to buy the advertised car at the advertised price. I'll send a fax confirming this'. Clara replied, 'Great - I'll let Barney know when he gets in'. When Barney returned home, Clara could no longer remember the details of her earlier conversation and told Barney, 'A woman rang about the car and she is willing to buy it'.

Explain whether a binding contract has been formed.

- 2 Acceptance of an offer must be communicated before a contract comes into existence.

Critically assess any exceptions to this principle that might exist.

Cambridge AS and A Level Law 9084 Paper 32 Q2 May/June 2014

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25

Intention to create legal relations

Introduction

We all regularly make agreements with other people, but it is not always the case that we intend these agreements to be legally binding; for example, if I agree to meet you in a restaurant to buy you a meal, you will not sue me if I do not

arrive. These social or domestic agreements do not usually amount to contracts, but we will see that there are cases where they may be. This chapter links to the key concept of justice, fairness and morality.

25.1 Reason for requirement

Many agreements are plainly never intended by the parties to be legally binding; there is no intention to take any dispute to a court of law. However, there are other situations, such as with business and commercial agreements, where the parties intend there to be a contractual relationship. It is not always easy to determine whether there is an intention to create legal relations and, as a result, the courts have developed two rebuttable presumptions (this means an assumption of fact accepted by the court unless proven otherwise):

- » In commercial agreements, there is a strong presumption that there is an intention to create a legal relationship.
- » In social and domestic arrangements, the parties do not intend the agreements to be legally binding.

Figure 25.1 illustrates the difference between commercial and social arrangements. There are no hard and fast rules, and the area of intention is very much decided on the facts of individual cases. The presumptions are generally followed, unless there are factors that permit them to be rebutted.

25.2 Presumption and rebuttal in commercial and social/domestic agreements

25.2.1 Commercial agreements

It is important that there is consistency and certainty with commercial agreements, as they often involve large sums of money. There is always a strong presumption that there is an intention to create legal relations. The presumption can be rebutted if there is strong evidence.

For example, when I take my car to a garage for a service, there is a strong presumption that I intend to enter into a legally binding contract to which I am bound.

The presumption will even apply where, on the face of it, it is gratuitous in character. In *Edwards v Skyways Ltd* (1964), an attempt to give a 'golden handshake' in a redundancy failed on the basis that an ex gratia payment indicates no pre-existing liability to make the payment. The agreement once made is binding because of the context in which it is made.



▲ Figure 25.1 The difference between commercial and social agreements

In business, free gifts, as long as they are not bribes, are often given in order to promote businesses. Such an arrangement can still be held to indicate a legal relationship and mean that the promise is legally binding.

CASE EXAMPLE

Esso Petroleum Co. Ltd v Commissioners of Customs and Excise (1976)

Esso gave away World Cup coins with every four gallons of petrol sold. Customs and Excise wanted to claim purchase tax from the transaction, and to succeed they needed to show that the transaction was contractual – the purchase of petrol being the consideration for the free coin – and therefore that there was an intention to create legal relations.

A majority decision in the House of Lords said that, as Esso was clearly trying to gain business from the promotion, there was an intention to be bound by the arrangement.

However, it is possible for a similar type of agreement not to contain an intention to be legally bound where it is specifically stated in the agreement.

CASE EXAMPLE

Rose and Frank Co. v J.R. Crompton and Bros Ltd (1924 and 1925)

There was a clause in the contract between the parties that tried to get round the jurisdiction of the courts and to bind the parties instead by an 'honourable pledge'. This effectively meant that the agreement was not a formal agreement and there was not an intention to be bound.

Statutes sometimes make it clear that contracts are not intended to be legally binding. An example of this can be found under s 1 of the Law Reform (Miscellaneous Provisions) Act 1970, where an engagement to be married is no longer deemed to be an agreement that can be enforced in law.

25.2.2 Social and domestic agreements

The vast majority of social and domestic arrangements do not amount to contracts, as they are not intended to be legally binding. For example, if you agree to meet

me for a coffee after work, it is unlikely to be a binding legal contract.

There are three main areas where social and domestic arrangements tend to arise:

- » husband and wife
- » children and parents
- » other social arrangements.

Husband and wife

Generally with husbands and wives, the parties are left to themselves to sort out problems, and the arrangements will usually not be held to be binding.

CASE EXAMPLE

Balfour v Balfour (1919)

A husband worked abroad while his wife remained in England, and the husband promised her an allowance of £30 per week. The husband did not pay. The wife later petitioned for divorce and at the same time claimed the allowance money.

Her claim failed, as the agreement had been reached during an amicable point in their relationship and not in contemplation of divorce. It was a purely domestic arrangement and the agreement was not legally enforceable.

However, this principle can be rebutted if there is evidence to the contrary, as there was in *Merritt v Merritt (1970)*

CASE EXAMPLE

Merritt v Merritt (1970)

A husband left his wife for another woman. The marital home was in joint names, and the husband agreed to pay the wife £40 per month as long as she paid the mortgage payments. He also agreed that once the mortgage had been repaid, he would transfer the house into the wife's sole name.

The wife paid off the mortgage, thus performing her side of the bargain, but the husband refused to transfer the property to her name. The court held there was an intention to create a legally binding agreement between them.

The distinction between the two cases is clear: in *Merritt*, the agreement took place due to the marital

breakdown, whereas in *Balfour* the arrangements were made on the basis of an amicable agreement. Furthermore, *Merritt* shows that the courts will take all factors into account when deciding whether there was an intention to create a legal relationship.

Internet research

Search online for the cases of *Balfour v Balfour* (1919) and *Merritt v Merritt* (1970) – use www.bailii.org – and confirm why they were decided differently.

Children and parents

It is possible for families to make contracts which appear to be formal contracts, mainly due to their character. In such cases, the courts need to look at the real purpose of the agreement, and it is this purpose that will determine whether or not the agreement is legally binding.

CASE EXAMPLE

Jones v Padavatton (1969)

In return for a daughter giving up a good job in New York, her mother agreed to pay her an allowance on the basis that she went to England and studied for the Bar. The idea was that when she qualified she would move to Trinidad where her mother lived and practise law.

The daughter went to England but found it difficult to survive on the allowance, and so the mother bought her a house, which was big enough for the daughter to live in and also to rent out part to supplement her income.

The mother and daughter subsequently argued, and the mother sought repossession of the house as there had never been an intention to create a legal relationship. The majority of the Court of Appeal agreed, saying the agreement was to last until the daughter passed her Bar finals. As five years had elapsed and she had still not passed them, the contract had lapsed. The agreement with regard to the house was so ambiguous as to be incapable of being a contract.

Other social arrangements

The presumption is against finding an intention to create a legally binding relationship, but this can always be rebutted.

If money has changed hands, then it will not matter that the arrangement is made socially and it can be held to be legally binding.

CASE EXAMPLE

Simpkins v Pays (1955)

A lodger and two members of a household entered a newspaper competition. Each person paid equally but the entry was made in the lodger's name. The agreement was on the basis that they would share the winnings.

They won £750 and the lodger refused to share the winnings, claiming it was purely a domestic relationship. His defence failed and he was bound by the agreement.

However, the presumption will not always be rebutted, as was shown in *Wilson v Burnett* (2007).

CASE EXAMPLE

Wilson v Burnett (2007)

Three women attended bingo (a numbers game) together, in which players strike off the numbers on their playing cards as they are randomly generated, and one woman won £100 000. The other two contended there was an agreement to share any prize over £10.

The Court of Appeal held the evidence not to be conclusive, and pointed to the fact that before the woman won the big prize she had won £153; her friends repeatedly asked if she was going to share it, and there was no evidence of an intention to be legally bound.

ACTIVITY

Najwa runs a catering business. She has a big contract for catering at a large wedding, but cannot find any qualified caterers to assist her. She asks her friend Wani to help. Wani is a kitchen assistant at a local school but does not hold any professional catering qualifications.

When Wani asks Najwa to pay her for helping at the wedding, Najwa refuses, stating that Wani is a friend and therefore she cannot expect to be paid.

Question

Advise Wani on what action can be taken.

COMMENT

Evaluation of the law relating to rebuttable presumptions with intention

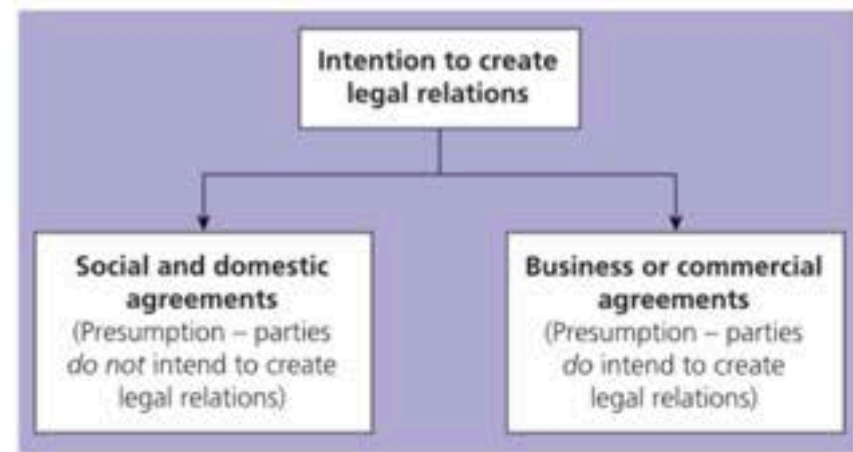
There are two rebuttable presumptions with intention:

- In social or domestic situations, the parties do not intend to be bound.
- In a commercial setting, the parties do intend to be bound.

The problem with intention ultimately boils down to the rebuttal rules.

With social and domestic situations, the parties rarely consider the question of whether there is a contract. To be asked then to produce clear evidence that the rule has been rebutted is extreme.

However, with commercial contracts where there is the presumption of legal relations, there is a heavy duty to rebut, which is not done easily. There needs to be a clear intention to rebut and it will be for the person relying on the rebuttal to prove it.



▲ Figure 25.2 Intention

TARGET SKILLS

- 1 How does a domestic contract become a binding contract?
- 2 How does a commercial contract cease to be binding for failure of intention?
- 3 Analyse the strength of evidence required to show a commercial agreement is not binding.
- 4 Evaluate whether rebuttal is easier to achieve with domestic contracts or commercial contracts.

▼ Figure 25.3 Key cases: intention to create legal relations

Key cases	
Case	Summary
<i>Esso Petroleum Co. Ltd v Commissioners of Customs and Excise</i> (1976)	A majority decision in the House of Lords said that as Esso was clearly trying to gain business from a promotion, there was an intention to be bound by the arrangement.
<i>Rose and Frank Co. v J.R. Crompton and Bros Ltd</i> (1924 and 1925)	The agreement was not a formal agreement ('honourable pledge') and there was not an intention to be bound.
<i>Balfour v Balfour</i> (1919)	The claimant's claim failed; the agreement was a purely domestic arrangement and not legally enforceable.
<i>Merritt v Merritt</i> (1970)	The court held there was an intention to create a legally binding agreement between husband and wife.
<i>Jones v Padavatton</i> (1969)	The agreement with regard to a house was so ambiguous as to be incapable of being a contract.
<i>Simpkins v Pays</i> (1955)	A lodger refused to share winnings, claiming it was purely a domestic relationship. His defence failed and he was bound by the agreement.
<i>Wilson v Burnett</i> (2007)	There was no formal agreement to show that they had agreed to share the winnings.

STRETCH AND CHALLENGE

Consider situations which are essentially in a social environment but because of the nature of the subject matter they can be seen to create a commercial intention.

TEST YOURSELF

- 1 What are the two rebuttable presumptions?
- 2 Why should commercial agreements generally lead to legal relationships?
- 3 Why should family agreements not generally be enforceable?
- 4 What is an honourable pledge?
- 5 Why should commercial agreements be considered as enforceable unless rebutted?

EXAM-STYLE QUESTIONS

- 1 Critically analyse whether it is harder to prove a rebuttal in a commercial situation as opposed to a social one.
- 2 John's neighbour Nasser offers to drive John to the airport and collect him when he returns, to save John incurring airport parking charges. As John is leaving Nasser's car to catch his plane, he says to Nasser, 'I'll buy you a present with the money I have saved on parking charges'. John never buys Nasser a present.

Was there an intention to create legal relations?

26

Consideration

Introduction

The mere fact of agreement alone does not make a contract. Both parties to the contract must provide consideration – each side must promise to give or do something for the other.

Consideration can take many forms, such as a service, money, an object or a promise to perform an action –

or to refrain from performing it. Originally, contracts were only recognised if they were contained in a deed, but the giving of consideration by both sides became the accepted method of showing that these types of agreement were in fact contracts. This chapter links to the key concept of effectiveness and certainty.

26.1 Nature and function

In *Currie v Misa* (1875), Lush J said of consideration:

'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.'

In *Dunlop v Selfridge Ltd* (1915), Sir Frederick Pollock in the House of Lords gave this definition of consideration:

'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.'

For example, if I contract with you for the sale and purchase of my car for £500, I am gaining a benefit of the £500 but I have the detriment of giving up my car. For you it is the other way round: you gain my car but give up £500.

The quotations above use the word 'forbearance'; sometimes consideration can be the willingness *not* to do something.

For example., if you stop revving your car up at night, I will not issue court proceedings to gain an injunction against you for the nuisance you are causing me.



▲ Figure 26.1 Consideration can be a promise to perform or stop performing an action

Internet research

Search www.bailii.org for the case of *Currie v Misa* (1875) and find the definition of consideration.

26.1.1 Executed and executory consideration

There are two valid types of consideration – executed and executory. They show the two ways in which a promise might be bought.

- » Executed consideration is when one of the parties has done all that is required of them, leaving the outstanding liability on the other party. For example, if I have offered a reward for finding and returning my lost watch and you return it to me, you have fulfilled your part of the contract. You have executed your consideration, but my payment of the reward is still outstanding.
- » Executory consideration is a promise made for a promise. For example, you and I have a contract for the sale and purchase of a watch tomorrow for £200. We have each made a promise to do something: I will give you the watch, you will give me £200.

26.1.2 Sufficiency/adequacy

There are various rules of consideration and we will look at these in turn.

The consideration must be sufficient but need not be adequate

Sufficiency in law means that what is being supplied as consideration (such as money, a service or an object) must be of the type that is regarded in law as capable of supporting the contract. It is not for the courts to enquire as to the adequacy of consideration – there has to be economic value, but it is not for the courts

to decide whether it is the right value or whether there has been a good or bad bargain.

Sufficiency must show itself to be real, tangible and having some value.

The key issue is whether the consideration is of some value in the eyes of the law. Even things with no apparent worth have been seen as having value by the courts.

CASE EXAMPLE

Chappell v Nestle Co. (1960)

Nestle offered a vinyl recording of music normally costing 6s 8d (about 34p) for 1s 6d (about 7p now) plus three chocolate bar wrappers. It was a way to promote the chocolate bars and the wrappers were thrown away by the company. The wrappers were held to be good consideration.

26.1.3 Past

The consideration must not be past

This means that any consideration cannot be given before the agreement, but must come after it. If consideration is given before the agreement, it cannot be proved that a bargain actually existed and therefore there is no contract. If the defendant made the promise after the consideration was given, the promise can only be regarded as an expression of gratitude and as such is not a binding contract.

CASE EXAMPLE

Re McArdle (1951)

A father died, having willed a house to his children once their mother had died. During the mother's lifetime, one of the children and his wife lived in the house, and during that time carried out various repairs and improvements to it.

On the mother's death, the other children signed a document stating that the executors should pay the son and his wife for the repairs and improvements. The money was not paid and the estate was sued for the money. It was held the repairs and improvements were past consideration and not payable.

An example would be if you clean my car, and when you have finished you ask for £10, then I don't have to pay you as it is past consideration. But if you say you will clean my car tomorrow for £10, and I agree and you clean my car, there is a contract. If I don't pay, you can sue me for breach of contract.



▲ Figure 26.2 Consideration must not be past

However, the courts can employ a rule whereby past consideration may be enforced. For this to happen, there must be an earlier (implied or expressed) request to carry out the act. It is a promise to pay or benefit the performer of the act in some way.

The later express promise secures the reward in relation to the earlier promise, so that the consideration is not past. This is often known as the rule in *Lampleigh v Braithwait (1615)*.

CASE EXAMPLE

Lampleigh v Braithwait (1615)

Braithwait was accused of a killing, and asked his friend Lampleigh to get him a King's pardon. Lampleigh did this at considerable expense to himself and Braithwait subsequently offered to pay him £100, but never did. It was held that even though no price was mentioned at the time of the request, it was clear that both parties contemplated a payment, and the later promise of payment was clear evidence of this.

The consideration must move from the promisee

Someone cannot sue on a contract to which they are not a party. This is sometimes known as the 'privity of contract' rule. A person cannot sue or be sued under a contract unless they have provided consideration. This can be seen in *Tweddle v Atkinson (1861)*.

CASE EXAMPLE

Tweddle v Atkinson (1861)

Two fathers of an engaged couple who were about to be married each agreed to pay the couple a sum of money. The woman's father died before making the payment, and her husband sued the estate. As he was not party to the contract, he was not successful.

Like many rules on consideration, there are exceptions. One of the most obvious is where there is a collateral contract, which is a contract that runs parallel to the main contract. This happens when a promise is made of relevance to the contract by a person who is not party to the contract but derives a benefit from it.

This rule can also be affected by the Contracts (Rights of Third Parties) Act 1999. The Act came about because of intense criticism of the privity of contract rule, as it was felt that this rule put unnecessary hurdles in the way of third parties claiming under contracts clearly intended for their benefit. The main objective of the Act was to benefit a person who is not party to a contract if:

- » the contract expressly provides that they may, or
- » the term purports to confer a benefit on them (unless the term of the contract states that it was not intended to be enforceable by the third party).

26.1.4 Performance of existing duties

Performance of existing duties will not amount to valid consideration

An existing public duty will not amount to valid consideration

If a person is obliged by legal status or by operation of law to carry out an obligation, which forms the basis of their consideration in a potential contract, performance of that obligation cannot amount to sufficient consideration.

For example, I offer a reward of £50 for the safe return of my lost watch. If it is returned by a police officer, they are not entitled to the reward as they are merely carrying out their duty.

CASE EXAMPLE

Collins v Godefroy (1831)

A policeman was summoned to attend court. It was important for the defendant that he attended and so he offered the policeman money to ensure that he did so. There was no consideration, and therefore this agreement was not contractual and unenforceable.

The position will, however, change if it can be shown that they have done something more than the duty imposed on them by law. This was the case in *Glasbrook Bros v Glamorgan County Council* (1925).

CASE EXAMPLE

Glasbrook Bros v Glamorgan County Council (1925)

During a strike, a pit owner asked for extra police protection and promised an extra payment in return. After the strike he refused to pay, saying that the police were just carrying out their legal duty. It was held that the police had provided more than they would normally have done, and there was consideration for the promise.

An existing contractual duty will not amount to valid consideration

The rule that applies to public duties imposed by the law also applies where there is a pre-existing contractual duty to the defendant. Mere performance of an existing contractual duty cannot amount to sufficient consideration under a fresh contractual agreement.

CASE EXAMPLE

Stilk v Myrick (1809)

Two sailors of an 11-man crew deserted the ship, and the captain offered the remaining crew their salary if they sailed the ship safely home. The court held the promise was not binding. The sailors were bound by their existing duty to sail the ship home, and gave no extra consideration.

The situation, however, is different where the claimant does something in excess of existing duties.

CASE EXAMPLE

Hartley v Ponsonby (1857)

The facts were similar to *Stilk v Myrick*, but here only 19 members of a 36-man crew remained. A similar promise to pay more money for the safe return trip of the boat was made.

Here it was held that the promise could be enforced, because the reduction in numbers made the voyage far more dangerous. This meant that the crew were discharged from their original agreement and were free to enter into a new one.

As a further example, imagine that following our agreement yesterday that you would buy my watch for £50, I now want you to collect it today and you will have to pay £55. There is an existing duty to sell the watch for £50, and no extra consideration is being given for the additional £5.

However, following our agreement to buy and sell the watch for £50, if your car breaks down and I agree to drive 100 kilometres to deliver the watch, there is extra consideration.

The Privy Council has ruled that a promise to perform an existing obligation that is made to a third party can be valid consideration for a new contract. This was seen in *Pao On v Lau Yiu Long* (1980).

CASE EXAMPLE

Pao On v Lau Yiu Long (1980)

Lau wished to purchase a property owned by Pao; the property was in fact Pao's main asset. A contract was entered into, whereby Lau's company would buy a large number of shares in Pao's company. There was a clause in the contract that Pao should retain 60 per cent of the shares for at least one year, to avoid possible panic in the trading of such a high volume of shares. Pao wanted a guarantee that the shares would not suddenly fall in value, and a subsidiary agreement was entered into in which Lau would buy back 60 per cent of the shares at \$2.50.

Pao subsequently realised that this might benefit Lau more if the shares rose in value, and refused to carry out the contract unless the subsidiary agreement was scrapped and replaced by a straightforward indemnity by Lau against the fall in value of the shares.

Lau could have sued at this stage for breach of contract but feared loss of public confidence and agreed the new terms. The shares fell in value. Lau refused to honour the agreement and Pao sought to enforce the indemnity. Lau's defence was that the indemnity was past consideration and that Pao had given no consideration, as he was only doing what he was bound to do under the main agreement.

As to the defence of past consideration, the Privy Council applied the rule in *Lampleigh*, as Lau's demand that the 60 per cent of shares should not be sold for one year carried with it an implied promise to Pao.

As to the defence that there was no consideration, the Privy Council found that this also failed – by continuing the contract, Pao was protecting the credibility and financial standing of Lau's company, and the price payable in return for this was the indemnity.

One of the most controversial cases concerning this area of consideration is *Williams v Roffey Bros and Nicholls Contractors Ltd* (1990).

CASE EXAMPLE

Williams v Roffey Bros and Nicholls Contractors Ltd (1990)

The defendants were building a number of flats, and subcontracted the carpentry to the claimant for £20 000. The claimant had in fact under-quoted and ran into financial difficulty. The defendants had a clause in their contract for building the flats saying that they would be liable to pay money if the flats were not ready on time. The claimant said he would not be able to complete the carpentry on time, so the defendants offered him another £10 300 to do this.

The work was completed on time but the defendants refused to pay the extra money. The claimant was only doing what he had been contracted to do, and it was held that the defendants were gaining the benefit of not having to pay the penalty for not completing the work on time. In other words, it was seen that the contractor had gained a benefit through not having to pay the penalty.

As an example, I agree to sell you my car for £500 and deliver it to you within 48 hours. It then becomes clear that I am not going to be able to deliver on time. You offer me an additional payment of £50 because you need to receive it on time, as you have an agreement to sell it to someone else. As a result of making this promise for the £50, you are gaining a benefit of the contract to sell on and avoiding the loss of that deal.

Providing the promise was not given as a result of economic duress or fraud by me, then there is a benefit to you that can be consideration, and you are legally bound to pay if I deliver the car within the 48 hours.

The case of *Williams v Roffey Bros and Nicholls Contractors Ltd* seems to be contrary to that of *Stilk v Myrick*, even though the Court of Appeal expressed it as a refinement to the rule.

Williams v Roffey has generated a lot of legal debate. A number of academics feel that the approach weakens the role of consideration and moves the law of contract towards the acceptance of 'reliance' as a basis for making promises enforceable. Contracts that were previously unenforceable because of lack of consideration may now become enforceable.

The case effectively introduced an entirely new concept to this area of the law: where a party voluntarily makes

a bare promise in a commercial context on which the other party to the agreement relies, then the promisor should be bound by the promise. The problem is that this makes the rules too vague and uncertain to be easily followed.

26.1.5 Part payment of debt

Part payment of a debt is not valid consideration for a promise to forego the balance

The basic rule was first stated in *Pinnel's Case* (1602): payment of a smaller sum than the debt itself on the date due can never relieve the liability of the debtor to pay the whole debt. The creditor will always be able to issue proceedings for the outstanding money.

In *Pinnel's Case*, it was stated:

'... but the gift of a horse, hawk or robe etc., in satisfaction is good for it shall be intended that a horse, hawk or robe etc., might be more beneficial to the claimant than money, in respect of some circumstance, or otherwise the claimant would not have accepted it in satisfaction.'



▲ **Figure 26.3** Part payment of a debt is not normally acceptable

The common law rule contained in *Pinnel's Case* was confirmed by the House of Lords in *Foakes v Beer* (1884).

CASE EXAMPLE

Foakes v Beer (1884)

Dr Foakes owed Mrs Beer £2090 after she had gained a court judgment against him, which it was agreed could be paid in instalments. Later, Mrs Beer demanded interest on the payments, which is always payable on a judgment debt. Dr Foakes refused to pay but the court ruled in Mrs Beer's favour, following the rule in *Pinnel's Case*.

What happens if the debtor pays not in cash but by a cheque? Is this a sufficiently different form of payment to amount to good consideration, even though it does not represent the full amount of the debt? This is unlikely, and the rule will not apply where the creditor is giving into pressure by the debtor to accept less. This was shown in the case of *D and C Builders Ltd v Rees* (1965).

CASE EXAMPLE

D and C Builders Ltd v Rees (1965)

The builders were owed £482 for work they had done. After several months of waiting for payment, during which they suffered severe financial problems, the builders were asked to accept a cheque from the defendant for £300 in final payment, which they reluctantly did.

The builders subsequently sued for the balance and were successful. They were not prevented by the agreement to accept less, which in the event was extracted due to pressure.

There are two notable exceptions where a lesser sum may amount to good consideration and full payment of the debt:

- » accord and satisfaction
- » the doctrine of promissory estoppel (see below).

Accord and satisfaction

This is where a contract is discharged in return for a different consideration from the original obligation.

Examples would include:

- » when you buy my watch and make payment considerably early
- » where I ask you to make payment to my brother in Australia
- » where you have not paid for my car, but I agree to accept £490 instead of £500 from your friend on the basis I will not sue you for the balance of £10.

In *British Russian Gazette v Associated Newspapers* (1933), Scrutton LJ made the following statement:

'Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.'

It ends the contract by both parties agreeing to release each other from the obligations under the original contract.

26.1.6 Promissory estoppel

The doctrine of promissory estoppel

This is the defence to a claim by a creditor for the remainder of the debt where part payment has been accepted. The essential elements of the doctrine are:

- » There must be an existing contractual relationship.
- » The claimant must have waived some of their rights under the contract.
- » The rights were waived knowing the defendant would rely on the waiver.
- » The defendant relied on the promise to forego some of the debt.

The doctrine of promissory estoppel stops the claimant from going back on their promise, and has been established in equity as to do so would be unfair. The concept, it is thought, was originally seen in *Hughes v Metropolitan Railway Co.* (1877), where it was held that a creditor's promise to accept part payment as full settlement should be binding.

The modern development of the doctrine is found in *Central London Property Trust Ltd v High Trees House Ltd* (1947).

CASE EXAMPLE

Central London Property Trust Ltd v High Trees House Ltd (1947)

The defendants leased a block of flats from the claimants in 1937. When the Second World War started, it became impossible to find tenants and the defendants could not pay the rent. As a result, the claimants agreed to accept half the rent.

By 1945, all the flats were rented and the claimants wanted the rent to be paid in full again. It was held that they could have the original rent only from when the flats were rented out; they could not claim for the previous period, as they were estopped from going back on their promise on which the defendants had relied.

As an example, I insure my house and pay the premiums monthly. I am subsequently made redundant and tell the insurers I cannot pay the full amount of the premium. The insurers agree to accept half the premium until I find another job. They cannot now insist on the full premium until I find another job, but I must pay the full premium again when I get another job.

The doctrine must be used as a defence and not as a cause of action, as was shown in *Combe v Combe* (1951).

CASE EXAMPLE

Combe v Combe (1951)

A wife separated from her husband and sued on a promise that he had freely made to pay her £2 a week.

It was held that the wife had provided no consideration for her husband's promise, and could not rely on promissory estoppel, which did not give rise to a cause of action. It was also held that as promissory estoppel is an equitable remedy, it cannot be used as a sword but only a shield.

There has been debate as to whether the doctrine stops existing rights or merely suspends them so that they might be reinstated in the future.

Figure 26.4 summarises the principles and key facts of consideration.

ACTIVITY

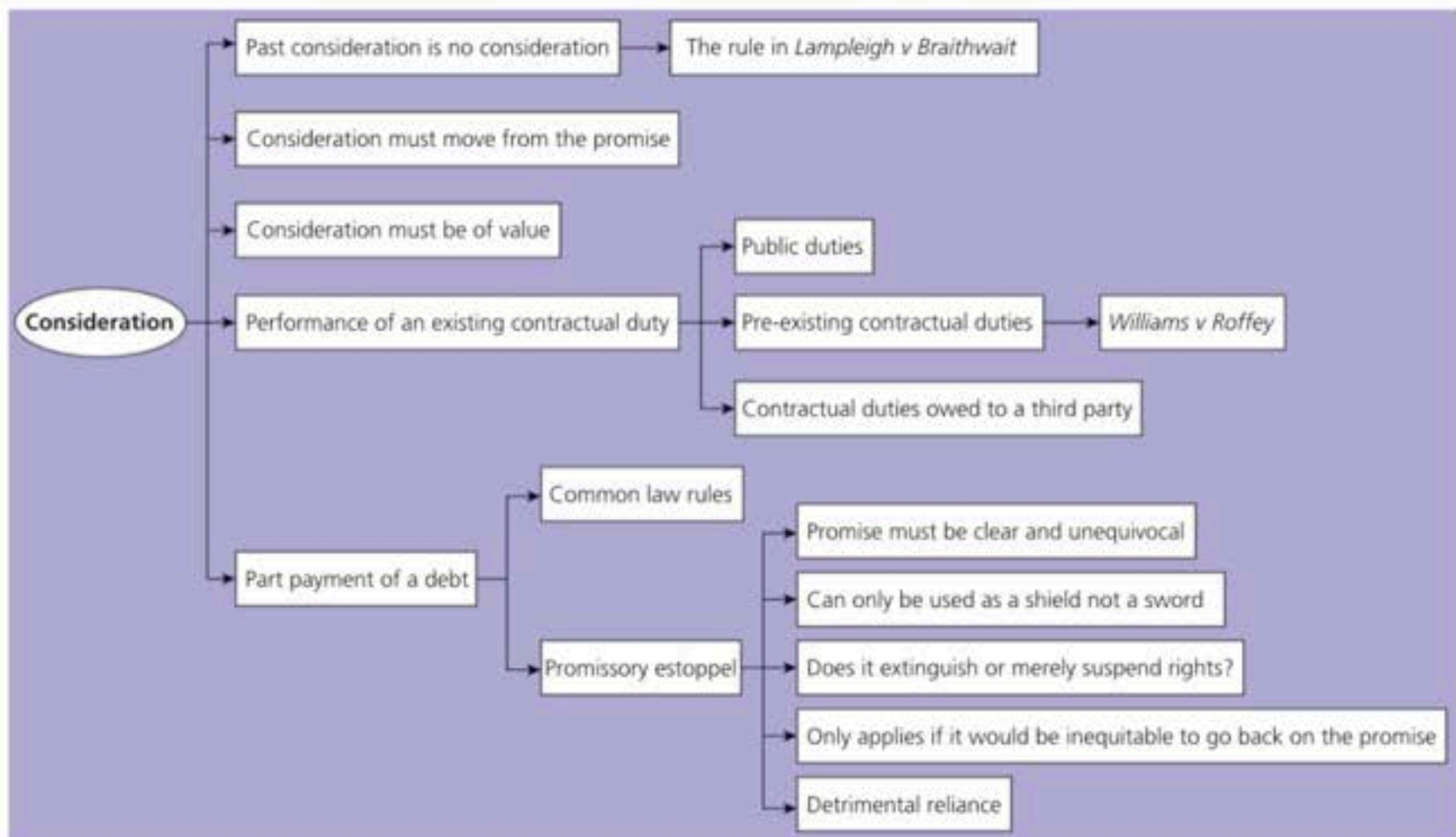
Aiman lives in the River Hotel, which is owned by his brother Haziq. While Haziq is away on holiday there is a period of cold weather, causing a pipe in Haziq's garage to burst. Aiman telephones Haziq to tell him that a pipe has burst in his garage, and Haziq agrees that Aiman should repair the pipe for £150. After carrying out the repair, Aiman then decides to repaint the garage wall, as it had been damaged by water from the burst pipe.

When Haziq returns, he thanks Aiman for his help but refuses to pay him the £150 for fixing the pipe because they are brothers. Aiman then asks Haziq to pay him £40 for painting the garage wall and Haziq initially agrees to pay this money, but then refuses.

Aiman is sacked from his job and cannot afford to pay Haziq the rent for the room in the hotel. Haziq agrees that he will not charge him rent while he does not have a job. A month later, Aiman finds a new job and Haziq demands the full rent again plus the month's arrears of rent.

Question

Advise Aiman on his best course of action.



▲ Figure 26.4 The principles and key facts of consideration

▼ Figure 26.5 Key cases: consideration

Case	Summary
<i>Chappell v Nestle Co.</i> (1960)	Chocolate wrappers were held to be good consideration.
<i>Re McArdle</i> (1951)	The repairs and improvements to an inherited house were past consideration and not payable.
<i>Lampleigh v Braithwait</i> (1615)	Although no price was mentioned at the time of the request, it was clear that both parties contemplated a payment, and the later promise of payment was clear evidence of this.
<i>Tweddle v Atkinson</i> (1861)	A husband who was not party to the contract was not successful when he sued the estate.
<i>Stilk v Myrick</i> (1809)	The sailors were bound by their existing duty to sail the boat home, and gave no extra consideration.
<i>Hartley v Ponsonby</i> (1857)	The crew were discharged from their original agreement and were free to enter into a new one.
<i>Collins v Godefroy</i> (1831)	There was no consideration for a policeman to attend court, and therefore this agreement was not contractual and unenforceable.
<i>Glasbrook Bros v Glamorgan County Council</i> (1925)	Providing extra police as requested did not amount to performing an existing duty.
<i>Pao On v Lau Yiu Long</i> (1980)	An act done before a promise was made was good consideration for that promise if it was done at the promisor's request and the parties understood the act was to be paid for at a later date.
<i>Williams v Roffey Bros and Nicholls Contractors Ltd</i> (1990)	The claimant was only doing what he had been contracted to do.
<i>Pinnel's Case</i> (1602)	Payment of a smaller sum than the debt itself on the date due can never relieve the liability of the debtor to pay the whole debt.
<i>Foakes v Beer</i> (1884)	The whole debt has to be repaid including agreed interest, before there is a discharge.
<i>D and C Builders Ltd v Rees</i> (1965)	If payment is made by a different method it can discharge a debt but paying by cheque does not discharge the debt.
<i>Central London Property Trust Ltd v High Trees House Ltd</i> (1947)	The defendants could rely on the doctrine of promissory estoppel.

TARGET SKILLS

- 1 What is the difference between executed and executory consideration?
- 2 Name three rules of consideration.
- 3 Explain the rule and exceptions in *Pinnel's Case*.
- 4 Evaluate whether there is a place for promissory estoppel in today's society.

COMMENT

Evaluation of the law relating to consideration

Although many books talk about the doctrine of consideration, there is in reality no doctrine, and in fact there are conflicting ideas. The courts have developed a series of rules in an attempt to define the concept of consideration. There are two common legitimate forms of consideration: executed and executory.

It is a general principle of contract law that an informal gratuitous promise is legally unenforceable. But that does not mean that it has no legal effect. The promise can be formalised by incorporating it in a deed, or supporting it by some form of recognised consideration.

STRETCH AND CHALLENGE

Is it right that the courts should not interfere with the bargain within the contract and only the legal requirements of a contract?

TEST YOURSELF

- 1 Why was the doctrine of consideration developed?
- 2 Explain the law of consideration in a contract.
- 3 Why is it not possible to have past consideration?
- 4 What is privity of contract?
- 5 Explain the rationale for the decision in *Williams v Roffey Bros and Nicholls Contractors Ltd* [1990].

EXAM-STYLE QUESTIONS

- 1 The decision in *Williams v Roffey Bros* resulted in a more realistic approach to the enforcement of contracts.

Analyse how the development of the doctrine of consideration has been impacted by that decision.

Cambridge AS and A Level Law 9084 Paper 31 Q1 May/June 2011

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- 2 Critically analyse whether the requirements for promissory estoppel need to be the same both for commercial and non commercial situations.

Introduction

The parties to a contract must have the ability to contract. Some people do not have the ability to contract and make binding decisions. Legislation exists to protect minors (people under the age of 18) and people with mental difficulties from being

exploited. People may be temporarily incapacitated through alcohol or drugs. Contracts entered into with such people are not normally binding. This chapter links to the key concept of justice, fairness and morality.

27.1 Reason for limitation and possible reform

The Family Law Reform Act 1969 made significant changes to the laws relating to minors and, perhaps most importantly, reduced the age of a minor from 21 to 18. Section 9 of the Act states that a person now reaches the age of majority at the age of 18. The common law rule is that contracts do not bind minors, and others can be voidable at the minor's option.

The law does not prevent minors from entering into contracts but essentially seeks to protect them from unscrupulous business people and others who may take advantage of them.

27.2 Categories of contracts

Minors' contracts can be divided into three categories:

- » necessities
- » beneficial contracts of service
- » voidable.

27.2.1 Necessaries

The law states that:

- » minors should be allowed to enter contracts
- » minors should pay for goods and services that are supplied to them, and that are classed as 'necessaries' according to their station in life and according to their current needs.

The rule allows minors to enter contracts that are beneficial to them, but also prevents unscrupulous businesses from taking advantage of them. 'Necessary' in this context is a very specific legal term, and does not have the same meaning as 'necessity'. What is

necessary depends on the minor's background: what is necessary for a prince may not be the same as what is necessary for another child.

CASE EXAMPLES***Chapple v Cooper (1844)***

A minor whose husband had recently died instructed undertakers, whom she subsequently refused to pay, claiming incapacity. The undertakers successfully sued her for payment: the funeral was for her private benefit and deemed necessary, as she was under an obligation to bury her husband.

Nash v Inman (1908)

A minor was supplied goods to the value of £122 by a Savile Row tailor, including 11 gold-braided waistcoats. While the court accepted that this clothing might be appropriate and necessary to Inman's station in life, the contract was unenforceable because he already owned enough clothes.

Section 3 of the Sale of Goods Act 1979 states:

'Where the necessities are sold and delivered to a minor, or to a person who by reason of mental capacity or drunkenness is incompetent to contract, he must pay a reasonable price for them therefore.'

This shows that for a valid and enforceable contract to exist, the goods actually have to be supplied and the minor is only obliged to pay a reasonable price.

27.2.2 Beneficial contracts of service

Education, training and employment

Minors must be able to support themselves financially, and therefore need the capacity to enter into contracts of employment. However, the terms of the contract need to substantially benefit the minor. This can be seen in *Clements v London and North Western Railway Company* (1894), but this case can be compared with *De Francesco v Barnum* (1890).

CASE EXAMPLES

Clements v London and North Western Railway Company (1894)

A minor was employed as a porter. He agreed to join the company insurance scheme, and by doing so relinquished his rights under the Employers' Liability Act 1880. In the event of an accident, the statutory scheme would be more beneficial to the minor, as it covered more types of accident but with less compensation. When the minor tried to claim that he was not bound by the employer's scheme, he failed, as on balance it was more beneficial to him.

De Francesco v Barnum (1890)

A 14-year-old girl entered a seven-year apprenticeship to be taught dancing. She agreed to be at the defendants' total disposal and that she would not accept other engagements without their approval. There was no obligation to maintain her or employ her. If she were to be employed, the pay was extremely poor. The apprenticeship could also be terminated without notice. When the girl tried to accept other work, the actions taken to stop her failed.

The courts have become progressively more lenient as to what might be binding on a minor. This was seen in *Doyle v White City Stadium Ltd* (1935).

CASE EXAMPLE

Doyle v White City Stadium Ltd (1935)

The principle was extended to cover a minor who was a professional boxer. Under the contract, the boxer would lose his pay if he were disqualified. The contract was binding, as it encouraged the boxer to be a clean and proficient boxer, which was to his advantage.



▲ Figure 27.1 In *Doyle v White City Stadium Ltd*, it was to the minor's advantage for the contract to be binding

27.2.3 Voidable (continuing obligations)

These are contracts that the minor can validly enter into but may repudiate while still a minor or within a reasonable time after reaching the age of 18.

The common feature of these contracts is that the subject matter has some permanency. They are known as contracts of continuous or recurring obligations. The main classes are:

- » leases of property
- » buying shares
- » partnerships
- » marriage settlements.

They are voidable because of their potentially onerous content.

Whether the minor repudiates in time to avoid the obligation is a matter of fact and is determined case by case, as in *Edwards v Carter* (1893).

CASE EXAMPLE

Edwards v Carter (1893)

A minor tried to repudiate a marriage settlement, under which he agreed to transfer money he would inherit from his father to trustees. More than a year after his father's death, and some four and a half years after ceasing to be a minor, he tried to repudiate the agreement. He argued he could not have done it before because he did not know the extent of his inheritance. It was held that the repudiation was too late.

Where there are no obligations or conditions in force there is not a problem; the problem arises only when the obligation has arisen. It is generally felt that the minor should be liable for debts that have arisen before the obligation. The situation showing past debts and future debts was clearly illustrated in the case of *Steinberg v Scala (Leeds) Ltd* (1923).

CASE EXAMPLE

Steinberg v Scala (Leeds) Ltd (1923)

A minor bought shares that were to be paid for in two stages. She made the first payment but could not make the second. The court held she could repudiate the contract and thus not have to pay the second instalment, but she could not recover the sums paid in the first instalment.

27.3 Remedies against minors

The general rule is that minors are not bound by contracts into which they have entered and do not incur liability. Liability can be incurred if they ratify the contract. In addition, where the contract has been performed by the minor, they will be unable to recover the benefits they have conferred on the other party.

27.3.1 The Minors' Contracts Act 1987

This Act states that a contract made by a minor is unenforceable and cannot be binding.

This has the following implications:

- » Even though the minor may not be bound by the contract, the other party will be.
- » If the minor has already paid money under the contract, they may be able to recover it if no consideration has been made to them.
- » When the minor reaches 18, they can confirm the contract if they so wish.
- » Ratification can be implied just by the minor continuing with the contract.

Guarantees

Section 2 of the Act provides that where there is a guarantor to the contract, their liability will not be avoided due to their guarantee being a minor.

In equity

Section 3 of the Act provides that where 'it is just and equitable to do so', the court may require the minor to transfer any property acquired by the minor under the contract back to the original owner.

27.3.2 Limits

The definition of 'necessaries' is very wide, and under s 3(3) of the Sale of Goods Act 1979 they are considered to be 'goods suitable to the condition in life of the minor'. A wide definition has also been adopted in common law.

A minor is bound in contract of employment, if that contract is generally for their benefit.

Certain contracts are voidable rather than void, and therefore the contract will be valid and binding until the minor repudiates. If they perform their side of the contract, it is unlikely that a voidable contract can be made void.

A contract with a minor is effective to pass property to the minor. Under s 3(1) of the Minors' Contracts Act 1987, it is also effective to pass property from a minor.

Internet research

Search online for the Minors' Contracts Act 1987 to find out what the Act repealed.

ACTIVITY

Samira is due to celebrate her eighteenth birthday in two weeks' time and is about to start work. She shops on the internet for suits to wear to work. She orders two suits and agrees to pay for them on delivery.

Samira then buys two pairs of training shoes from another company, on repayment terms, even though she already has two pairs.

The suits arrive but Samira fails to pay the invoice. She also fails to make the credit payments for the shoes, which have not yet been worn.

Question

Advise Samira as to her legal liability.

▼ Figure 27.2 Key cases: capacity (minors)

Key cases	
Case	Summary
<i>Chapple v Cooper</i> (1844)	A young widow (minor) was successfully sued for payment of her husband's funeral as this was necessary.
<i>Nash v Inman</i> (1908)	A tailor successfully sued a minor, as the clothes were not deemed necessary.
<i>Clements v London and North Western Railway Company</i> (1894)	A minor was bound by the employer's scheme as it was beneficial to him.
<i>De Francesco v Barnum</i> (1890)	A minor was not bound under the terms of her apprenticeship.
<i>Doyle v White City Stadium Ltd</i> (1935)	The contract was binding, as it encouraged the minor to be a clean and proficient boxer, which was to his advantage.
<i>Edwards v Carter</i> (1893)	A man could not repudiate a marriage settlement drawn up while he was a minor, as it was too late.
<i>Steinberg v Scala (Leeds) Ltd</i> (1923)	A minor could repudiate the contract and thus not have to pay the second instalment, but she could not recover the sums paid in the first instalment.

TARGET SKILLS

- 1 Who is a minor?
- 2 Explain the exceptions to a minor not being liable to a legal contract.
- 3 Evaluate the law in relation to minors.

STRETCH AND CHALLENGE

Should the law be so heavily in favour of a minor, if that minor is aware of what they are doing when entering into a contract?

COMMENT**Evaluation of the law relating to capacity (minors)**

The general rule is that a minor is not bound by a contract which they enter into during their minority. It would therefore seem expedient to avoid contracts with minors if at all possible!

That said, a minor can incur liability in certain situations, and it is more difficult for a minor to obtain remedies once the contract has been performed.

There are limits placed on the minor in an attempt to level the playing field, but is it right that a minor can attract criminal liability at age 14 and under but in contract be deemed not to know what they are doing until they have become an adult at age 18?

The law relating to minors is much criticised, as a lot of the case law is over a hundred years old and often relates to people aged between 18 and 21. This is perpetuated by the fact that the age for majority is now 18 years. Even below the age of 18, it is possible to apply to join the army and also to get married, with parental consent.

TEST YOURSELF

- 1 What are the main items to be considered under voidable contracts for minors?
- 2 What happens to the person who has entered into a contract with a minor?
- 3 Why does the law allow minors to avoid the effects of a contract continuing or recurrent obligations?
- 4 Is it always the minor that the law seeks to protect?
- 5 What is the common feature between necessities and contracts of service or apprenticeships?

EXAM-STYLE QUESTION

Injustice is caused by the rules relating to the capacity of minors to contract with adults.

Critically assess the extent to which the remedies that adults can obtain against minors mitigate this.

Cambridge AS and A Level Law 9084 Paper 32 Q1 October/November 2013

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28

Express terms

Introduction

Once it is determined that a contract is in existence, we need to find out what the parties have actually agreed to do.

The parties agree express (explicit) terms either orally or in writing. However, their contractual obligations are not necessarily limited to those that have been agreed, and other terms may arise through implication.

Often in commercial situations and elsewhere, the law itself might impose certain obligations that come about through various statutes. In addition, the court might read terms into the contract that it thinks are necessary to give effect to the contract. They may also arise as a result of custom. This chapter links to the key concept of justice, fairness and morality.

28.1 The distinction between representations and terms, and importance

A contract consists of a number of terms, but not everything that is said during negotiations forms a term of the contract. Sometimes representations will be made with no intention of them becoming a term of the contract. Whether a statement is a contractual term or a mere representation depends, ultimately, on the intention with which it was made.

28.1.1 Incorporating statements as terms

A contract may be made:

- » orally
- » in writing
- » partly orally and partly in writing.

Where it is made in a completely oral form, the main task of the judge will be finding out:

- » which exact words were used, looking at the evidence
- » whether these words were representations or terms (representations means the words used before the contract is drawn up, whereas terms are parts of the contract).

The terms of the contract are the obligations of the parties. A term is often seen as an expression of willingness by both parties to be bound by the obligation in it. If the term is breached, it will give the other party the right to sue.

Express terms are those agreed upon by the parties at the time the contract is formed, either orally or in writing.

When a contract is in writing, it is generally easier to identify the specific terms. However, negotiations leading up to the contract can often be oral. It thus becomes necessary to establish whether a particular statement is a term of the contract or not. To do this, the courts have developed certain guidelines.

In order for the statement to be a term of the contract, it must be incorporated into the contract. To determine this, the courts adopt an objective analysis to consider what would reasonably be in the minds of the parties when they formed the contract.

Factors to be considered when incorporating statements as terms of the contract include:

- » timing
- » importance of the term
- » special knowledge and skills
- » reduction of terms in writing
- » incorporation by signature
- » the 'parol evidence' rule.

Timing

If there is a significant gap between the making of the statement and the contract, the courts will be reluctant to incorporate the statement.

CASE EXAMPLE

Routledge v McKay (1954)

A motorcycle was registered in 1939, but when a new registration book was issued it stated 1941. In 1949 the owner, who did not know of the inaccuracy, told his buyer that the age was as per the registration document. The buyer bought the motorcycle a week later, by way of a written contract that made no mention of the age.

When the buyer discovered the true age, he sued for breach of contract. The court held that his claim failed, as the lapse of time was too wide to create a binding relationship based on the statement. The statement was not incorporated, due to the length of the interval between the negotiations and the date of the contract.

For example, confirming that a car will have passed an MOT (its certificate of roadworthiness) before it is collected is a term of the contract.

Importance of the term

A statement is likely to be a term if its importance is such that the representee (buyer) would not have entered into the contract but for the statement; to do otherwise would be to ignore the intention of that party.

Where one party asks for specific details about the agreement, this can also be taken to indicate the importance to be attached to the answer. The courts will be willing to incorporate this statement in the contract.

CASE EXAMPLE

Bannerman v White (1861)

Negotiations were taking place for the purchase of hops (seeds used to brew beer). The buyer stated that if the hops had been treated with sulfur, he was not interested. The seller gave assurances that they had not been. Some of the hops had been treated with sulfur, and when the buyer found out he repudiated the contract.

The claimant said that the negotiations were only preliminary to the contract and not part of it. The court held the stipulation regarding the sulfur amounted to a condition, and the contract had therefore been breached.

A statement such as described in this case can sometimes be a term of the contract even if it conflicts with a previously written statement. This was seen in *Couchman v Hill (1947)*.

CASE EXAMPLE

Couchman v Hill (1947)

This case concerned the sale of a heifer (young female cow). The conditions of sale contained a clause stating that it was sold 'with all faults, imperfections and errors of description'. The sale described the heifer as 'unserved', meaning it had not yet been used for breeding. Before the sale, the claimant asked both the seller and auctioneer to confirm it was 'unserved'; they both assured him it was. Relying on these assurances, he bought the heifer.

Soon after, he discovered the heifer was in calf. It in fact died giving birth, as it was too young to have a calf. The Court of Appeal held that the claimant could recover damages. The documents were only part of the contract and the oral assurances were part of the other terms of the contract.

For example, to confirm that a car being bought is in full working order becomes a term of the contract.

Special knowledge and skills

The courts are willing to accept that statements made by parties with specific expertise relevant to the contract can be relied on. There will be no need to check the accuracy of the statement.

The importance of the special knowledge being relied on can be seen in two cases having similar facts: *Oscar Chess Ltd v Williams (1957)* and *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd (1965)*.

CASE EXAMPLES

Oscar Chess Ltd v Williams (1957)

The defendant was an ordinary motorist who sold his car to motor dealers for £290. It was described as a 1948 Morris 10, and the defendant honestly believed this to be true. It was later discovered to be a 1939 model, and therefore of lower value. The claimant's action for breach of a term of the contract failed, as the defendant had no expertise or specialist knowledge.

Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd (1965)

The claimant bought a Bentley car from the defendants, who were motor dealers. The defendants stated it had only done 20000 miles (30000 kilometres) whereas in fact it had done over 100000 miles (160000 kilometres). The claimant was successful in his claim, since he relied on the specialist knowledge of the dealers in stating the mileage.

For example, if I am a car salesperson and offer to sell you a racing car and it turns out to be a regular family car, there is a breach of a term and the contract can be rescinded.



▲ **Figure 28.1** The consumer must be able to rely on specialist knowledge

Reduction of terms in writing

If an oral agreement is partly reduced into a written agreement, the courts have to decide whether the written agreement alone should represent the contract or whether the contract should be regarded as partly written and partly oral.

The exclusion of an oral statement from the document tends to suggest that it was not intended to form a contractual term; see *Routledge v McKay* (1954). However, in other cases the courts have considered an earlier oral statement and a later written agreement as being part of one united contract.

CASE EXAMPLE

Birch v Paramount Estates (Liverpool) Ltd (1956)

A couple bought a house from a developer on the basis of an assurance that it would be 'as good as the show house', which it turned out not to be. The Court of Appeal held this to be so central to the agreement that it had been incorporated in the contract.

28.2 Written terms

Incorporation by signature

The general rule is that if a person signs a document, they will be bound by the terms of that contract whether or not they have read it. Only the person whom is sought liable under the terms of the contract, or their agent, need sign the document.

The 'parol evidence' rule

Written evidence is more powerful and convincing than the spoken word. Thus where a contract is made in a written document and a statement is made orally between the parties and not subsequently incorporated into the contract, generally the courts will infer that the oral statement was not intended to form part of the contract.

However, there will be times when a party to a written agreement seeks to say that the written document does not fully reflect the actual agreement that has been made – this is where the 'parol evidence' rule applies: any oral or other evidence that the party introduces to show that the actual agreement should not be accepted is inadmissible if it is used to add to the contract, to vary it or to contradict the terms contained in it.

The rule is justified on two bases:

- 1 If the contract is in written form, then it is logical for it to contain all the terms. Anything omitted was not intended to be included.
- 2 To do otherwise would create uncertainty.

The problem with the rule is that there are inevitably many contracts that are partly written and partly oral. In such cases, both elements of the agreement need considering to give an accurate and true picture of the position. As a result, the rule does have exceptions:

- » There is evidence of custom or trade usage.
- » Oral evidence can be adduced to show that the contract would not be operative until some specified event.
- » A party can quote evidence to show that the contract was not binding, for example incapacity, lack of consideration or mistake.
- » The written document is being used to show that there was a prior oral agreement, but does so inaccurately.
- » There is a collateral agreement, which is a contract where consideration is provided by making another contract.

ACTIVITY

Sue enters a contract with Steve, a builder, who agrees to convert her property for £30 000. Steve agrees to start work on 1 May and says the work will take about six weeks. Steve then realises he has underestimated the cost and is finding it difficult to find the money to buy materials. He asks Sue for extra money and Sue refuses. He now refuses to do the work.

Advise Sue.

▼ Figure 28.2 Key cases: express terms

Key cases	
Case	Summary
<i>Routledge v McKay</i> (1954)	The statement was not incorporated, due to the length of the interval between the negotiations and the date of the contract.
<i>Bannerman v White</i> (1861)	The court held the stipulation regarding the sulfur amounted to a condition, and the contract had therefore been breached.
<i>Couchman v Hill</i> (1947)	The claimant could recover damages. The documents were only part of the contract and the oral assurances were part of the other terms of the contract.
<i>Oscar Chess Ltd v Williams</i> (1957)	The claimant's action for breach of a term of the contract failed, as the defendant had no expertise or specialist knowledge.
<i>Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd</i> (1965)	The claimant was successful in his claim, since he relied on the specialist knowledge of the dealers in stating the mileage.
<i>Birch v Paramount Estates (Liverpool) Ltd</i> (1956)	The Court of Appeal held an assurance to be so central to the agreement that it had been incorporated in the contract.

Internet research

Search online to find out which types of contract, by law, have to be in writing.

TARGET SKILLS

- 1 What is the difference between express and implied terms?
- 2 When does a representation become an express term?
- 3 When does a contract have to be written?
- 4 What is parole evidence and when is it used?

COMMENT**Evaluation of the law relating to express terms**

Express terms are statements that have been specifically agreed by the parties and are terms within the contract. They can be confused with negotiations and representations, which is where a lot of disputes can arise.

To be certain, it would be best to put all terms in writing and thus make them express. The problem

would then be whether the parties would be able to remember everything that should be included.

It is the court's duty to ascertain and give effect to the intention of the parties and this is usually done from the document in which they have expressed their agreement. However it should be noted that the courts are moving away from the literal approach to interpretation to one of the purposive approach: looking to the commercial purpose of the transaction. Evidence of pre-contractual negotiations of conduct subsequent to the making of the contract and the parties' subjective intentions are generally inadmissible.

STRETCH AND CHALLENGE

When do negotiations turn into actual terms of the contract that are to be binding on the parties?

TEST YOURSELF

- 1 Explain the law governing the terms of a contract.
- 2 Can evidence be used to add to or vary a contract?
- 3 When are pre-contractual statements taken as having been incorporated in a contract?
- 4 What do the courts look at when deciding if a statement is a representation or a term?
- 5 What difference does it make whether a statement is a term of the contract or a representation?

EXAM-STYLE QUESTIONS

- 1 What is the purpose of parole evidence, and in what circumstances may it be used?
- 2 Compton Ltd manufacture photocopiers for clients with special requirements. They do not sell to customers but lease the photocopiers. There are clauses in the contract which state:
 - There must be prompt payment of the agreed monthly rental fee and this is deemed of the essence of the contract.
 - The lessee will disconnect the power supply to the machine at the end of each day.
 - The lessee will notify Compton Ltd immediately of any fault in the machine and will not permit repairs to be carried out by anyone else.

In January, Gunner Ltd leased a photocopier from Compton Ltd on a three-year lease on the above terms at £500 a month. Compton Ltd has now discovered that Gunner Ltd often leaves the power on overnight and has had minor repairs carried out to the machine. Gunner Ltd is also two days late with payment of its rental fee.

Advise Compton Ltd.

Introduction

The Consumer Rights Act 2015 (CRA) updates the law on unfair contract terms in contracts between a trader and a consumer.

The Act gained Royal Assent on 26 March 2015 and came into force on 1 October 2015. It brought into

effect into UK law the EU Unfair Contract Terms Directive and applies to business-to-consumer contracts whether or not negotiated by the consumer. This chapter links to the key concept of power and its limits.



▲ Figure 29.1 UK consumer rights were updated by the Consumer Rights Act 2015

29.1 Supply of goods

The Consumer Rights Act 2015 (CRA) applies where a business (a trader) supplies goods, digital content or services to a consumer.

The conditions implied by the Sale of Goods Act 1979 (SGA) as to the standard of goods and/or services are now statutory rights to which consumers are entitled.

In addition, under s 12 CRA, pre-contract information becomes an implied term of the contract; this would include such things as terms of payment, delivery and after-sales service.

Key definitions are found in s 2 of the Act:

- » trader – s 2(2)
- » consumer – s 2(3)
- » business – s 2(7)
- » goods – s 2(8)
- » digital content – s 2(9); the Act provided consumer protection to specifically cover digital content (however it is supplied) for the first time.

See Chapter 31 for details of these definitions.

There is a need to differentiate between consumers and non-consumers:

- » A person who works one day a week from home and buys a kettle to be used at home (even if used on that working day) is a consumer, as the purchase is outside of their trade and therefore covered by CRA.
- » However, a sole trader who works from home and buys a printer that is used 95 per cent for business purposes is a non-consumer covered by SGA.

The following sections only apply to a contract for a trader to supply goods to a consumer.

29.1.1 Satisfactory quality (s 9)

Section 9(1):

'Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory.'

Section 9(2):

'The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of –

- (a) any description of the goods,*
- (b) the price or other consideration for the goods (if relevant), and*
- (c) all the other relevant circumstances.'*

This reflects s 14(2A) of the Sale of Goods Act 1979. Originally under s 14(2), the goods had to be of a 'merchantable quality', but the Sale and Supply of Goods Act 1994 amended s 14(2) and replaced the word 'merchantable' with 'satisfactory'. 'Satisfactory' is explained in a new s 14(2)(A) as:

'... goods of a satisfactory quality if they meet the standard that a reasonable person should regard as satisfactory, taking account of any description of the goods, the price and all other relevant circumstances.'

Section 9(3) states:

- 'The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods –
- (a) fitness for all the purposes for which goods of that kind are usually supplied;
 - (b) appearance and finish;
 - (c) freedom from minor defects;
 - (d) safety;
 - (e) durability.'

This reflects s 14(3) of the Sale of Goods Act 1979. The provision applies where the buyer:

- '... either expressly or impliedly makes known to the seller any particular purpose for which the goods are bought regardless of whether or not that is a purpose for which goods of that kind are commonly supplied.'

The section is mainly used where the buyer is relying on the expertise of the seller. If the seller freely agrees to sell for that purpose, then there is a clear breach if the goods are inadequate for the purpose. It can apply to things that are not implicit in the contract but should have been obvious.

CASE EXAMPLE***Grant v Australian Knitting Mills Ltd (1936)***

The claimant purchased woollen underpants. They contained traces of chemicals that caused the claimant to contract a painful skin disease. The court accepted that the underpants had an obvious purpose and that the buyer would have impliedly made known the purpose for which he was buying them. There was a breach of an implied term.

Section 9(4) states:

- 'The term mentioned in subsection (1) does not cover anything which makes the quality of the goods unsatisfactory –
- (a) which is specifically drawn to the consumer's attention before the contract is made,
 - (b) where the consumer examines the goods before the contract is made, which that examination ought to reveal, or
 - (c) in the case of a contract to supply goods by sample, which would have been apparent on a reasonable examination of the sample.'

This reflects s 14(2C) of the Sale of Goods Act 1979.

29.1.2 Goods to be fit for a particular purpose (s 10)**Section 10 states:**

- '(1) Subsection (3) applies to a contract to supply goods if before the contract is made the consumer

makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the goods. ...

(3) The contract is to be treated as including a term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are usually supplied.

(4) Subsection (3) does not apply if the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader or credit-broker.'

This reflects s 14(3) of the Sale of Goods Act 1979.

29.1.3 Goods to be as described (s 11)

This corresponds with s 13 of the Sale of Goods Act 1979, which implies a term that the goods must correspond to the description applied to them by the seller.

This section applies even where the buyer actually sees and selects the goods.

CASE EXAMPLE***Beale v Taylor (1967)***

A buyer of a car was influenced by its description as a '1961 Triumph Herald'. It turned out to be a mix of two cars welded together, one part of which was an earlier model. The buyer successfully argued s 13 breach of contract.

29.1.4 Consumer rights for breach**▼ Figure 29.2 Consumer rights for breach**

Section in CRA 2015	Description
Sections 20 and 22	If the goods do not meet requirements, the consumer has a short-term right to reject the goods within 30 days, unless the expected shelf-life of the goods is shorter (e.g. perishable goods). The trader cannot impose any fee on the refund. The refund must be made within 14 days after agreement to refund.
Section 23	Consumers have the right to request that faulty or not-as-described goods are repaired or replaced, even after the 30-day right to reject period has expired.
Sections 20 and 24	Consumers have the right to a reduction in the price or to finally reject the goods after one unsuccessful repair or replacement.

Breach of digital content

Digital content is described as data produced and supplied in digital form. It includes such things as software, apps, eBooks, music, videos and games. Consumers have statutory rights when they buy digital content or it is supplied along with other paid-for goods or services, in each case under a contract.

Digital content must be of satisfactory quality, fit for a particular purpose or as described by the seller. If digital content does not meet these criteria or develops a fault, a consumer has the right to have a digital product repaired or replaced.

The retailer has one opportunity to repair or replace any goods or digital content that are of unsatisfactory quality, unfit for purpose or not as described, before a claim for a refund.

The consumer can choose whether they want the goods to be repaired or replaced, but the retailer can refuse if they can show that that choice is disproportionately expensive compared with the alternative.

If the attempt at a repair or replacement is unsuccessful, the consumer can then claim a refund or a price reduction if they wish to keep the product. If they do not want a refund and still want the product repaired or replaced, they have the right to request that the retailer makes further attempts at a repair or replacement.

Internet research

Find case law for a legal definition of a business.

29.2 Supply of services

The Consumer Rights Act 2015 also replaces the Supply of Goods and Services Act 1982.

29.2.1 Sections 49, 51 and 52

Supply of services is now governed by ss 49, 51 and 52 CRA 2015, which imply into every contract for the supply of services the following:

- » s 49 – the service must be performed with reasonable skill and care
- » s 51 – the price for the service will be reasonable if not agreed, and
- » s 52 – the service will be performed within a reasonable period if not agreed.

Pre-contractual statements, or any information said or written to the consumer about the trader or service, are implied terms if they influence the consumer to buy

the service or make any decision about the service after entering into the contract.

The new Act very much mirrors the law under the Supply of Goods and Services Act 1982, which was designed to protect services:

- » Section 13 of the Supply of Goods and Services Act 1982 provides that where there is the supply of services in the course of business, it is implied that the supplier will carry out those services with reasonable care and skill. The supplier must be competent and professional.

CASE EXAMPLE

Lawson v Supasink Ltd (1984)

The defendant was contracted to design, supply and install a kitchen. Plans were drawn up but the defendant did not follow them properly. The claimant sued under s 13 and was awarded damages.

- » Section 14 implies a term that where the contract has provided no time for the service, then the service should be carried out within a reasonable time.

CASE EXAMPLE

Charnock v Liverpool Corporation (1968)

The defendant took eight weeks to repair a car, whereas it was shown that it could have been done in five weeks. The defendant was held in breach of the implied term.

- » Section 15 states there is an implied term that the party will pay a reasonable price where no price is fixed.

29.2.2 Consumer rights for breach

- » Section 55: where a trader has failed to provide a service with reasonable skill and care, or it does not conform to precontractual statements it has made, the consumer can require the trader to perform the service again to complete it correctly.
- » Section 56: consumers may also claim a price reduction of up to 100 per cent in certain circumstances, depending on how serious the breach was.

ACTIVITY

Audrey and Bill visit CompuCity to shop for a laptop and a printer, both for their own personal use.

Audrey approaches a sales assistant and tells him she needs a printer that uses fewer cartridges than her present one. The sales assistant shows Audrey a printer he says requires only two cartridges, and tells her it has been reduced to £105.

Bill has been comparing laptops with another sales assistant, and has been shown one costing £250. Bill is extremely pleased with this price, expecting to have to pay far more.

When Audrey gets home, she opens the printer box and discovers to her dismay that the printer needs four printer cartridges. Meanwhile, Bill has been setting up the laptop. It appears to be working perfectly until he tries to load software, at which point it crashes.

The next day, Audrey and Bill take the printer and the laptop back to CompuCity and ask for a refund on both. The manager tells Audrey and Bill that they cannot get a refund on the printer or the laptop, as there is no fault with either of them.

Advise Audrey and Bill.

TARGET SKILLS

- 1 What are statutory implied terms under the Consumer Rights Act 2015?
- 2 What is the difference between a consumer and a business?
- 3 Explain how the Consumer Rights Act 2015 protects consumers.
- 4 Evaluate consumer rights for breach.

COMMENT

Evaluation of the Consumer Rights Act 2015

Some of the provisions under the Consumer Rights Act 2015 (CRA) are very similar to those under both the Sale of Goods Act 1979 and Supply of Goods and Services Act 1982. It seems likely that existing case law will be used and cited when the new Act is litigated.

The aim of CRA is to consolidate in one Act numerous and often confusing consumer rights legislation, while at the same time introducing

some new law. CRA deals with four main areas: digital content, goods, services and unfair terms.

CRA only applies to contracts between traders and consumers, but business-to-business suppliers and purchasers cannot ignore it either if the goods, digital content or services in question will eventually be supplied to consumers.

However, it is important to note that provisions within the Sale of Goods Act 1979 remain, and the complicated law which gives consumers cancellation rights in respect of 'distance contracts' (among other things) remains in place under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('Consumer Contract Regulations 2013'). Therefore, consumer law remains complex.

STRETCH AND CHALLENGE

Is consumer law too heavily weighted against businesses?

TEST YOURSELF

- 1 What terms cannot be added to consumer contracts?
- 2 Who is defined as a trader and who is defined as a consumer under CRA 2015?
- 3 When will UCTA be used following CRA 2015?
- 4 Does CRA 2015 apply to business-to-business transactions?
- 5 What are the consumer rights for breach under CRA 2015?

EXAM-STYLE QUESTIONS

- 1 Does the Consumer Rights Act 2015 rectify many of the complications that existed for consumers with the Unfair Contract Terms Act 1977?
- 2 The PC you bought for your business three months ago from CompuCity for £1000 has stopped working. You no longer have the receipt for the purchase but you do have your business credit-card statement, showing the purchase was made at that time, for that amount of money, from that store.

What rights do you have under UK law to refund, repair or replacement?

Introduction

Once the express and implied terms of a contract have been established, it is then necessary to decide whether they are conditions or warranties:

- ★ A condition is a major term of the contract and goes to the heart of it. If the condition is breached, it can end the contract and give rise to damages.

- ★ Warranties are not as important as conditions. If they are broken, this will not end the contract but merely create the right for the aggrieved party to seek damages.

The following sections examine the nature of terms, giving different examples and effects of breach. This chapter links to the key concept of liability.

30.1 Conditions

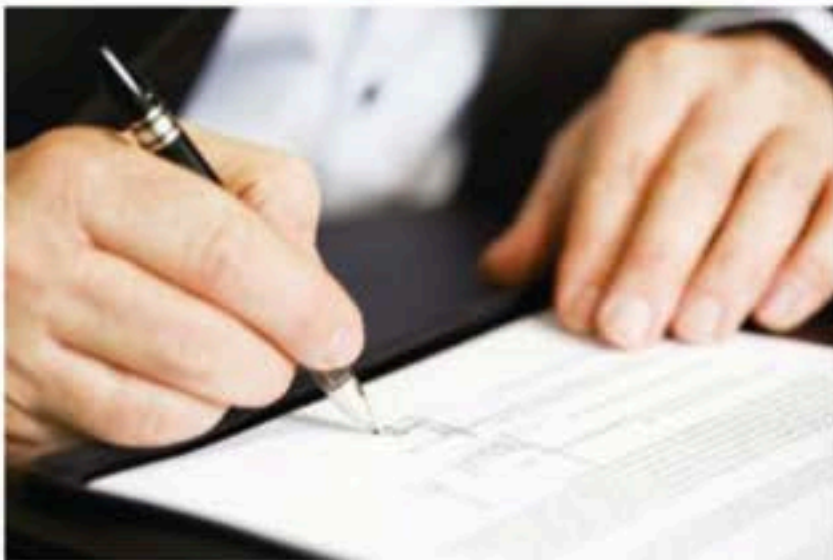
Conditions are such important terms of the contract that the contract will be rendered meaningless if they are breached.

If a condition is breached, the claimant will be allowed the fullest range of remedies – the ability to repudiate the contract and claim damages. The leading authority is *Poussard v Spiers and Pond* (1876).

CASE EXAMPLE***Poussard v Spiers and Pond* (1876)**

An actress who was contracted to appear in the leading role in an opera felt unwell and unable to attend the early performances. The producers gave her role to another actress. The actress sued for breach of contract and lost.

As the lead singer, her performance was crucial to the production and so was a condition. The producers were therefore entitled to repudiate and terminate her contract.



▲ **Figure 30.1** If conditions are breached, the contract is meaningless

30.2 Warranties

These are minor terms of the contract, and the contract might be able to continue if they are breached.

Warranties are usually of an ancillary or secondary purpose to the contract. As a result of this, the only remedy for breach of a warranty is in damages. The leading case here is *Bettini v Gye* (1876).

CASE EXAMPLE***Bettini v Gye* (1876)**

A singer was contracted to appear at a variety of theatres. His contract had a term saying he should attend rehearsals for six days prior to the start of the performances. He was absent for the first three days of rehearsals, and on his return found he had been replaced.

He sued, and the court held that the requirement was only ancillary to the main purpose of the contract. As a result, the breach only entitled the producers to damages and not a right to repudiate the contract.

30.3 Innominate terms

The word 'innominate' comes from the Latin word *innominatus*, which means nameless or anonymous.

In law, an innominate term does not have any specific classification. In determining the outcome of the breach of the term, the court will consider the consequences of the breach rather than classifying the term when deciding what remedy should be awarded.

The courts developed the concept because it was felt that the right to repudiate should only be available when the breach was so bad that the only remedy that was fair to both parties was for the contract to be ended. The concept was first developed in the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962) known as *The Hong Kong Fir Case*.

CASE EXAMPLE

The Hong Kong Fir Case (1962)

The defendants chartered a ship from the claimants under a two-year agreement. One of the terms in the contract required the ship to be 'in every way fitted for ordinary cargo service'. The ship broke down as a result of the incompetence of the engine-room staff, but it was in a generally poor state and not seaworthy. For 18 weeks, the ship was not usable while repair works were carried out. The defendants therefore repudiated the contract.

The claimants sued, saying only a warranty had been breached and not a condition, and therefore only damages were appropriate. The Court of Appeal agreed, but in its judgment stated that not all contracts could simply divide terms into conditions and warranties, and that many contracts were much more complex. It was stated:

'All that can be predicted is that some breaches will, and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract... unless provided for expressly in the contract it will depend on the nature of the event to which the breach gives rise and does not follow automatically from prior classification.'

The remedy is determined after the consequences of the breach have been identified. Only if the breach is sufficiently serious can the contract be repudiated.

The problem with innominate terms is that they leave the parties in a state of uncertainty. No one will know the consequence until there is a breach and the judge has declared how serious it is. Nevertheless, the principle of innominate terms has been accepted in subsequent cases.

CASE EXAMPLE

Reardon Smith Line v Yngvar Hansen-Tangen (1976)

A tanker that was to be chartered was described as Osaka 354 (the yard where it was built), whereas in fact it was Oshima 004. The tankers were exactly the same. The charterers considered the description of the tanker's origin to be a condition, and they were therefore entitled to terminate the contract.

The House of Lords rejected this and held that the description was not a condition but an innominate term. Since the party had not been substantially deprived of the whole benefit, they were only entitled to damages.

The question that has to be asked is: has the innocent party been deprived substantially of the whole benefit of the contract?

▼ Figure 30.2 Key cases: status of terms

Key cases	
Case	Summary
<i>Poussard v Spiers and Pond</i> (1876)	The lead singer's performance was crucial to the production and so was a condition. The producers were therefore entitled to repudiate and terminate her contract.
<i>Bettini v Gye</i> (1876)	The requirement to attend rehearsals was only ancillary to the main purpose of the contract. The breach only entitled the producers to damages.
<i>The Hong Kong Fir Case</i> (1962)	A warranty had been breached and not a condition, and therefore only damages were appropriate.
<i>Reardon Smith Line v Yngvar Hansen-Tangen</i> (1976)	The description was not a condition but an innominate term. Since the party had not been substantially deprived of the whole benefit, they were only entitled to damages.

Internet research

Search www.bailii.org for the case of *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* (1962) and define innominate terms.

ACTIVITY

You employ someone to come and valet your car both inside and outside. When they arrive, they wash the car but do not clean the inside of the car.

Questions

- 1 What terms of the contract have been broken?
- 2 What are your remedies?

TARGET SKILLS

- 1 What is a condition?
- 2 What is a warranty?
- 3 Assess when a pre-contractual statement will be taken as having been incorporated into a contract.
- 4 Evaluate the consequences of a breach of a term of the contract.

COMMENT

Evaluation of the law relating to the status of terms

Not all contractual terms have the same importance, and this is reflected in contract law with the distinction between conditions and warranties. This distinction is vital. A condition goes to the heart of the contract and breach can lead to contract termination. A warranty is a breach of the contract but may only give rise to damages.

In the *Hong Kong Fir Shipping Case*, it was suggested that it was not enough to classify terms merely as

conditions and warranties, and that the character and nature of the breach should be taken into consideration. However, while creating flexibility this also causes uncertainty, and it becomes harder for the innocent party to know when they have the right to terminate.

This also leads to the possibility of pursuing expensive and perhaps futile litigation as in *The Chikuma*. However flexibility can give the law a wider view of contract and ultimately provide fairer decisions. Flexibility can also help prevent the breach of contracts due to trivial reasons and manipulation of the law where the sole desire is to avoid an unwanted contract.

STRETCH AND CHALLENGE

Could innominate terms be described as no more than delaying procedures that lead to uncertainty?

TEST YOURSELF

- 1 What is the major difference between a condition and a warranty?
- 2 What are the consequences of breach of a warranty?
- 3 What is an innominate term?
- 4 How does an innominate term vary from a condition or a warranty?
- 5 Will breach of an innominate term give rise to a right to repudiate a contract?

EXAM-STYLE QUESTIONS

- 1 Are innominate terms good because of the flexibility they create or bad because of the uncertainty that can occur around termination of the contract?
- 2 Aisha was employed as a research assistant, and within her contract it was stated:
 - The research assistant will dress smartly at all times.
 - The research assistant will work whatever hours are necessary to complete the assignments given to her.

On 1 June, Aisha is told to produce statistics for a meeting at 9 a.m. on 2 June. In spite of staying in the office till midnight, she is not able to produce the statistics. Her manager is angry and also notices that Aisha has come into the office on 2 June wearing jeans and a T-shirt. In front of several colleagues, Aisha's manager dismisses her.

Advise Aisha.

31

Control of exemption clauses

Introduction

Exemption clauses are also referred to as exclusion and limitation clauses. They seek to limit or exempt one of the parties from liability in contract or tort.

An exemption clause is subject to all the rules regarding terms, particularly those concerning

incorporation of a term in a contract. A contract may be found not to be legally binding if it is found to be unreasonable. This chapter links to the key concept of liability.

31.1 Common law

At common law, the courts are concerned to protect a weaker party against an exemption clause imposed without negotiation by a party that has superior bargaining power. The courts can achieve this by finding that the clause had not been incorporated as a term of the contract.

The courts have developed a three-stage process in establishing whether an exemption clause may be relied on:

- 1 It must be shown that it is an actual term of the contract.
- 2 It needs to be determined whether it actually attempts to protect the party inserting it into the contract.
- 3 There are a number of tests designed to restrict the use of such clauses.

31.1.1 Rules of incorporation

Where a party has signed an agreement, in general they are *prima facie* bound by it, even though they may not have read the contract and been aware of it. The leading case on this point is *L'Estrange v Graucob* (1934).

When dealing with contracts that are not signed, the first principle adopted by the courts as to whether an exemption clause can be added is whether the party had actual knowledge of the clause at the time of entering into the contract.

CASE EXAMPLE

Olley v Marlborough Court Hotel (1949)

A guest booked in at the reception desk of a hotel and paid for a week's stay. She went up to her room where there was a notice stating that the hotel would not be liable for any articles lost or stolen unless handed to the manager for safe keeping. She left in her room valuable furs, which were subsequently stolen.

It was held that the exemption clause did not protect the hotel, as it was not seen until after the contract had been entered into, and was not therefore incorporated in the contract.

However, if the parties have dealt with each other in the past on similar terms, it may be possible to imply knowledge of the clause from those past dealings and thus its incorporation in the contract.

CASE EXAMPLE

L'Estrange v Graucob (1934)

The claimant bought a vending machine from the defendants on a written contract, which contained a clause saying 'any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded'. The claimant did not bother to read the terms. The machine was

unsatisfactory and the claimant claimed for breach of an implied statutory term under the Sale of Goods Act 1893, which stated the goods had to be fit for purpose.

The claim failed because she had signed a contract waiving her rights; she was bound by the agreement, and the defendants were protected by the exclusion clause.

CASE EXAMPLE

Spurling (J) Ltd v Bradshaw (1956)

The defendant had previously dealt with the claimants, who were warehousemen. He delivered eight barrels of orange juice for them to store and received a receipt, which referred to its clauses printed on the back. One of the clauses exempted liability for damage by negligence, wrongful act or default. When the defendant went to collect the barrels, they were empty and he refused to pay.

The defendant claimed that the exemption clause came after the contract had been entered into, but also acknowledged there had been previous dealings where he had been given a similar receipt. It was held he was bound by the exemption clause.

The courts will not generally accept an exemption clause incorporated into a contract unless the affected party has been made sufficiently aware of it, either before the contract has been entered into or at the time the contract is formed. The party wishing to rely on the exemption need not show that they actually brought it to the notice of the other party, but only that they took reasonable steps to bring it to their attention.

Two cases can be compared on this issue: *Parker v South Eastern Railway Co.* (1877) and *Thompson v LMS Railway* (1930).

CASE EXAMPLES

Parker v South Eastern Railway Co. (1877)

The claimant left luggage at a station and was given a ticket. There was a clause on the back of the ticket, stating that the railway would not be liable for luggage exceeding £10 in value. The claimant's luggage was worth more and was stolen. The defendants sought to rely on the exemption clause but failed, as they could not show they had instructed the claimant to read the terms.

Thompson v LMS Railway (1930)

The claimant, who was illiterate, asked her niece to buy a railway ticket. On the front of the ticket was an instruction to look at the back of it, where it said that the ticket was issued subject to the conditions contained in the timetable. On page 552 of the conditions, there was an exemption clause.

The Court of Appeal held the company had taken adequate and reasonable steps to bring the clause to the attention of the claimant.

However, an exemption clause will not be incorporated into the contract when, on an objective analysis, it is contained in a document that would ordinarily not be deemed as being a contractual document or having contractual significance.

CASE EXAMPLE

Chapelton v Barry Urban District Council (1940)

The claimant hired deck chairs and received tickets on paying for them. On the back of the tickets were the words: 'The council will not be liable for any accident or damage arising from the hire of the chair.' One of the chairs was defective and collapsed, injuring the claimant. The defendants could not rely on the exemption clause, as the existence of the clause was not effectively brought to the attention of the claimant.

The party seeking to rely on the exemption clause must show that the clause was brought to the attention of the other party and thus incorporated in the contract. The courts have shown that the party relying on the clause to avoid liability has a very high duty to achieve this end. This is illustrated in *Thornton v Shoe Lane Parking Ltd* (1971).

CASE EXAMPLE

Thornton v Shoe Lane Parking Ltd (1971)

The claimant was injured in a car park. There was a notice in the car park, stating that parking was at the owner's risk. On entering the car park, the driver would take a ticket from a machine. On the ticket were printed the following words: 'This ticket is issued subject to the conditions of issue as displayed on the premises.' One of the notices in the car park excluded liability for damage to both property and personal injury.

When the claimant sued, the defendants sought to rely on the notice. The court refused to allow the exemption clause, on the basis that there had been insufficient attempt made to draw the claimant's attention to the clause.

Other reasons for failure of an exemption clause

Even where the exemption clause appears to have been successfully incorporated into the contract, it still does not mean that it will avoid liability in all cases. The clause could still fail on the construction of the contract as a whole, and there are a number of reasons for this, such as:

- » the *contra proferentem* rule
- » negligence
- » seriousness of the breach.

There are also some common law reasons for failure, including misrepresentation, overriding undertakings where the exemption is overridden by an express undertaking, third parties and collateral contracts (see Section 23.4).

31.1.2 The contra proferentem rule

Traditionally, the exemption clause is construed against the person relying on it. If there is any ambiguity, the clause will be interpreted in the manner least favourable to that person.

CASE EXAMPLE

Hollier v Rambler Motors (AMC) Ltd (1972)

The claimant took his car for repair at a garage, as he had done many times in the past. The conditions were contained in a form that the claimant had signed many times before, but not on the occasion in question. One of the terms stated: 'The company is not responsible for damage caused by fire to customers.' The car was damaged in a fire caused by the negligence of the defendant. The garage sought to rely on the exemption clause.

The Court of Appeal held that:

- 1 The clause had not been incorporated merely because of previous dealings.
- 2 For the defendant to rely on the clause, it must have been stated without ambiguity that the defendant would not be liable in the event of its own negligence.

31.2 Statute law

31.2.1 Unfair Contract Terms Act 1977

Section 1 of the Unfair Contract Terms Act 1977 (known as UCTA) applies to business-to-business contracts that involve liability, with the exception that s 8 applies to all contracts.

Definition of business liability (s 1 (3))

Business liability is defined in s 1(3) as liability that arises:

- (a) from things done or to be done by a person in the course of a business (whether his own business or another's); or
- (b) from the occupation of premises used for business purposes of the occupier.

The Act will not apply to the following contracts, as these are excluded by s 5:

- » contracts of insurance
- » contracts for the transfer of land
- » international commercial contracts.

CASE EXAMPLE

Stevenson and Another v Rogers (1999)

A fisherman sold his boat, but claimed his business was selling fish not boats. The phrase 'in the course of the business' in s 14 was considered. The court interpreted the phrase as covering the sale of a fishing boat, even though the seller was in the business of fishing rather than selling boats.

Negligence liability (s 2)

According to s 2(1), liability cannot be restricted or excluded in respect of liability for death or personal injury resulting from negligence. The section is restricted to business liability.

Internet research

Search online for the Unfair Contract Terms Act 1977 and state what s 2(1) provides for.

Liability arising in contract (s 3)

The Act also regulates clauses which seek to restrict or exclude liability for breach of contract.

The principal section that performs this role is s 3. This used to deal with two types of contract, but as a result of the Consumer Rights Act 2015, now only deals with contracts between businesses where one seeks to rely on their standard terms of business.

Reasonableness test (s 11)

Section 11(5) places the burden of proving that a clause is reasonable on the party seeking to rely on the clause.

Reasonableness is determined by reference to the factors set out in s 11 and the guidelines set out in Schedule 2. 'The strength of the bargaining position of the parties' is a relevant consideration when assessing reasonableness. On a strict reading of the Act, the Schedule 2 guidelines only apply to ss 6–7 but they have, nevertheless, informed the case law in relation to the interpretation on the Act in general.

Schedule 2 states that the courts should consider the following questions:

- » Is the bargaining strength of the parties comparable or equal?
- » Did the buyer receive inducements or advantages from the supplier that makes insertion of the exemption clause reasonable?
- » Were the goods manufactured, processed or adapted to the buyer's specification?
- » Are exclusions or limitations of liability customary practice, or should the buyer for any other reason have known of the existence or extent of the clause?

31.2.2 The Consumer Rights Act 2015

The Consumer Rights Act 2015 (CRA) updates the law on unfair contract terms in contracts between a trader and a consumer (s 61) and brings into effect in UK law the EU Unfair Terms in Consumer Contracts Directive 93/13/EEC.

It applies to business-to-consumer contracts, whether or not negotiated by the consumer, and also covers 'consumer notices', which are announcements and other communications intended to be read by a consumer, such as renewal notices and customer promotions.

This statute wraps up two separate pieces of consumer law:

- » the Sale of Goods Act 1979
- » the Supply of Goods and Services Act 1982.

It also:

- » repeals and replaces the consumer-facing provisions of the Unfair Contract Terms Act 1977
- » repeals all of the Unfair Terms in Consumer Contracts Regulations 1999.

Definitions (s 2)

The key definitions within s 2 CRA are as follows:

- » Section 2(2), 'trader': 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.'
- » Section 2(3), 'consumer': 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.'
- » Section 2(7), 'business': this includes the activities of any government department or local or public authority (including universities).
- » Section 2(8), 'goods': this refers to any tangible moveable items. Goods do not include water, gas and electricity if – and only if – they are put up for supply in a limited volume or set quantity.
- » Section 2(9), 'digital content': this means data which is produced and supplied in digital form.

Exclusion of liability in goods contracts (s 31)

Section 31 outlines all matters that cannot now be excluded. These include the fact that goods need to be of a satisfactory quality, goods need to be fit for purpose and goods must match their description.

Internet research

Investigate s 31 CRA and find out what cannot be excluded from a consumer contract.

Exclusion of liability in service contracts (s 57)

Section 57 enforces the consumer's rights to have any contracts to provide services performed to a reasonable standard.

Requirement for contract terms to be fair (s 62)

Under s 62(4), a term in a consumer contract will be unfair if:

'... contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.'

There is one fairness test and it is contained in s 62(5). Whether a term is fair is to be determined:

'(a) taking into account the nature of the subject matter of the contract

(b) by reference to all the circumstances existing when the term was agreed, and to all the other terms of the contract or any other contract on which it depends.'

Negligence liability (s 65)

Section 65 reflects the old provisions under s 2 UCTA 1977.

Requirement for transparency (s 68)

Section 68(1) requires the trader to ensure that a written term of a consumer contract or notice is transparent.

Section 68(2) states that a consumer notice is transparent if it is expressed in plain intelligible language and legible.

ACTIVITY

Janya entered into a contract with Freeways for the hire of a Lexus car and driver (named Chung) for a period of two weeks, at a cost of £2500.

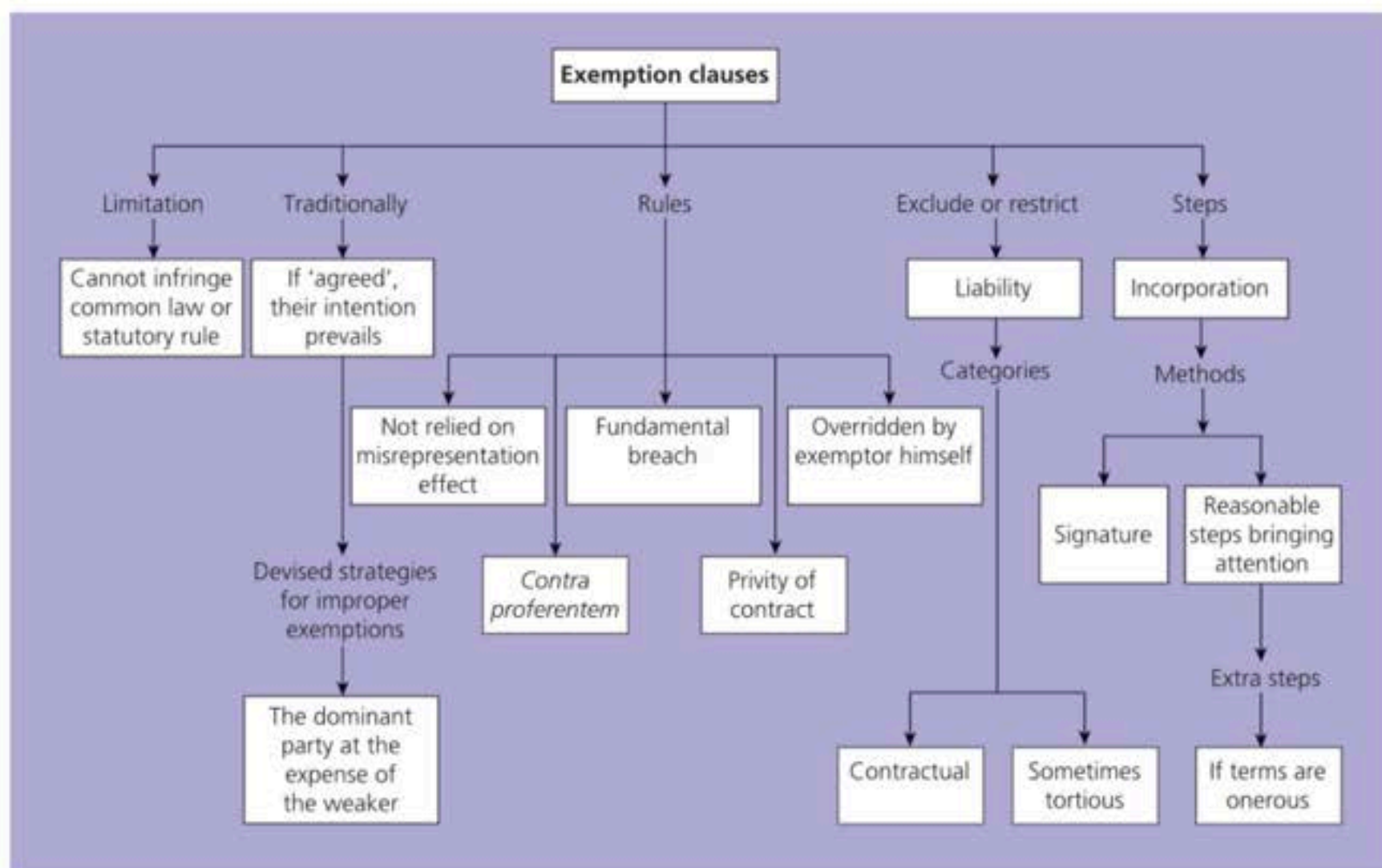
As she was leaving Freeways' office, Janya was handed an envelope containing brochures recommending various hotels. The envelope also contained a sheet of paper headed 'Terms and Conditions of Hire', on which was written, among other things, the following:

'1 Neither the company nor its employees or agents shall be liable for acts or omissions that occasion injury to clients or damage to or loss of their property, howsoever caused.

2 Any liability of Freeways, its employees or agents is limited to £100.

3 A person who is not a party to this contract shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any terms of this contract. This clause does not affect any rights or remedies of any person which exists or is available otherwise than pursuant to that Act.'

On the fourth day of Janya's holiday, the car in which she was travelling left the road and crashed into a stone wall. This accident was caused by Chung's carelessness, the driver employed by Freeways. Advise Janya of her rights.



▲ Figure 31.1 Control of exemption clauses

▼ Figure 31.2 Key cases: control of exemption clauses

Key cases	
Case	Summary
<i>L'Estrange v Graucob</i> (1934)	Despite not reading the agreement, the claimant was bound by it, and the defendants were protected by the exclusion clause.
<i>Olley v Marlborough Court Hotel</i> (1949)	The exemption clause did not protect the defendant, as it was not seen until after the contract had been entered into, and was not therefore incorporated in the contract.
<i>Spurling (J) Ltd v Bradshaw</i> (1956)	The defendant was bound by the exemption clause, as there had been previous dealings where he had been given a similar receipt.
<i>Parker v South Eastern Railway Co.</i> (1877)	The exemption clause failed, as the defendant could not show they had instructed the claimant to read the terms.
<i>Thompson v LMS Railway</i> (1930)	The exemption clause applied, as the defendant had taken adequate and reasonable steps to bring it to the attention of the claimant.
<i>Chapelton v Barry Urban District Council</i> (1940) <i>Thornton v Shoe Lane Parking Ltd</i> (1971)	The defendants could not rely on the exemption clause, as the existence of the clause was not effectively brought to the attention of the claimants.
<i>Hollier v Rambler Motors (AMC) Ltd</i> (1972)	The <i>contra proferentem</i> rule applied: • The clause had not been incorporated merely because of previous dealings. • The clause should have stated that the defendant would not be liable in the event of its own negligence.
<i>Stevenson and Another v Rogers</i> (1999)	Section 14 UCTA was considered: 'in the course of the business'. The court interpreted the phrase as covering the sale of a fishing boat.

TARGET SKILLS

- 1 Which exclusion clauses can never be upheld in a contract?
- 2 What has CRA 2015 changed in terms of exclusion clauses?
- 3 Assess the common law regarding exclusion clauses.
- 4 Evaluate how exclusion clauses affect business transactions.

COMMENT

Evaluation of the control of exemption clauses

The common law first looks to see whether the clause has been incorporated in the contract:

- If it is not incorporated in the contract, it will not be effective.
- If it is incorporated in the contract, legislation will decide whether it is effective or not.

Exclusion clauses are now dealt with under two separate Acts, depending on whether it is a business or a consumer contract. The old Unfair Contract Terms Act 1977 (UCTA) now deals with businesses, and the complicated Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) have now been reformed, meaning matters are less complicated.

The Consumer Rights Act 2015 (CRA) replaces the old UCTA for consumer contracts, but in essence repeats much of UCTA, making it clearer at the same time. Certain clauses under the new Act are blacklisted, whereas others are judged on their reasonableness.

The law is for the protection of the consumer, who is felt may be disadvantaged by businesses who are used to dealing with contracts. However, in the business world it is felt that businesses are capable of protecting themselves and the courts will try not to become involved unless they have to.

STRETCH AND CHALLENGE

What were the reasons behind creating the Consumer Rights Act 2015 and have they been achieved?

TEST YOURSELF

- 1 What is required for an exemption clause to be considered effective?
- 2 What are the differences between consumer dealing and inter-business dealing?
- 3 What does the *contra proferentum* rule mean?
- 4 How does CRA decide reasonableness?
- 5 How does UCTA decide reasonableness?

EXAM-STYLE QUESTIONS

- 1 What is the function of an exclusion clause, and can it ever be fair in consumer law?
- 2 Fatima is an experienced sailor and agrees to buy a boat from Paul for £20 000. Within the contract, there are the following terms:
 - It is agreed there is no undertaking as to quality, fitness, purpose or description.
 - There is no implied or express condition or warranty, express, statutory or otherwise, in this contract for sale.

Two months later while at sea, the boat proved to be not seaworthy and almost sank. Fatima wants to return the boat and recover her money.

Advise Fatima.

32

Performance

Introduction

When discharging a contract by performance, there is a need to see whether:

- the contract is an entire contract, or
- it is possible to divide the contract into separate divisible contracts held under the umbrella of one contract.

If the contract is entire, all obligations under the contract must be performed. If it is divisible, then on completion of each division there is performance, even though the umbrella contract has not been performed in its entirety. This chapter links to the key concept of effectiveness and certainty.

32.1 The entire or strict performance rule

The entire obligation must be performed completely and in its entirety. This was shown in *Cutter v Powell* (1795).

CASE EXAMPLE***Cutter v Powell* (1795)**

A second mate on a vessel sailing from Jamaica to Liverpool (a 49-day voyage) died when the ship was nine days short of Liverpool. An action by his widow to recover a proportion of his agreed wage failed, because the performance of the contract was not exact and entire.

32.2 Exceptions to the entire or strict performance rule**32.2.1 Substantial performance**

If the entire obligation has been performed except for a few minor details, the contract will be considered enforceable, subject to the minor defects. This was shown in *Hoenig v Isaacs* (1952), in contrast to *Bolton v Mahadeva* (1972).

CASE EXAMPLES***Hoenig v Isaacs* (1952)**

The contract fee was £750 and the cost of remedying defects was just over £55. In essence, the contract had been performed, and payment should be made subject to the cost of the minor defects.

***Bolton v Mahadeva* (1972)**

The contract fee was £560 and there were significant defects. The costs to rectify were £174, and it was held the contract had not been substantially performed.

32.2.2 Part performance

The aggrieved party can accept part performance of an entire obligation, if it is a matter of actual choice. This was shown in *Sumpter v Hedges* (1898).

CASE EXAMPLE***Sumpter v Hedges* (1898)**

There was a contract to build two houses and stables for £565 on the defendant's land. The contract was abandoned after work was done to the value of £333.

It was held that the claimant could not recover money, as the other party had not accepted this, and partial performance had to be a matter of real choice.

32.2.3 Divisible contracts

A contract may be divided into separate parts, so that the claimant can be paid for each part that has been delivered/completed. This was shown in *Ritchie v Atkinson* (1808).

CASE EXAMPLE***Ritchie v Atkinson* (1808)**

The claimant agreed to carry a specified quantity of hemp and iron. The price agreed was £5 per ton (hemp) and 5 shillings per ton (iron). The claimant only carried part of the agreed quantity. The defendant argued that the contract had not been fully performed and no payment was due.

The court ruled that payment should be made for parts of the contract delivered; lack of delivery of the other parts did not need to be paid (damages).

32.2.4 Prevention of performance

The claimant can claim for work done on a *quantum meruit* basis (i.e. amount merited), as in *Planche v Colburn* (1831).

CASE EXAMPLE

Planche v Colburn (1831)

A writer was allowed payment for the work he had already done when the publisher abandoned the series.

32.2.5 Tender of performance

If a party to a contract cannot complete performance without the concurrence of the other party, then the offer by them to perform and a rejection of that offer by the other party entitles the innocent party to be discharged from further liability.

In other words: one party has completed their part of the contract but the other has not, when they should have done. In this instance, the completing party can be discharged from the contract.

32.2.6 Time of performance

Equity considers time is not of the essence in a contract. However, it will be under the following circumstances:

- » It is stipulated in the contract.
- » The type of contract makes it imperative that time should be observed (an example would be a contract for perishable goods).
- » One party has given reasonable notice during the existence of the contract that performance must take place within a certain time, as in *Rickards v Oppenheim* (1950).

CASE EXAMPLE

Rickards v Oppenheim (1950)

The defendant gave final notice that if a car was not delivered in a specified time, they would cancel the order. It was held that time had been made of the essence by this final notice.

ACTIVITY

Paul takes his vintage car to a garage for repair. After two weeks, he asks when it will be ready and is told it will take another two weeks. Again, when Paul goes to collect, he is told it is not ready. Paul says to the garage that if it is not ready in seven days, he will take the car elsewhere. The car is not ready for another ten days.

Advise Paul.



▲ Figure 32.1 Time is of the essence in some contracts

32.2.7 Vicarious performance

This is also known as delegated performance, and is where the debtor has assigned their liability to another but is not relieved from their obligation to ensure the due performance of their contract with the original party or parties.

It will not always be possible to delegate to another, and each case will depend on its own circumstances.

CASE EXAMPLE

Robinson and Sharpe v Drummond (1831)

B agreed to build a carriage and to hire it to A for five years. B was to keep the carriage in repair. Two years later, B retired and assigned the business to C.

It was held that the contract between A and B was personal, and A could reject the performance offer by C.

Internet research

Find and explain a case which is a precedent for enforcing vicarious performance.

▼ Figure 32.2 Key cases: performance

Key cases	
Case	Summary
<i>Cutter v Powell</i> (1795)	Some obligations must be performed completely
<i>Hoenig v Isaacs</i> (1952)	Minor defects are acceptable
<i>Bolton v Mahadeva</i> (1972)	Major defects mean the contract is not performed
<i>Sumpter v Hedges</i> (1898)	Partial performance is a matter of choice
<i>Ritchie v Atkinson</i> (1808)	A contract may be divisible
<i>Planche v Colburn</i> (1831)	<i>Quantum meruit</i>
<i>Rickards v Oppenheim</i> (1950)	Time can be made of the essence
<i>Robinson and Sharpe v Drummond</i> (1831)	Vicarious performance

TARGET SKILLS

- 1 What is *quantum meruit*?
- 2 What is substantial performance?
- 3 Analyse what amounts to performance.
- 4 Discuss when a performance of a contract is complete.

COMMENT

Evaluation of the law relating to performance

Performance usually needs to be fully complete, as in *Cutter v Powell*.

If there is a substantial lack of performance, the contract will not be considered complete. The problem, however, lies with defining a 'substantial lack of performance'.

The issue then becomes a little more confusing when the question of *quantum meruit* is considered, although this usually revolves around the prevention of a contract being completed.

STRETCH AND CHALLENGE

Is it fair that someone who performs part of a contract but does not finish should be paid nothing?

TEST YOURSELF

- 1 What is the difference between a divisible contract and a collateral contract?
- 2 What do you understand by substantial performance? Can it be defined?
- 3 How can time be made of the essence?
- 4 How is performance achieved in a reward case?
- 5 What do you understand by vicarious performance?

EXAM-STYLE QUESTIONS

- 1 A party to a contract who does not perform the whole contract is not entitled to any payment. Discuss.
- 2 Jenny agrees to buy Sarah's car for £12000. Sarah gives Jenny the car, but Jenny does not pay the £12000. Jenny and Sarah then agree to abandon the contract, and Sarah tells Jenny to keep the car and that she 'does not need the money anyway'.

Jenny uses the £12000 to pay for double glazing at her house. Sarah later decides she wants her car back and alleges the agreement to discharge the contract is unenforceable.

Advise Jenny.

Introduction

A breach in itself does not discharge the contract, but it may allow one party the option of treating the contract as discharged.

The breach must be sufficiently serious, and be of a condition and not a warranty. This chapter links to the key concept of justice, fairness and morality.

33.1 Actual breach

Actual breach is defined in W.J. Stewart's *Dictionary of Law* as:

'... an actual failure of a party to a contract to perform their obligations under that contract, or an indication of his intention to do so.'

33.1.1 Remedies

Damages are available for any breach of a condition, warranty or innominate term.

The purpose in contract law is to put the injured party, so far as possible, in the position they would have been in had the contract been properly performed.

CASE EXAMPLE***Robinson v Harman* (1848)**

Robinson claimed there had been an agreement to grant a good lease of the premises. Relying on this, he had incurred expenditure in the sum of £20 in preparing the lease. Further, because of Harman's breach of the contractual agreement, Robinson claimed he had lost great gains and profits which would have otherwise accrued to him.

Robinson successfully recovered damages for his expenses and for the loss of the bargain.

33.2 Anticipatory breach

An anticipatory breach can be explicit, as shown in *Hochester v De La Tour* (1853), or implicit, as shown in *Frost v Knight* (1872).

CASE EXAMPLES***Hochester v De La Tour* (1853)**

A travel operator announced in advance that he would not be fulfilling his contract.

***Frost v Knight* (1872)**

A party stopped himself from carrying out a promise to marry, by marrying another person.

The effect of an anticipatory breach is that the other party:

- » may sue for damages immediately, rather than wait for the breach to occur
- » does not have to wait for the date of performance of the contract (*Hochester v De La Tour* (1853)).

The innocent party may refuse to accept repudiation. They may affirm the contract and continue to perform their obligations under the contract.

A repudiation does not automatically bring a contract to an end. The innocent party has an option either to affirm the contract or to terminate the contract, unless the innocent party:

- » needs the co-operation of the other party
- » had no legitimate interest, financial or otherwise, in performing the contract rather than in claiming damages.

Where the party decides to affirm the contract, this might have two disadvantages:

- 1 An innocent party who affirms the contract may lose the right to sue for damages completely if the contract is frustrated between the date of the unaccepted anticipatory breach and the date fixed for performance.

CASE EXAMPLE

Avery v Bowden (1855)

The contract to supply goods to Russia was affirmed, but subsequently the Crimean War broke out and the contract was frustrated as it was illegal to trade with an enemy country.

- 2 An innocent party who affirms the contract but subsequently breaches the contract cannot argue that the unaccepted anticipatory breach excused them from their obligations to perform under the contract.

Where the breach is not accepted, the parties remain subject to their obligations under the contract. The innocent party may therefore find themselves liable to pay damages for breach of contract, if they fail to accept the anticipatory breach and subsequently breach the contract themselves.



▲ **Figure 33.1** Breach of contract can lead to the payment of damages

ACTIVITY

Louise agrees with Ronaldo to transport wood from the UK to Italy by 20 June 2020, and time is of the essence. On 18 June, her lorry breaks down in the mountains. She telephones Ronaldo to say she will be five days late. Ronaldo accepts the situation. When Louise reaches Italy, she finds that the border is closed due to the COVID-19 pandemic.

Advise Ronaldo.

Internet research

Search online to discover the dangers of claiming anticipatory breach.

▼ **Figure 33.2** Key cases: breach of contract

Key case	
Case	Summary
<i>Robinson v Harman</i> (1848)	Claim for loss of bargain
<i>Hochester v De La Tour</i> (1853)	Verbal anticipatory breach
<i>Frost v Knight</i> (1872)	Factual anticipatory breach
<i>Avery v Bowden</i> (1855)	Third-party factors (the Crimean War)

TARGET SKILLS

- 1 What amounts to a breach of contract?
- 2 How can a breach of contract come about?
- 3 Analyse how damages are assessed for breach of contract.
- 4 Evaluate the consequences of a breach of contract.

COMMENT

Evaluation of the law relating to breach

The question of whether a breach has occurred depends on the precise construction of the terms of a contract. It is for the person alleging the breach to prove it.

A breach of contract does not automatically bring a contract to an end, but it does give various options to the parties who are not in breach.

Every breach of a valid and enforceable contract gives the innocent party a right to recover damages in respect of the loss suffered as a result of the breach, unless liability for breach has been effectively excluded by an appropriately drafted exclusion clause.

STRETCH AND CHALLENGE

Is it right that the innocent party can claim damages from the time of anticipatory breach, rather than the time when breach actually occurs?

TEST YOURSELF

- 1 What is an anticipatory breach?
- 2 Does a breach of contract automatically bring a contract to an end?
- 3 When does the innocent party need to notify an anticipatory breach?
- 4 Are damages always payable for a breach?
- 5 Can an innocent party become liable for a breach of contract following an anticipatory breach by the other party?

EXAM-STYLE QUESTIONS

- 1 When a contract is breached, what options may the innocent party have at their disposal?
- 2 A Ltd employs B Ltd to build a multi-purpose sports complex. B Ltd engages subcontractors C Ltd, who use cement which is unsuitable.

Soon after completion, cracks appear. The complex has to be closed for extensive repairs and a lot of income is lost. A Ltd has also put in a bid to host the World's Squash Championships, which it has to withdraw as a result of the repairs.

Advise A Ltd.

34

Frustration

Introduction

Frustration is when unforeseen contingencies beyond the parties' control prevent performance (note it is 'parties' plural and not 'party' singular – it applies to both parties).

As a result, there are changes in circumstances which make the contract impossible to perform, or totally deprived of its commercial purpose, or it becomes radically different to perform.

Usually, if you do not perform a contract you can expect to be sued for breach. This means that you will have to pay damages. However, if you can successfully claim the contract was frustrated, you are discharged from your obligations. This chapter links to the key concept of justice, fairness and morality.

34.1 Types of frustrating event

There are five ways in which frustration can occur:

- 1 destruction of subject matter
- 2 contract becomes illegal to perform
- 3 government or local authority intervention
- 4 commercial purpose has been destroyed
- 5 death or non-availability.

34.1.1 Impossibility of performance

Destruction of subject matter was shown in *Taylor v Caldwell* (1863).

CASE EXAMPLE

Taylor v Caldwell (1863)

A music hall was hired for four days, at the cost of £100 per day. After the contract was made, but before the start of the four-day hire period, the hall burned down. The contract had become frustrated and impossible to perform.



▲ Figure 34.1 A contract will be frustrated if it is impossible to perform because of the destruction of subject matter

34.1.2 Supervening illegality

Avery v Bowden (1855) is an example of when the contract becomes illegal to perform (see page 246).

Government or local authority intervention can frustrate a contract, as shown in *Metropolitan Water Board v Dick Kerr* (1918).

CASE EXAMPLE

Metropolitan Water Board v Dick Kerr (1918)

Government intervention ordered all work on a contract to stop, so that the materials could be used to help the war effort. The contract between the parties was frustrated.

34.1.3 Change of circumstances making performance pointless

When commercial purpose has been destroyed, this will frustrate the contract. This was shown in *Krell v Henry* (1903), but should be compared with *Herne Bay Steam Boat Company v Hutton* (1903).

CASE EXAMPLES

Krell v Henry (1903)

To watch Edward VII's coronation in 1902, a private room was booked, overlooking Pall Mall. The coronation did not take place and as a result the contract was frustrated.

Herne Bay Steam Boat Company v Hutton (1903)

This case also involved an event to coincide with Edward VII's coronation in 1902: a commercial steamboat was hired to see the king perform a naval review. The contract was not frustrated, because although there was no coronation, there was a commercial element in hiring the boat and seeing the review of the fleet.

Death or non-availability also frustrates a contract, as shown in *Whincup v Hughes (1871)*.

CASE EXAMPLE

Whincup v Hughes (1871)

A six-year apprenticeship with a watchmaker came to an end after a year, when the watchmaker died.

34.2 Limitations on the doctrine of frustration

34.2.1 Contractual provision

This concerns construction of the clause and whether it has anticipated the actual frustration that has occurred. Unless the provision is intended to be all-embracing, it will not prevent the discharge of the obligation.

34.2.2 Inconvenience or additional expense

Frustration occurs when performance requires something radically different from what was undertaken. It is not enough to argue that performance has become even extremely difficult. It is not frustrated where there is merely inconvenience, hardship or increased expense, as shown in *Davies Contractors Ltd v Fareham Urban District Council (1956)*.

CASE EXAMPLE

Davies Contractors Ltd v Fareham Urban District Council (1956)

Builders agreed to build a council estate at a fixed price. Strikes, bad weather, and shortages of materials and labour led to delays and the estate being built at a substantial loss. Reasons for the delay did not amount to frustration.

34.2.3 Foreseen or reasonably foreseeable events

Foreseen or reasonably foreseeable events tend not to frustrate a contract.

To attempt to guess the arrangements that the parties would have made at the time of the contract, had they contemplated the event that has now unexpectedly happened, is to attempt the impossible.

The courts will not apply frustration unless they consider that to hold the parties to further performance would, in the light of the changed circumstances, alter the fundamental nature of the contract.

34.2.4 Self-induced breach

Where the breach is self-induced, there is no discharge of the contract. The onus of proof is for the party claiming it was self-induced. The offending party is not required to prove that the event was not their fault.

34.3 The effect of frustration at common law

Historically, the position was that the contract was discharged from the moment of the frustrating event, and losses lay where they fell. This meant that money:

- » paid before the frustrating event was unrecoverable
- » due before the frustrating event had to be paid
- » due after the frustrating event was not payable.

34.4 The Law Reform (Frustrated Contracts) Act 1943

This Act changed the effect of frustration at common law. Under s 1(2):

- » All sums payable before the frustrating event cease to be payable.
- » All sums paid before the frustrating event are recoverable.
- » There is discretionary power to allow the payee to deduct money already owed to him/her by the payor against sums paid and/or expenses incurred before the frustrating event.

Section 1(3) gives discretionary power to award a sum in respect of a valuable benefit received before the frustrating event.

The effects of this Act can be seen in *Gamerco v ICM/Fair Warning (1995)*.

CASE EXAMPLE

Gamerco v ICM/Fair Warning (1995)

The claimants agreed to promote a rock concert to be performed by Guns N' Roses. The claimants paid \$412 000 as an advance, before the contract was frustrated due to the licence being withdrawn by a third party. The claimants had also incurred \$400 000 expenditure.

The claimants recovered the full \$412 000 advance payment.

ACTIVITY

The rock band called The Red Hot Curries is renowned for its elaborate performances. The Bespoke Agency contracted with a supplier called Stage Left to provide specialist staging specifically for a concert in July. The Bespoke Agency paid £200 000 as a deposit to secure the staging, and promised to pay the balance of £200 000 when the staging was delivered on 28 June.

When Stage Left delivered the staging to the stadium on 28 June, The Bespoke Agency informed them that the concert was cancelled, and told them they no longer needed the staging. When The Bespoke Agency demanded the return of their deposit, Stage Left refused to pay it, and instead demanded the additional £200 000 owed to them. The Bespoke Agency refused, stating that they made it very clear when they entered into the contract that they only needed the staging for this one-off concert that would now not be taking place.

Advise The Bespoke Agency on whether Stage Left's claim for breach is likely to be successful.

Internet research

The Law Reform (Frustrated Contracts) Act 1943 is available at www.legislation.gov.uk/ukpga/Geo6/6-7/40/section/1. Why was it introduced into the English legal system?

▼ Figure 34.2 Key cases: frustration

Key cases	
Case	Summary
<i>Taylor v Caldwell</i> (1863)	The contract was frustrated through the hall burning down.
<i>Avery v Bowden</i> (1855)	The contract was frustrated by the outbreak of war.
<i>Metropolitan Water Board v Dick Kerr</i> (1918)	The contract was frustrated by government intervention.
<i>Krell v Henry</i> (1903)	The contract was frustrated by the coronation not taking place, and the room not being needed.
<i>Herne Bay Steam Boat Company v Hutton</i> (1903)	The contract was not frustrated; there was no coronation but there was a commercial interest.
<i>Whincup v Hughes</i> (1871)	Personal contract and death lead to frustration.
<i>Davies Contractors Ltd v Fareham Urban District Council</i> (1956)	Extra costs do not frustrate contracts.
<i>Gamerco v ICM/Fair Warning</i> (1995)	The case discusses the amount of expenses that may fairly be deducted from a deposit.

TARGET SKILLS

- 1 What situations give rise to frustration?
- 2 What are the remedies for frustration under the Law Reform (Frustrated Contracts) Act 1943?
- 3 Assess the variation of matters in the performance of a contract that do not amount to frustration.
- 4 Evaluate the law of frustration.

COMMENT

Evaluation of the law relating to frustration

Frustration occurs where the contract cannot be completed due to no fault of any of the parties.

The doctrine needs to be kept within very narrow limits, so as to avoid abuse. It will not be applied on the basis of inconvenience, increase in expense or loss of profit.

A contract which is discharged by frustration ends automatically by the rule of law, irrespective of the wishes of the parties. What happens when the contract is discharged through frustration is determined by statute, unless the parties have made express provision for the consequences of the alleged frustration within the contract.

STRETCH AND CHALLENGE

Is it right that a contract may be frustrated at law if the parties knew there was a likelihood of the contract not proceeding?

TEST YOURSELF

- 1 Explain when it will be impossible to perform a contract through frustration.
- 2 What happens if the parties to a contract provide for frustration in the contract terms?
- 3 Does death always frustrate a contract?
- 4 What are the remedies for frustration in common law?
- 5 What are the remedies for frustration as provided by statute?

EXAM-STYLE QUESTIONS

- 1 Explain under what circumstances a contract would be deemed to be frustrated, and what remedy the law gives should a contract be found to be frustrated. You should refer to relevant UK case law in your answer.

35

Common law remedies

Introduction

There are a number of remedies that may be awarded, either when:

- ★ a contract is breached, or
- ★ there is a vitiating factor, such as misrepresentation, mistake or undue influence.

The most typical remedy is compensation, which usually takes the form of a sum of money.

Remedies may be either under common law or equitable. Common law remedies in the main take the form of monetary damages. This chapter links to the key concept of liability.

35.1 Purpose and nature of damages

Damages are a sum of money paid by the defendant to the claimant once liability has been established, in compensation for the harm suffered by the claimant.

In contract, the purpose of the award is to compensate the claimant for the losses suffered as a result of the breach.

The aim of the damages is to put the person in the position they would have been in had the contract been properly completed and performed by the defendant.

Unlike in tort cases, where there is often a large amount of speculation involved, in contract law the damages usually represent the actual financial loss, and they are rarely speculative.

35.2 The measure or calculation of damages

Unliquidated damages (those assessed by the courts) compensate the claimant for the loss they have suffered as a result of breach. Their purpose is not to punish or recoup the gain made by the defendant.

35.2.1 Expectation loss

In the case of expectation loss, damages are awarded for the loss of a bargain. The aim is to put the party in the same position, as far as money can do, as if the contract had been performed.

35.2.2 Reliance loss

In the case of reliance loss, damages are awarded for out-of-pocket or wasted expenditure. This is the format

used in tort, putting the parties back to where they were. These damages are also used where it would be difficult to assess what the benefits would have been to the claimant.

CASE EXAMPLE***Anglia Television v Reed (1972)***

An actor withdrew from playing the lead role in a television film, and the production company recovered all costs incurred to the time he withdrew. They were reliance losses, as it could not be known whether the project would make a profit or loss, and so only costs incurred were compensated for.

35.2.3 Non-pecuniary loss

In the case of non-pecuniary loss, damages will be awarded in certain cases for such things as pain and suffering, physical inconvenience, damage to commercial reputation and distress to the claimant. Traditionally, there was no award for injured feelings, as was shown in *Addis v Gramophone Co.* (1909) and subsequently confirmed in *Johnson v Unisys* (2001), but some limited exceptions have been recognised, namely in *Jarvis v Swan Tours* (1973) for loss of holiday enjoyment. It is thought, however, that this will apply to consumer contracts and not commercial contracts, and only to contracts which are specifically made in relation to personal enjoyment.

Internet research

Search online to find the difference between liquidated damages and penalty clauses.

35.3 Limitations on recovery of damages

35.3.1 Remoteness and causation

Causation is a question of fact in each case. The court will decide whether the breach is the main reason for the loss suffered by the claimant.

Generally, losses need to have been within the reasonable contemplation of the parties at the time of the contract. The rules governing remoteness in contract were first set out in *Hadley v Baxendale* (1854).

CASE EXAMPLE

Hadley v Baxendale (1854)

A mill owner contracted with a carrier to deliver a crankshaft for his mill. When the contract was formed, the carrier did not know that the mill owner had no spare crankshaft and could not operate without the one he was contracted to deliver. The carrier was late with delivery by several days, during which time the mill was unable to grind corn.

The mill owner sued for loss of profit but was unsuccessful because the carrier was unaware of the importance of the urgent delivery.

Following this case, damages will only be recoverable if:

- » they can be fairly and reasonably considered as arising from the breach, or
- » the parties may reasonably have contemplated the damages at the time of the contract.

CASE EXAMPLES

Victoria Laundry Ltd v Newman Industries Ltd (1949)

The defendants were contracted to deliver a boiler to the laundry, which they did five months after the due delivery date. The laundry sued for loss of usual profits from the date of the breach, for which it succeeded.

It also sued for loss of profit on a government contract it had failed to perform without the boiler, but lost on the basis that the government contract was unknown to the defendants at the time the contract was formed.

The Heron II (1969)

A ship was chartered to carry sugar. The ship arrived late, and when the charterers sold the sugar, the price had dropped. The House of Lords held the ship owners liable for the loss because they knew there was a sugar market in the port of destination, and should have anticipated that prices would fluctuate, affecting the charterers.

The first rule covers loss that any reasonable person would expect to result from that type of breach. The second rule only operates when special circumstances apply to the contract, and the information about these special circumstances is expressly communicated to the defendant by the claimant.

CASE EXAMPLE

Transfield Shipping Inc. v Mercator Shipping Inc. ('The Achilleas') (2008)

The Achilleas was a ship chartered by one company to another for seven months. The ship was returned nine days late, and the owners claimed a higher loss in damages than the hirers felt was due.

The hirers thought the loss was based on the difference between the charter rate and the market rate, being the sum the owners could have achieved in hiring the boat for the additional nine days, which would have given a figure of about \$158,000.

The owners, however, wanted the loss to include a very lucrative deal they had negotiated when the market was at its peak, which they now had to renegotiate as a result of the Achilleas delay. They calculated their losses at \$1.36 m.

The lower courts held that the loss of the lucrative deal was foreseeable under the rules in *Hadley v Baxendale*. However, the House of Lords held it was the lower figure that was the loss. This was on the basis that in the shipping industry, damages for late delivery would be assessed on the basis of the difference between the charter rate and the market rate, and the hirer would not be liable for any other losses.

There are two contrasting cases on this point: *Victoria Laundry Ltd v Newman Industries Ltd* (1949) and *The Heron II* (1969).

It was felt that the two rules stemming from *Hadley v Baxendale* should be reviewed, and so they were in *Transfield Shipping Inc. v Mercator Shipping Inc. ('The Achilleas')* (2008).

The Achilleas was considered in *Supershield Ltd v Siemens Building Technologies FE Ltd* (2009), where it was confirmed that:

- » *Hadley v Baxendale* remains the standard rule, but
- » *The Achilleas* approach should be taken where the *Hadley v Baxendale* approach would not reflect the expectations or intentions that could be reasonably imputed to the parties.

35.3.2 Mitigation

Mitigation limits the amount of damages that the claimant may be awarded. The claimant is expected to keep their damages to a minimum, and cannot claim for losses they could reasonably have avoided.

The key question to ask in mitigation is whether the innocent party has acted reasonably.

For example, if a seller waited an unreasonably long time and the price fell, they may be expected to bear some of the loss. They would only receive the difference between the contract price and the resale price at the time the contract was broken. The same damages would be due even if the seller believed that the price would increase and their assumption is proved false.

However, while the claimant is bound to try to keep the loss to an acceptable minimum or not to deliberately increase the loss, they will not be bound to go to extraordinary lengths in order to mitigate the loss. The claimant is only expected to do whatever is reasonable in the circumstances.

CASE EXAMPLE

Pilkington v Wood (1953)

The claimant bought a house with a defective title, due to the negligence of his solicitor. As a result, the claimant could not move until the issue had been resolved. He incurred extra costs in hotel bills and travelling expenses. He also telephoned his wife daily, ran up several other bills and brought an action against the solicitor for these costs. The solicitor argued that the claimant could have brought his action against the seller, and thus mitigated his losses in the action against the solicitor, but this claim was rejected.

The claimant must not take any unreasonable steps that would actually increase the amount of the loss. This was seen in *The Borag* (1981).

CASE EXAMPLE

The Borag (1981)

A ship was detained for breach of contract and the owners borrowed large sums of money at exorbitant rates in order to gain its release. The Court of Appeal would not allow recovery of damages in respect of the interest, since it held there was no real justification for incurring them.

TARGET SKILLS

- 1 What is remoteness?
- 2 What are penalty clauses?
- 3 Assess which damages are seldom recoverable.
- 4 Evaluate the purpose of damages in contract.

ACTIVITY

A claimant is under a duty to mitigate their loss. However, it is technically incorrect to say that they are under a duty to mitigate their loss, as they do not

incur any liability if they fail to mitigate. Should this be the law?

COMMENT

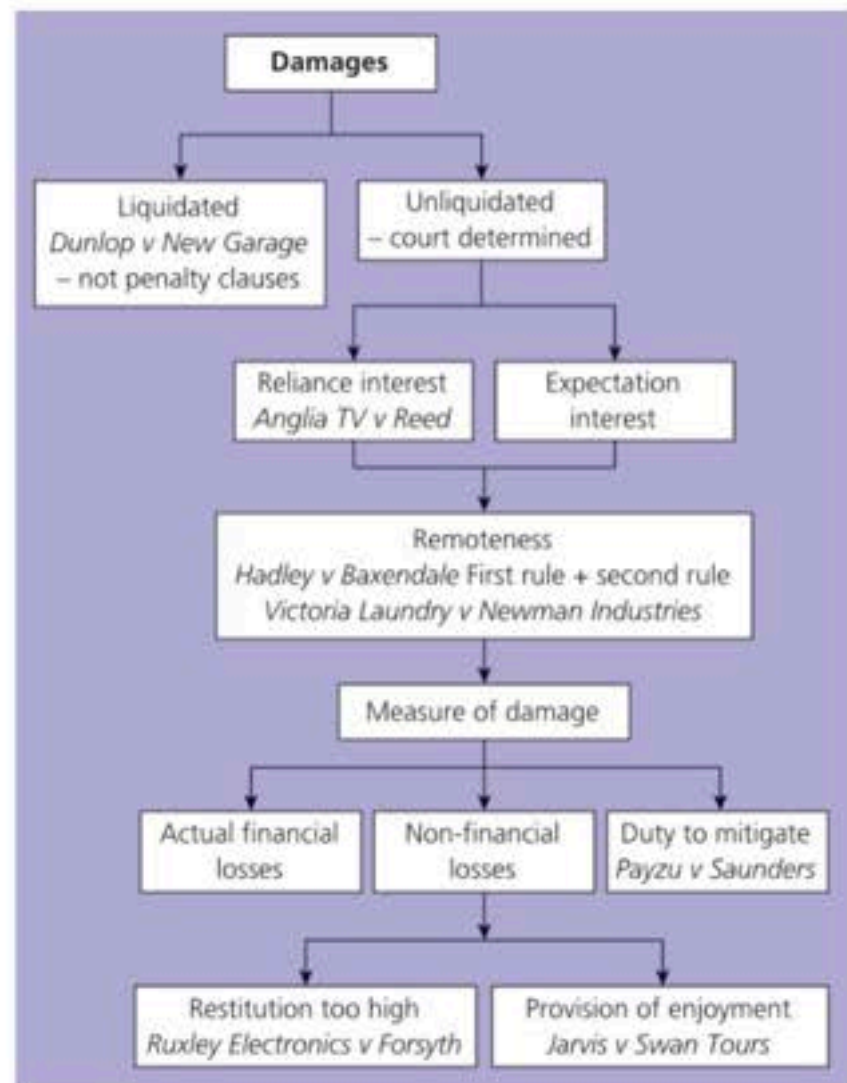
Evaluation of the law relating to the use of damages

A party who, in breach of contract, fails to perform an obligation which is entire cannot generally make a claim for payment from an innocent party, but this rule is subject to exceptions where the party in breach has substantially performed their obligations under the contract and where the innocent party has accepted part performance and where the court believes the obligation is not entire but divisible.

Where the term broken is a condition, which is the essence of the contract, the innocent party can terminate and claim loss of bargain damages.

Remedies are essentially damages and are compensatory.

Damages are awarded to compensate the claimant for the loss they have suffered as a result of a breach. The damages seek to put the party in the position they would have been in had the contract been performed. If no loss has been suffered, only nominal damages will be awarded. The courts will always seek to award damages as opposed to equitable remedies (see Chapter 36).



▲ Figure 35.1 Common law remedies for breach

▼ Figure 35.2 Key cases: common law remedies for breach

Key cases	
Case	Summary
<i>Anglia Television v Reed</i> (1972)	The claimant recovered all costs, as they were expectant losses.
<i>Hadley v Baxendale</i> (1854)	The claimant sued for loss of profit but was unsuccessful because the defendant was unaware of the importance of the urgent delivery of the goods.
<i>Victoria Laundry Ltd v Newman Industries Ltd</i> (1949)	The claimant successfully sued for loss of usual profits from the date of the breach, but failed to gain damages for loss of profit on a deal unknown to the defendant when the contract was formed.
<i>The Heron II</i> (1969)	The defendants were liable for the loss because they knew there was a sugar market in the port of destination, and should have anticipated that prices would fluctuate.
<i>Transfield Shipping Inc. v Mercator Shipping Inc. ('The Achilleas')</i> (2008)	The House of Lords assessed damages for late delivery on the difference between the charter rate and the market rate; the defendant would not be liable for any other losses.
<i>Supershield Ltd v Siemens Building Technologies FE Ltd</i> (2008)	<i>Hadley v Baxendale</i> remains the standard rule, but <i>The Achilleas</i> approach should be taken where the <i>Hadley v Baxendale</i> approach would not reflect the parties' expectations.
<i>Pilkington v Wood</i> (1953)	The defendant argued that the claimant could have brought his action against the seller and thus mitigated his losses in the action against the defendant, but this claim was rejected.
<i>The Borag</i> (1981)	Recovery of interest was not allowed, as there was no real justification for incurring it.

STRETCH AND CHALLENGE

What are the different purposes for damages in contract and in tort? Explain the difference.

TEST YOURSELF

- 1 Explain the meaning of damages.
- 2 What is the purpose of the award of damages?
- 3 Explain how reliance loss is calculated.
- 4 What are non-pecuniary losses?
- 5 Explain how mitigation may help a defendant.

EXAM-STYLE QUESTIONS

- 1 The rules on remoteness of damage and mitigation in contract are simply ways for the courts to attempt to legitimise the arbitrary damages that they award. Discuss.

- 2 Tim is a professional photographer. He bought a new digital camera from Mary, which was stated in the contract as being compatible with his photographic software. The camera was not compatible with the software. Advise Tim as to his remedies in the following circumstances:
 - Tim used the camera for the first time on a commercial photoshoot. When he tried to upload the images to his computer, he found that they were corrupted. He had to go back to his client and reshoot the session, which cost him £500 in additional expenses, and £3000 profit on another potential contract that he had to turn down. Having discovered the fault, Tim was unable to work for several days while he sought a replacement camera. He had no back-up camera, and so lost all business during that time.
 - The malfunctioning camera and the ensuing difficulties it caused placed Tim under considerable stress at a time when business was already hard. As a result, he suffered a period of depression and was off work for several weeks.

Introduction

There are often situations where the mere payment of money by way of damages is insufficient. In these types of case, equitable remedies may be available.

Specific performance, specific restitution, rescission and injunction are examined in this chapter, looking at their nature, purpose and limitations. This chapter links to the key concept of justice, fairness and morality.

36.1 Purpose of equitable remedies

The purpose of equitable remedies is that they should be awarded where common law damages are an inadequate award and justice is not served.

Equitable remedies might be awarded, for example, where:

- » the item being bought is so unique that no alternative can be found
- » the defendant cannot pay
- » the claimant's business is being harmed.

36.2 Specific performance

This is a court order that forces the offending party to perform their part of the contract. It is an equitable remedy, which gives the court discretion on whether or not it is granted. The discretion is based on several key principles:

- 1 Specific performance will not be granted where damages would be an adequate remedy. Usually the subject matter of the contract will be unique, and it will not be possible to acquire it somewhere else.
- 2 Specific performance will not be granted if constant supervision of the court is needed to ensure the order is complied with.
- 3 Specific performance is generally not available for contracts of personal service, such as employment.
- 4 'Delay defeats equity.' Specific performance is not normally available if the claimant takes too long in seeking the remedy.
- 5 Specific performance is subject to the principle of mutuality, meaning that if the order is available to one party, it should also be available to the other party.
- 6 Specific performance is not available where the claimant's actions are inequitable: 'He who comes to equity must come with clean hands.'

CASE EXAMPLES***Ryan v Mutual Tontine Westminster Chambers Association (1893)***

There was a tenancy agreement for a flat in an apartment block, whereby the landlord was obliged to provide a hall porter (conciierge) to take care of the common areas. The person employed failed to do the work properly. An order for specific performance failed, as the court could not be expected to supervise the work.

Flight v Bolland (1828)

The person seeking the remedy was a minor. The court would not award specific performance, as the other party could not have succeeded in obtaining the same remedy against a minor who lacked capacity.

Webster v Cecil (1861)

The claimant was trying to enforce a contract for land that he knew included an inaccurate statement as to price, and there was evidence to show what the price should have been. His action failed and the contract was rectified to reflect the actual price agreed.

36.3 Specific restitution

In the context of a breach of contract, specific restitution is simply the repayment to the claimant of any money or other benefits that they have passed to the defendant in advance of the breached contract.

In contract law, the restitution is to do with consideration. The presence or absence of consideration may determine the appropriateness of the remedy.

Restitution is sometimes used to prevent the unjust benefit of one party. The normal reason for damages is to compensate the claimant for their losses, but restitution is often used to prevent the defendant gaining unfairly. This is a principle that has been expressly rejected in contract law.

CASE EXAMPLES

Stocznia Gdanska SA v Latvian Shipping Co. (1998)

A shipyard entered a contract where it was to design and build a ship. It rescinded the contract before title to the boat passed. The buyers of the boat claimed return of instalments on the contract price, on the basis of there being no consideration.

The claimant failed, with the House of Lords saying that the true test of whether there was failure of consideration is based not on whether the buyer received nothing under the contract but on whether the seller had done nothing under the contract.

Attorney-General v Blake (2001)

A spy wrote an autobiography, for which he was to be paid £150 000, some of which was paid in advances. In the book, he gave details of his work, which was in contravention of the Official Secrets Act 1989. The Attorney-General brought an action to prevent him being paid the money that was still owed.

The court allowed the injunction but also considered the situation with regards to damages.

The Attorney-General could show no losses to the government and therefore damages could only be nominal. However, the court did not want the defendant to profit from his breaching of the Official Secrets Act, and held restitution could be used as it was an exceptional case: the defendant did not provide full service through his breaching of the Act, and had made a profit through doing what he had expressly been prohibited from doing.

36.4 Rescission

The effect of rescission is that contractual damages cannot be claimed because the contract has been set aside for all purposes and so there is no basis for any claim on the contract. As it has been set aside, there can be no breach.

36.5 Injunction

An injunction is a court order instructing someone to:

- » refrain from doing something (prohibitory), or
- » do something (mandatory).

For example, to build a property in England or Wales, planning permission is needed. If I start building without planning permission, the council will issue a prohibitory injunction to stop me from carrying on building. If I have already built the house without planning permission and the council finds out, it will issue a mandatory injunction, telling me to take it down.



▲ **Figure 36.1** If building work starts without planning permission, a council can issue a prohibitory injunction

Injunctions vary as to the relief they offer:

- » They can be perpetual, where the remedy in itself is a final remedy.
- » They can be interim, where they are granted in advance of any trial of the issue so as to retain the *status quo*.

In contract law, injunctions are seldom mandatory for mainly the same reasons we saw in specific performance: they are difficult to oversee and enforce. As a result, they are usually negative restrictions on the defendant.

Internet research

Search online to discover in what circumstances the court might grant an injunction in relation to a contract for personal services.

36.6 Limitations on the award of equitable damages in contract law

The majority of contract and tort actions are subject to the basic limitation period of six years from the date on which the action arose. In the case of contract, the period is identified in s 5 of the Limitation Act 1980:

'An action founded on simple contract shall not be brought after the expiration of six years from the date on which the action accrued.'

The reasons for the limitation are twofold:

- 1 If there is a valid case, the claimant should be encouraged to bring the action as soon as possible, thus enabling evidence to be gathered and preserved.
- 2 It is only fair on the defendant that the claim should be brought as soon as possible. The defendant can suffer from not knowing the certainty of their budget when contemplating the possible costs of a successful action against them.

We saw this maxim under specific performance rules: 'delay defeats equity'. A claimant who waits too long in bringing a claim will be prevented from succeeding.

COMMENT**Evaluation of the law relating to the use of equitable remedies**

The use of damages at common law is the most useful and likely remedy, but there are cases when damages, although they might be obtainable for a breach of contract, are inadequate as a remedy. This is mainly because mere money will not compensate the claimant properly.

It is in these situations that equity steps in and adds fairness to justice. Equity is a parallel system to the common law, providing flexible and discretionary weapons to the judge's armoury. Equity does not bind the world, nor is it a right.

Usually it will be for the claimant to demonstrate why damages would be an insufficient remedy. The courts then have the discretion to order an equitable remedy where it would seem fair and just to do so.

ACTIVITY

Kylee travels to the South of France for her annual holiday. While she is there, a volcano in Italy erupts violently and a cloud of volcanic ash causes the majority of airlines to ground all flights across Europe until the cloud disperses sufficiently for the risk to air traffic to pass. Her flight home is consequently postponed by her airline.

Kylee has unfinished business in London that she needs to conclude. The delay to her return flight threatens her ability to sign business contracts worth £30 000 in commission to her.

She tries to find an alternative flight home and to communicate with her business contacts to explain her delay, but fails to do either. She finds a hotel in which to stay and waits for her original flight to be rescheduled.

On her return home ten days later, she finds that she has lost the business that she had hoped to conclude and thus the expected £30 000 commission. The loss of this business causes her considerable mental stress and trauma. In addition, the airline refuses to reimburse her accommodation and meal costs caused by the flight delay. The airline claims that she could have travelled home by train instead of waiting for flights to resume.

Question

Consider whether the airline is liable in contract for the losses sustained by Kylee.

TARGET SKILLS

- 1 Name the different types of injunction.
- 2 What is the difference between common law and equitable remedies?
- 3 If there is a breach of contract, assess when an equitable remedy can be awarded.
- 4 Evaluate the circumstances of when it is inappropriate for the court to order an injunction.

▼ **Figure 36.2** Key cases: equitable remedies for breach of contract

Key cases	
Case	Summary
<i>Ryan v Mutual Tontine Westminster Chambers Association</i> (1893)	An order for specific performance failed, as the court could not be expected to supervise the work.
<i>Flight v Bolland</i> (1828)	The court would not award specific performance, as the other party could not have succeeded in obtaining the same remedy against a minor who lacked capacity.
<i>Webster v Cecil</i> (1861)	A request for specific performance failed, because the claimant was trying to enforce a contract for land that he knew included an inaccurate statement as to price.
<i>Stocznia Gdanska SA v Latvian Shipping Co.</i> (1998)	The House of Lords said the true test of whether there was failure of consideration is based not on whether the buyer received nothing under the contract but on whether the seller had done nothing under the contract.
<i>Attorney-General v Blake</i> (2001)	Restitution was used as it was an exceptional case: the defendant did not provide full service through his breaching of the Official Secrets Act.

STRETCH AND CHALLENGE

Why do the courts prefer to award damages rather than grant specific performance?

TEST YOURSELF

- 1 What are the common features of property that can be subject to specific performance?
- 2 Why are the courts reluctant to award mandatory injunctions?
- 3 When will specific performance be denied?
- 4 What is the position of the parties following rescission?
- 5 Why would it be inappropriate to award specific performance for breach of a personal contract?

EXAM-STYLE QUESTIONS

- 1 The effect of the equitable remedy of rescission is to set a contract aside and put the parties back to the position they were in before the contract was made.

With reference to case law, analyse the circumstances under which the remedy might be granted by the court and critically assess any barriers to such awards.

Cambridge AS and A Level Law 9084 Paper 32 Q1 May/June 2014

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- 2 Giving examples, explain where the remedies of specific performance, rescission and injunctions might be most appropriate.

Nature of liability in negligence

Introduction

Negligence is probably one of the most important torts in civil law. It is based on the concept of a defendant breaching a legal duty of care that is owed, leading to a claimant being harmed or suffering loss. It forms the basis of other torts, such as negligent

misstatement and nervous shock. Also, it has influenced torts such as *Rylands v Fletcher*, which will be considered in Chapter 44. This chapter links to the key concept of liability for actions or omissions.

37.1 Nature and justification

37.1.1 What interests does the law of negligence protect?

The tort of negligence protects against three types of harm generally:

- » personal injury (both physical and psychiatric harm)
- » damage to property
- » economic loss.

There may be different rules in relation to each type of harm.

Liability in negligence can be restricted when it is considered undesirable for policy reasons; for example, the courts have imposed limitations on who can bring a claim for psychiatric harm, as *Alcock v Chief Constable of South Yorkshire* (1991) illustrates. This case concerned the liability of the police to victims who suffered either physical or psychiatric harm at the 1989 Hillsborough stadium disaster (see subsection 41.2.1).

37.1.2 Negligence and the Human Rights Act 1998

The Human Rights Act 1998 imposes a duty on the state to respect and act consistently with the European Convention on Human Rights. These rights include the rights to life (Article 2), liberty and security (Article 5) and a fair trial (Article 7).

The Human Rights Act 1998 states that it is 'unlawful for a public authority to act in a way which is incompatible with a convention right'.

This appears to suggest that when deciding cases or devising legal rules, the courts are under a duty to respect the parties' human rights. Therefore:

- » all decisions must be compatible with the Human Rights Act

- » the content of the law of tort, and therefore the rights and duties that exist between private individuals, must include adequate protection of the rights provided for in the Act.

The Act is used increasingly in tort as another head of liability or, as in *Osman v UK* (1998), a claimant will sue the state directly to obtain a remedy where the common law does not allow (see subsection 38.3.3). In *Osman*, the claimants failed in their claim against the police for their failure to prevent harassment and injury from a known person, because of the police's blanket immunity in negligence.

▼ Figure 37.1 Key terms for the aims of tort

Key term	Description
Compensation	The main aim of tort – to ensure the claimant recovers any losses that arise because of the tortious act.
Corrective justice	This is based on the concept that it is fair for the claimant to be put in the position that they would have been in had the incident not occurred.
Deterrence	The imposition of liability is used as a mechanism to prevent future tortious acts.
Vindication	The claimant not only wants to be recompensed but also wants an inquiry into the tortious behaviour.

37.2 Personal liability

Generally, the law of negligence places responsibility and the payment of compensation on an individual level. When the tortfeasor (the person committing the tort) is found liable, it is that person who is responsible for any harm that occurs. In reality, while liability might be imposed, it is not necessarily the individual who pays any damages.

37.3 Joint tortfeasors

The matter of joint tortfeasors arises where two or more people may be responsible for the claimant's harm.

The defendants' liability may be:

- » independent (personal), or
- » several, or
- » joint.

37.3.1 Independent (personal) liability

Independent liability is imposed on the defendants where the claimant has suffered harm as a result of two separate torts; each defendant is liable for the damage they caused.

37.3.2 Several liability

Several liability occurs when more than one defendant acts independently to cause the same damage to the claimant; an example of this can be found in *Vision Golf Ltd v Weightmans* (2005).

CASE EXAMPLE

Vision Golf Ltd v Weightmans (2005)

The claimants were tenants of some land. As a result of a legal dispute, the landlord took the land back. In May 2000, the claimants instructed the defendants, a firm of solicitors, to deal with this problem. However, the defendants failed to make a court application that could have allowed the claimants to recover the land.

In December 2000, the claimants instructed another firm of solicitors to make the application, but they were advised that there was little chance of the application being successful. This advice was incorrect and the application had a very good chance of succeeding. When the application was finally made, it was dismissed because of delay.

The defendants' failure had resulted in the loss of the land. This could have been put right by the second firm. The wrong advice led to the same damage – the loss of the land. The Chancery Division of the High Court held that if the first firm had made the application, the claimants would have got their land back. The fact that the second firm caused the same damage meant that the first firm could claim a contribution from it – it could not avoid liability completely.

37.3.3 Joint liability

This type of liability arises in one of two ways:

- 1 Two or more people with a joint purpose commit the same wrongful act. This is called 'acting in a common design or plan'.

CASE EXAMPLE

Brooke v Bool (1928)

The claimant leased a shop from the defendant who was entitled to enter the premises. A lodger in the shop told the defendant that he could smell gas. Both men investigated. The defendant told the lodger to light a match. There was an explosion. Both the defendant and the lodger were jointly liable for the damage caused by the latter's negligent act.

- 2 By way of vicarious liability that may arise when, for example, an employer is made liable for the torts committed by an employee. The defendant can sue both the employee and the employer if they choose to. In reality, this will usually be the employer, as the employer will have insurance and be in a better position to pay the damages. However, the employer can sue the employee to recover a contribution towards the damages they paid out, but do not generally do so.

Each joint tortfeasor is liable for the full amount of the compensation, but the claimant can only recover the amount once.

The Civil Liability (Contribution) Act 1978

This Act applies to joint liability.

Section 1

This section states that any person liable in respect of any damage suffered by another person may recover a contribution from any person liable in respect of the same damage (whether jointly liable with them or otherwise). The person seeking the contribution must be actually or theoretically liable.

Section 2

This section deals with the amount of contribution a person may be entitled to. This is the amount that the court finds to be just and equitable to impose, having regard to the person's responsibility for the damage in question. The court will take into account all the relevant circumstances, such as the degree of blameworthiness and the parties' roles in creating the damage.

CASE EXAMPLE

Fitzgerald v Lane (1989)

The claimant stepped out into traffic on a busy road. A vehicle driven by the first defendant hit him. This pushed him into the path of the vehicle driven by the second defendant. Both were held liable.

The House of Lords stated the claimant's conduct had to be considered in the light of both defendants' behaviour. The court said that the claimant was

50 per cent to blame. It then had to consider the contribution to be paid by each defendant. It was held that both defendants were equally to blame and therefore they had to contribute equally to the remaining 50 per cent of the claimant's compensation.

The court may order that a party need not pay a contribution, or it may order a party to pay a complete indemnity. The amount that can be recovered by way of contribution is limited to the amount that the claimant could have obtained from that particular defendant.

This principle caused problems in relation to mesothelioma cases, where it was medically impossible to pinpoint when harm occurred. There are a number of cases regarding mesothelioma where the rules relating to causation were changed to take this problem into account. The courts decided that since this was the position, all potential defendants should be held accountable and liable to pay damages.

The matter came to a head in *Barker v Corus UK Ltd* (2006) (see subsection 40.2.4 for full details of this case). The issue before the court was whether a defendant was liable jointly and severally with any other defendants, or whether the defendant should be liable for a share only. The share would be apportioned according to the share of the risk created by the defendant's breach of duty. The Supreme Court decided on the second approach. However, this part of the *Barker* judgment was reversed by s 3 of the Compensation Act 2006, which makes each defendant jointly and severally liable in such instances.

37.3.4 The aims of the law of negligence

When the law of negligence is applied, the judges attempt to meet the aims of tort generally. These are:

- » corrective justice
- » compensation
- » deterrence
- » vindication.

Corrective justice

Justice requires that a person does not unreasonably interfere with others. It also requires that if a person does interfere with others, the person harmed should be compensated. But the payment of compensation is based on fault, so the claimant must show that the defendant has caused the harm. Even if harm is proved, it may not be possible to successfully claim for all losses.

Corrective justice rests on the concept of individual responsibility, which in itself can be diminished if it is not the defendant personally paying compensation (as will be seen below).

Compensation

Justice for the claimant can be achieved in most cases by requiring the defendant to pay damages for any loss suffered after fault has been imposed. However, justice can only be done when it is the defendant actually paying the compensation.

In reality, claiming in negligence is often seen to be conditional on the defendant having insurance. There is little point in suing a person who has no assets that can be used to pay the claimant – a 'man of straw'. There may be limited justice where an insurance company pays the compensation, as there is limited personal responsibility and, also, the claimant's loss is distributed across society in the form of increased insurance premiums.

If it is impossible to prove fault on the defendant's part, claimants have to look at other sources of compensation, such as welfare benefits, personal insurance policies or compensation schemes.

Deterrence

Decisions made in the tort of negligence also play a part in deterring future careless activity or behaviour. The imposition of liability in relation to a particular activity enables others to adjust their behaviour accordingly. Sometimes, the effect of the imposition of liability is not to deter potentially negligent behaviour but to stop it altogether, just in case an incident might occur.

This aim is also weakened by the existence of insurance, as this only leads to a rise in insurance premiums generally across society. The only payment that the defendant will have to pay is their increased insurance premium, which is not a deterrent in itself.

Vindication

Some negligence claims are brought to find out what actually happened. This is often connected with a desire to gain publicity to stop such an incident from happening again. An example would be the claims in nervous shock of friends and relatives of those killed in the 1989 Hillsborough football stadium disaster in *Alcock v Chief Constable of South Yorkshire Police* (1991).

▼ Figure 37.2 Key facts for liability in negligence

Key facts	
Nature and justification	• Provides a remedy for unwanted harm • Involves interference with personal rights • Based on both legal principles and policy considerations
Aims	• Corrective justice – based on the concept of individual responsibility • Compensation – to be paid for any loss suffered • Deterrence – to prevent similar accidents in the future • Vindication – to find out what actually happened, rather than seek compensation
Types of liability	• Personal liability • Joint liability: – Independent – each defendant compensates the claimant for the damage each of them caused – Several liability – more than one defendant acts independently to cause the same damage – Joint liability – where two or more people with a joint purpose commit the same wrongful act

COMMENT

Evaluation of policy influences in negligence

Judges can be influenced by so-called policy considerations when making decisions involving negligence. The word 'policy' is used to describe a certain type of factor that may be taken into account by the courts when deciding cases, but what does policy mean? It can mean all the factors that may have an influence on how a case should be decided and how the law should develop. Policy here covers:

- arguments of morality or justice
- floodgates arguments (the concern that if the law is developed in a particular way, it may lead to large numbers of people bringing claims)
- economic considerations
- resource allocation.

37.4 Vicarious liability

Generally, in tort, liability will attach to the person who committed the tort. However, it can also attach to someone who has either authorised or willingly overlooked it.

There will also be circumstances where a person may be liable if they neither authorised nor overlooked the tort. This is known as vicarious liability. The most usual example is where an employer is responsible for the actions of an employee, although it can exist in partnership cases or in the case of a parent and child.

It is seen as a way of ensuring a just and practical remedy for harm while trying to deter future wrongdoing. Even so, it appears to be unfair, as it imposes a duty on the employer without them being at fault, as it is a form of strict liability.

The doctrine of vicarious liability appears to rest on both policy and economic factors:

- » There is a need to obtain compensation for the victim from a solvent defendant.

- » The employer is more likely to recruit better employees and provide better training to avoid litigation.

37.4.1 Establishing employer liability

There are many reasons why an employer may be held liable:

- » The employer is more likely to be in a position to compensate the claimant, as they will have insurance cover. However, any financial loss is spread across society through increased insurance premiums and/or higher prices for the consumer.
- » Employers benefit from the employees' work, so they must take responsibility for any harm caused.
- » Vicarious liability is an inducement to the employer to promote high standards of behaviour or safety.
- » As the employee is usually under the control of the employer, this may encourage the employer to maintain standards of good practice and to take care when recruiting employees.
- » An employer should supervise employees closely, however; most wrongful acts are an isolated occurrence. Generally, the doctrine is seen as a motivation to reduce workplace incidents.

Vicarious liability is not static; for example, types of employment change over time, and the courts now allow for liability in relationships 'akin to employment'. However, the development of the law in this area is not very consistent. The court in *Imperial Chemical Industries Ltd v Shatwell* (1965) said that any development was not the result of 'any very clear, logical or legal principle, but [of] social convenience and rough justice'.

In order for there to be vicarious liability in employment situations, two elements need to be proved:

- » There must be an employer/employee relationship or a relationship 'akin to employment' between the defendant and the person for whose actions they are being held liable.
- » The employee must be acting in the course of employment when the tort is committed.

37.4.2 Employer/employee relationship

The general rule is that an employee is employed under a contract of service, while an independent contractor is employed under a contract for services. This distinction is important, because an employer will not be liable for the torts of an independent contractor.

The courts use various tests to determine whether a person is an employee. Some of these are outdated but are a good starting point. The traditional tests are the:

- » control test
- » business integration test
- » multiple test
- » business on their own account test.

Control test

The control test was devised in *Ferguson v John Dawson and Partners (Contractors) Ltd* (1976). It is based on the old-fashioned concept of master and servant. The court considers the extent to which the employee was under the control of the employer in terms of how they did their work and the way in which it was done. However, this test is not suitable for modern employment patterns, because not all employees are under direct control of their employer.

In *Catholic Child Welfare Society v Various Claimants* (2012), Lord Phillips said:

'Many employees employ a skill or expertise that is not susceptible to direction by anyone else in the company that employ them.'

Business integration test

In *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* (1952), Lord Denning devised the integration test. He suggested that where the employee's work is carried out as an integral part of the business, a contract of employment would exist.

Multiple test

As the business integration test proved to be inadequate, the multiple test was introduced in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and NI* (1968). Here, it was held that three conditions must be fulfilled for a contract of service to exist:

- 1 The worker agrees for the payment of a wage to provide work or skill for the other person.
- 2 They agree to be under the other person's control, so that it makes the other the master.
- 3 Other terms of the contract are consistent with the contract being one of service.

However, if the parties have stated in the contract that a person will be self-employed and the other terms of the contract reflect this, the contract will be regarded as one for services. This means that the worker is an independent contractor and the employer, generally, will not be liable for their actions.

Business on their own account test

This approach was taken in *Market Investigations Ltd v Minister of Social Security* (1969), where the High Court suggested that the question to ask is whether the worker is performing the service as a person in business or on their own account. The court will consider whether the person uses their own premises and equipment, whether they hire their own helpers, the degree of financial risk they take and the degree of responsibility they have for investment and management.

The court made it clear, though, that the test is not to be regarded as conclusive; there is no definitive test, because what is important in one case may not be in another.

The 'akin to employment' approach has been adopted by the courts for some time but was confirmed in the case of *Cox v Ministry of Justice* (2016).

CASE EXAMPLE

Cox v Ministry of Justice (2016)

The catering manager at HM Prison Swansea was negligently injured by a prisoner carrying out paid work under supervision in the prison kitchen. He dropped a large bag of rice on her upper back.

The Ministry of Justice was held to be vicariously liable for the injuries, as the prisoner's activity in unloading supplies was 'akin to employment', even though the relationship to the prison was not voluntary.

Internet research

You can find out more about cases in this area at:
<https://www.pureemploymentlaw.co.uk/two-recent-supreme-court-cases-consider-vicarious-liability/>

ACTIVITY

Identify whether the following workers are employees or independent contractors:

- 1 Evan works as a driver for Bizdrives, a company that provides limousines to drive business executives between meetings. He is paid per trip, but Bizdrives deducts tax and insurance from his pay. Under his contract, Evan is allowed to drive for other firms at times when he is not driving for Bizdrives.
- 2 Jalil works as a delivery driver for KwikDelivery Ltd. The company has employed Jalil for three years. It states in his contract that he is an employee.

- 3 Lilian works for SuperFoods Ltd as a casual worker. Her contract states that she does not have guaranteed hours per week and the company will call her if she is needed.
- 4 Paula is a volunteer at a local school but she is paid expenses for travel to and from the school.
- 5 Timothy is a prisoner but he works in the kitchen every day.

37.4.3 The course of employment

What the courts regard as being in the course of employment is a question of fact. There tends to be an inconsistent approach to decisions, as they are based on policy reasons.

For many years, the courts used the so-called 'Salmond test' when determining if the employee was acting in the course of employment. The Salmond test was devised by Sir John Salmond. The question to be asked here is whether the employee's act was a 'wrongful and unauthorised mode of doing some act authorised by the master'.

However, since *Lister v Hesley Hall Ltd* (2001), a different test is used. The House of Lords said that the proper approach to deciding if an act is in the course of employment is no longer the question in the Salmond test. The relevant question now is whether the tort is so closely connected with the employment that it would be fair and just to hold the employer liable.

The Salmond test

There are two elements to this test:

- 1 a wrongful act authorised by the employer, or
- 2 a wrongful and unauthorised mode of doing some act authorised by the employer.

A wrongful act authorised by the employer

An employer is clearly liable when they instruct the employee to act wrongfully, but they can also be liable if the employee has implied authority to commit the tort.

CASE EXAMPLE

Poland v Parr (1927)

A person transporting goods on a cart, who had handed over his wagon and was going home, hit a boy whom he suspected, mistakenly but reasonably, of stealing his employer's cart.

The employer was held vicariously liable, as an employee has implied authority, in an emergency, to protect their employer's property.

However, if violence is inflicted as part of a private disagreement, it is not normally in the course of employment, as *Warren v Henlys Ltd* (1948) demonstrates.

CASE EXAMPLE

Warren v Henlys Ltd (1948)

The attendant verbally abused a customer at a petrol garage as he drove off without paying. The customer then paid, called the police and threatened to report the attendant to his employers. At that point, the attendant physically assaulted the customer, who sued the employer. The employer was not liable as the misbehaviour was not in the course of employment.

The garage owners were not vicariously liable, because the act of assault was one of personal revenge and not done in the course of employment.

However, if the circumstances are now appropriate, the close connection test may be used, as in *Mattis v Pollock (t/a Flamingos Nightclub)* (2003) which is discussed later in this subsection.

A wrongful and unauthorised mode of doing some act authorised by the employer

This situation arises where the employee is doing their job but they:

- » ignore an express instruction not to do something

CASE EXAMPLE

Limpus v London General Omnibus Co. (1862)

A bus driver had been given written instructions not to race or obstruct other buses. He ignored this and caused a collision. He was in the course of employment, even though he was carrying out his job in an improper manner

- » act carelessly (negligently)

CASE EXAMPLE

Century Insurance Co. v Northern Ireland Road Transport Board (1942)

The employee was employed as a petrol tanker driver. While he was unloading his tanker at a garage, he threw away a lit match. The defendants were held liable for the employee's negligence, as he was doing his job at the time the tort was committed, even if he was doing it in a negligent way.

- » use unauthorised help (the cases here are inconsistent, and decisions seem to be based on the question of whether the employer derives a benefit from the unauthorised help)

CASE EXAMPLE

Rose v Plenty (1976)

A milkman allowed a young boy onto his milk float (delivery vehicle) to help him with his milk deliveries, against his employer's instructions. It was held to be in the course of employment when the boy fell off and was injured. Part of the reason for this was that the boy's help benefited the employer's business.

- » breach a statutory duty – this shows that the imposition of vicarious liability is not restricted to common law claims.

CASE EXAMPLE

Majrowski v Guy's and St Thomas' NHS Trust (2006)

A former employee claimed that he had been bullied, intimidated and harassed by his departmental manager acting in the course of employment. He claimed damages under the Protection from Harassment Act 1977.

It was held that an employer may be vicariously liable for breach of statutory duty imposed on its employee if the test of fairness and justice was met and there was a sufficient connection between the employee's breach of duty and the nature of the employment.

If the employee acts outside the course of employment, then the employer cannot be vicariously liable. An employee acts outside the course of employment (goes on a 'frolic' (an escapade) of their own) in the following circumstances:

- » carrying out an act not within the scope of the employee's work; that is, the employee does something that is not connected with what they are employed to do

CASE EXAMPLE

Beard v London General Omnibus Co. (1900)

A bus conductor, in the driver's absence, decided to turn the bus around. It was not his job to do so and he was therefore acting outside the course of his employment.

- » diverting from the proper work on a 'frolic' – there are two contrasting cases here

CASE EXAMPLES

Hilton v Thomas Burton (Rhodes) Ltd (1961)

Four workmen were in their employer's van, which they were allowed to use for travelling to a demolition site out in the countryside. After half a day's work, they decided to go for tea in a café seven miles (11 kilometres) away. On the way back, there was an accident caused by the van driver's negligence. One of the passengers was killed. The court held that there was no vicarious liability, because even though the driver had permission to use the van, he was not employed to do so when the accident occurred.

Williams v Hemphill (1966)

In contrast, there was liability in relation to a bus driver who detoured while carrying children in order to please the children on board.

- » giving unauthorised lifts – as with other case law regarding vicarious liability, there are contrasting cases even though the facts are very similar

CASE EXAMPLES

Twine v Bean's Express Ltd (1946)

The defendants' employee gave the claimant's husband a lift in a van, and he was killed because of the driver's negligence. The driver had been told not to give lifts to anyone who was not within a group of authorised passengers, and there was a notice on the side of the vehicle stating who could be allowed to have a lift. The claimant's husband was not one of this group. There was no liability because the driver was doing an unauthorised act and was outside the course of his employment.

Young v Edward Box and Co. Ltd (1951)

A driver's foreman consented to the passenger's presence in the vehicle. The employer was held liable because the foreman was acting in the course of his employment, even though the passenger was unaware of the foreman's lack of authority.

- » acting in excess of the proper boundaries of the work.

CASE EXAMPLE

Makanjuola v Commissioner of Police for the Metropolis (1990)

A plain-clothes off-duty police officer showed his warrant card to obtain entry to premises. He asked about the immigration status of two of the residents in the property. He told them that

they were in breach of immigration regulations and demanded sexual favours in return for not reporting them to the Immigration Department. There was no vicarious liability, because this behaviour was not within the terms of the officer's employment.

The Salmond test has also been used where employees have been travelling to or from work. Usually, such employees are not within the course of employment, unless they are travelling specifically on the employer's business.

CASE EXAMPLE

Smith v Stages (1989)

A worker travelling between home and a temporary workplace, and who was paid during that time, was held to be in the course of employment. This was the position even though the employee had a discretion about the method and time of travel.

The close connection test

The close connection test was developed by the courts to manage cases where it was alleged that there had been intentional wrongdoing. Some forms of intentional wrongdoing such as dishonesty (*Lloyd v Grace Smith and Co.* (1912) concerning fraud by a solicitor's clerk) and theft (*Morris v Martin* (1966) concerning theft of a customer's property from a cleaner) had been dealt with using the Salmond test.

The case of *Lister v Hesley Hall Ltd* (2001) overruled a line of cases where liability had been refused on the basis that the wrongdoing committed by the employee was not a way of carrying out their employment duties.

CASE EXAMPLE

Lister v Hesley Hall Ltd (2001)

A warden at the defendants' school for boys with emotional and behavioural difficulties had subjected the claimants to sexual abuse over a long period of time.

It was held that the warden had been entrusted with the boys' care, and his torts (assault and battery) had been so closely connected with his employment that it would be fair and just to hold the defendants vicariously liable.

The court used the extension that Salmond added to the second limb of his test, which stated that:

'A master ... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them.'

The courts now adopt a broad approach to decide whether the acts were so closely connected with the employment that it would be fair and just to hold the employers liable. *Lister* has been used in a wide range of cases.

CASE EXAMPLES

Mattis v Pollock (t/a Flamingos Nightclub) (2003)

The owner of a nightclub was vicariously liable to the claimant, who was paralysed from the waist down after a doorman employed by the nightclub stabbed him. The doorman, who had started the fight in the nightclub, went home to arm himself with a knife and returned to the vicinity of the club where he stabbed the claimant. The court held that the stabbing was directly linked to the incident that had occurred previously. It was so closely connected with what the doorman was expected to do that it fell within the scope of his employment. Also, the court was influenced by the fact that the employer knew of and encouraged the doorman's violent behaviour.

Gravil v Carroll (2008)

The claimant got involved in an argument during a rugby match and broke the defendant's nose. It was held that the wrongful act committed by the player was so closely connected with his employment as a rugby player that the club he played for was vicariously liable.

Ministry of Defence v Radclyffe (2009)

The Ministry of Defence was vicariously liable for the negligence of an officer who urged Radclyffe to jump from a bridge while on a recreation break during an adventure training exercise in Germany. The connection between the nature of his employment as an officer in the army and his breach of duty was within the *Lister* test.

It would appear then that, following *Lister*, an employer can do very little to avoid liability for the intentional wrongdoings of their employee. This does not mean that the claimant will always win. Indeed, the claimant failed in *N v Chief Constable of Merseyside* (2006).

CASE EXAMPLE

N v Chief Constable of Merseyside (2006)

A police officer assaulted the female claimant while on duty. This conduct was not in the course of employment and neither was there a close connection with his employment. His uniform only gave him the opportunity to commit the wrongdoing.

It is clear that the circumstances in which an employer may be vicariously liable for an employee's misconduct are not closed, and recent cases have shown the need to take a broad approach to the nature of employment and what is reasonably part of it. The application of *Lister* still raises questions about how closely connected the employee's actions have to be.

Cases involving sexual activities with children have been instrumental in the development of the law relating to vicarious liability; for example, they have broadened the scope in terms of who an employee is and have explored the issue of what can be regarded as a close connection to employment.

CASE EXAMPLES

***Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* (2010)**

A non-Catholic boy, who had nothing to do with the Catholic Church other than to attend a youth club at a church, alleged that the Catholic Church was vicariously liable for the acts of the Catholic priest who abused him. The Court of Appeal held that the *Lister* test was satisfied in full, and there was vicarious liability.

***JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* (2012)**

The Court of Appeal decided that the usual employment tests were not appropriate, because a priest is not an employee of the church but merely an officeholder. It decided therefore that only a relationship akin to employment needed to be proved. The Court of Appeal held that the relationship between a parish priest and diocese was akin to an employment relationship, so liability was imposed. This test has recently been confirmed in *Cox v Ministry of Justice* (2016).

***Mohamud v WM Morrison Supermarkets plc* (2016)**

The court considered the issue of close connection. Here, the employee had verbally abused and physically assaulted the claimant. The Supreme Court found that the assault was the result of a sequence of events. The employee's actions were a gross abuse of his position but they were closely connected with his employment because he was employed to serve customers. Therefore, it was just for the defendant to be liable for its employee's abuse of position.

After a period of expansion of the law, two recent Supreme Court decisions appear to have halted this development.

CASE EXAMPLE

***Morrisons Supermarket v Various Claimants* (2020)**

A disgruntled employee uploaded personal details of colleagues to a file-sharing site and sent the data to three national newspapers. The employee was imprisoned, but the colleagues also sued the employee and employer for breach of statutory duty (under the Data Protection Act), misuse of personal information and breach of confidence.

The Supreme Court considered what 'close connection' meant and stated that employers will not be liable for a wrongful act, whether or not the act is engaged in furthering the employer's business or is an effort to deliberately harm the employer as part of a vendetta. So, there was no vicarious liability as the employee's actions were outside the course of employment.

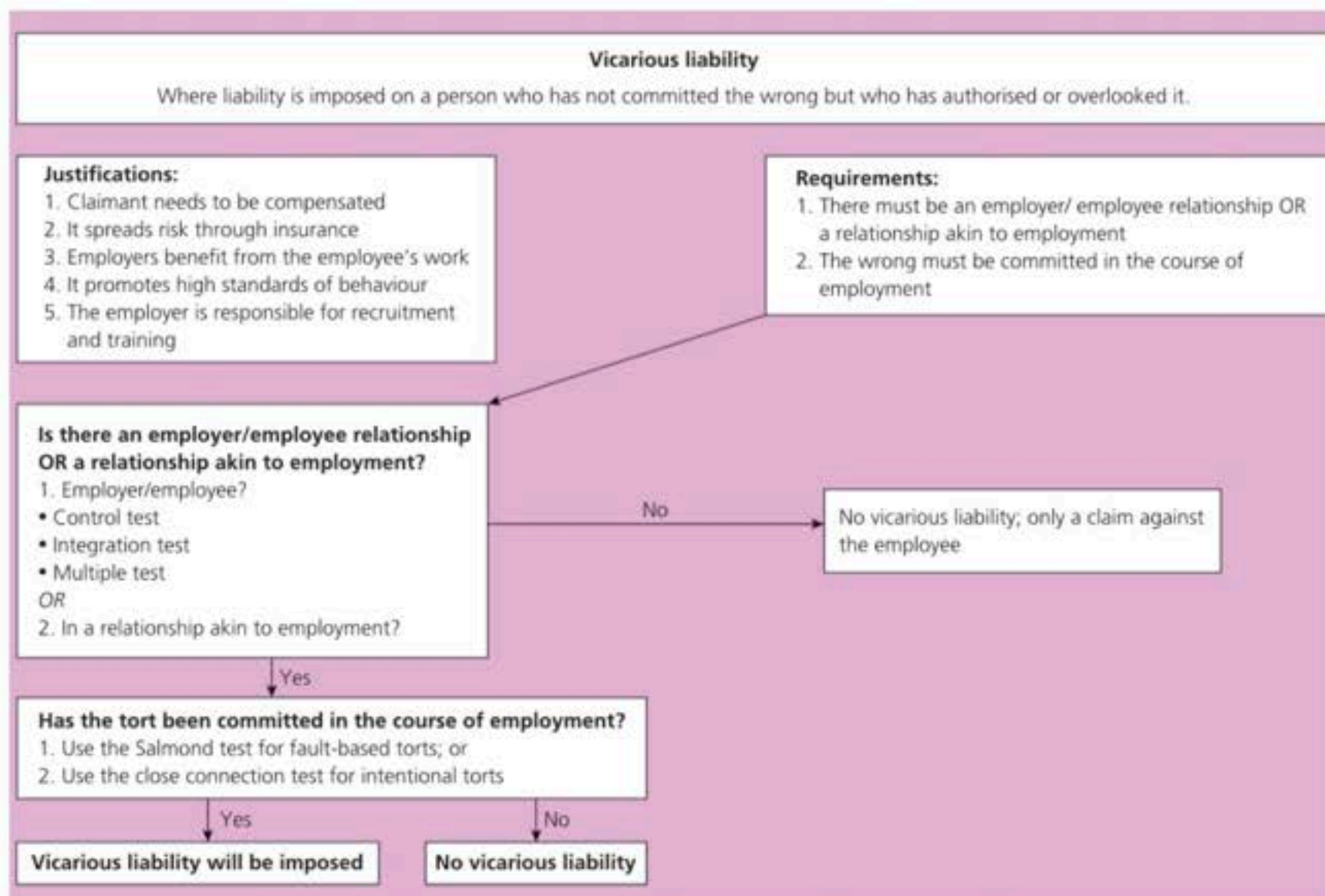
This case, together with *Barclays Bank plc v Various Claimants* (2020), allowed the Supreme Court to clarify the application of the two stages of the test for vicarious liability and to restrain:

'... the expansion of those parties which are considered to be employees or "quasi employees", and the range of wrongful actions of employees for which an employer can be held to be vicariously liable.'

ACTIVITY

Are the following tortious actions in the course of employment?

- 1 Ahmad works as a chauffeur for Cars R Us. Before finishing the job he was on, he received an urgent call to pick up his daughter from school. On the way to the school, he crashes into Becky's car, injuring her.
- 2 Caroline works for a firm of solicitors as a secretary. She is only permitted to smoke outside the firm's building. During a break, she goes outside to smoke a cigarette. When she finishes, she throws the lit cigarette end towards the rubbish bin. However, instead of going into the bin, the cigarette lands on her co-worker's dress, damaging it.
- 3 Viktor works as a delivery man. He is late making a delivery, so he decides to catch up by breaking the speed limit. He is caught by the police and is charged with speeding.
- 4 Ian works in a garage that sells petrol. He thinks that a man is about to drive away without paying. He runs out of the garage premises and hits the man, fracturing his jaw.



▲ **Figure 37.3 Vicarious liability**

▼ **Figure 37.4 Key cases: vicarious liability**

Key case	
Case	Comment
<i>Ferguson v John Dawson and Partners (Contractors) Ltd</i> (1976)	Control test – based on the concept of master and servant Not suitable for the modern employment environment
<i>Stevenson, Jordan and Harrison Ltd v MacDonald and Evans</i> (1952)	Business integration test – is the employee's work carried out as an integral part of the business?
<i>Ready Mixed Concrete (South East) Ltd v Minister of Pensions and NI</i> (1968)	Multiple test – introduced because the business integration test was inadequate
<i>Cox v Ministry of Justice</i> (2016)	Test – is the relationship akin to employment?
<i>Poland v Parr</i> (1927)	Liability, as the employee had implied authority to protect the employer's property
<i>Warren v Henlys Ltd</i> (1948)	No liability as the employee's behaviour was outside the course of employment.
<i>Limpus v London General Omnibus Co.</i> (1862)	Liability where the employee ignored an express order not to do something
<i>Century Insurance Co. v Northern Ireland Road Transport Board</i> (1942)	Liability for the employee's negligent act
<i>Rose v Plenty</i> (1976)	Liability for using unauthorised help
<i>Majrowski v Guy's and St Thomas' NHS Trust</i> (2006)	An employer may be liable for breach of a statutory duty if there is a close connection between the breach and the nature of employment.
<i>Beard v London General Omnibus Co.</i> (1900)	There was no vicarious liability as the conductor acted outside the course of employment.

Key case	
Case	Comment
<i>Hilton v Thomas Burton (Rhodes) Ltd</i> (1961)	No vicarious liability if the employee is on a frolic of their own
<i>Williams v Hemphill</i> (1966)	Liability where the driver went on a detour
<i>Twine v Bean's Express Ltd</i> (1946)	No vicarious liability if the employee is giving unauthorised lifts
<i>Young v Edward Box and Co. Ltd</i> (1951)	Liability as the behaviour was in the course of employment even though it was unauthorised
<i>Makanjuola v Commissioner of Police for the Metropolis</i> (1990)	No liability as the officer acted outside the course of employment
<i>Smith v Stages</i> (1989)	Travel to work was regarded as in the course of employment
<i>Lister v Hesley Hall Ltd</i> (2001)	Created the close connection test
<i>Mattis v Pollock (t/a Flamingos Nightclub)</i> (2003)	Liability because of the close connection between the employment and the assault
<i>Gravil v Carroll</i> (2008)	Liability as there was a close connection between employment as a rugby player and the assault
<i>Ministry of Defence v Radclyffe</i> (2009)	Liability because of the connection between employment and the employee's breach of duty
<i>N v Chief Constable of Merseyside</i> (2006)	The conduct was not in the course of employment. The officer's uniform only gave the opportunity to carry out the assault. No liability.
<i>Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church</i> (2010)	Court stated the claimant only proved that there is a relationship akin to employment between them and the defendant
<i>JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust</i> (2012)	'Akin to employment' test used for the first time. This test was confirmed in <i>Cox v Ministry of Justice</i> .
<i>Mohamud v WM Morrison Supermarkets plc</i> (2016)	Liability as there was a close connection between the gross behaviour and employment
<i>Morrisons Supermarket v Various Claimants</i> (2020)	No vicarious liability, as the employee's actions were outside the course of employment

TARGET SKILLS

- 1 Define vicarious liability.
- 2 Describe the tests that are used to decide whether a person is an employee.
- 3 Assess the effect that *Lister v Hesley Hall Ltd* (2001) has had on the law relating to vicarious liability.
- 4 Discuss the extent to which vicarious liability allows a claimant to obtain justice.

COMMENT

Evaluation of the law relating to vicarious liability

Vicarious liability is an area of law which has drawn a lot of criticism because of its apparent unfairness, even though this type of liability provides justice for the claimant.

Vicarious liability can be justified because an employer should have control over their employees, but an employer cannot supervise an employee all

the time. Also, some incidents cannot be protected against, regardless of how much training has been given. An employer may be held liable for incidents where the activity carried out by the employee has been prohibited or where a criminal act has been committed. Both of these principles may lead to claims of injustice on the part of the defendant, even though there is justice for the innocent party, the claimant.

An employee may be a 'man of straw', that is they may have very few resources to pay any compensation. The employer may be better able to bear the loss, as there is usually compulsory insurance available. This means that a claimant receives their compensation and justice, but the employer's contribution towards the compensation is usually their premium payments and increased premiums in the future.

Decisions made against employers provide an opportunity for others to ensure stringent

recruitment and training. It encourages employers to provide a safe working environment and safe working practices. However, as stated above, an employer may do all that they can to prevent injury to a person and incidents may still occur, because they are unable to supervise their workers all the time.

Also, early cases are inconsistent; it is difficult to form clear guidelines and outcomes can be unpredictable. Recent cases show that the cases tend to be pro-claimant, as the close connection and akin to employment tests are interpreted widely.

STRETCH AND CHALLENGE

Discuss why imposing liability on an employer for an employee's wrongful actions may be regarded as unfair.

TEST YOURSELF

- 1 Define tort.
- 2 List four policy considerations.
- 3 List the four aims of tort.
- 4 Define vicarious liability.
- 5 Name the case which created the close connection test.

EXAM-STYLE QUESTIONS

- 1 A general principle in tort states that wrongdoers should only be liable for their own actions.

Explain what you understand by the concept of vicarious liability and analyse why it is imposed

despite the apparent conflict with this general principle.

Cambridge AS and A Level Law 9084 paper 41 Q2 May/June 2014

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- 2 Anne has recently inherited a large amount of money. She asks her friend Dan, an architect, if a plot of land near her house would be suitable for building. Anne would like to purchase the land and build some houses, which she hopes to sell for a substantial profit.

Dan advises her, free of charge, that the land is suitable for building. Anne purchases the land for £1 million. She then discovers that the land was regularly flooded in recent years and is therefore unsuitable for building. Anne cannot build on the land and is unable to sell it.

Advise the parties of their rights, responsibilities and potential remedies.

Introduction

The tort of negligence applies when the claimant's injury or loss is caused by the defendant's failure to take reasonable care, in a situation where the defendant owes the claimant a duty of care. It is a relatively modern tort that was established in the case of *Donoghue v Stevenson* (1932).

To be successful in negligence, three elements need to be met:

- 1 A duty of care must be owed by the defendant to the claimant.
- 2 There must be a breach of that duty.
- 3 The damage to the claimant must be caused by the breach of duty.

This chapter links to the key concept of liability for actions or omissions.

38.1 The neighbour principle

Lord Atkin's judgment in *Donoghue v Stevenson* (1932) defined neighbours as:

'... persons who are so closely and directly affected by my act that I ought reasonably have them in contemplation as being so affected that, when I am directing my mind to the acts and omissions which are called in question.'

A person must take reasonable care to avoid injuring those who are likely to be harmed if they do not take care.

There are two elements to the neighbour test:

- 1 Reasonable foreseeability of harm: a duty of care will be owed where the defendant ought reasonably to foresee that failure to take care may cause injury.
- 2 'Neighbourhood': this refers to the relationship between the claimant and the defendant; the claimant must show that there is a degree of proximity between the parties.

So, a defendant will only be liable for their carelessness if they owe the claimant a duty to take reasonable care. If there is no duty of care, it does not matter how much harm has been done or how careless the behaviour was, the claimant will have no claim.

As the tort of negligence developed, Lord Atkin's general principles were supplemented by vague rules, with the aim of developing the tort within acceptable limits to prevent the floodgates from opening. The floodgates argument is a policy issue, where the courts are reluctant to extend the law because of the potential increase in the number of claimants. In turn, this would place pressure on the court system and also on insurance companies as, ultimately, it would be these companies who would pay compensation to a successful claimant.

The rules for the imposition of a duty of care were initially contained in Lord Wilberforce's two-part test in *Anns v Merton London Borough Council* (1977). The courts had to consider two questions when deciding when or if a duty of care was owed to the claimant:

- 1 Is there sufficient proximity between the claimant and defendant to impose a duty of care?
- 2 If yes, does the judge consider that there are any policy grounds that prevent the duty from being imposed?

Over a period of time, it became clear that this test was inadequate, as the judges did not like to apply policy considerations when their primary function is to apply the law.

When the case of *Caparo Industries plc v Dickman* (1990) was heard by the House of Lords, the judiciary took the opportunity to overrule *Anns v Merton London Borough Council* (1977), and a three-part test was created (see Section 38.2). This case was recently considered in *Robinson v Chief Constable of West Yorkshire* (2018).

CASE EXAMPLE

Robinson v Chief Constable of West Yorkshire (2018)

This case involved a claim for injuries sustained by a bystander who was at the scene of an arrest.

A police officer saw a suspect dealing drugs. He took the operational decision to not make an arrest immediately but called for support from fellow officers. In the meantime, the suspect had moved location and was standing outside a shop in the town centre. The support officers arrived. The officers

considered that if they did not arrest the suspect at that point, the opportunity to do so would be lost.

The decision was made that two officers would approach the suspect from one side and two from the other. The latter two officers arrived slightly later than the first two, to avoid getting the suspect's attention.

The officers approached and took hold of the suspect. He resisted the arrest and there was a struggle, which took them nearer to where the claimant was standing. The suspect and the police fell to the ground, and in doing so, collided with and injured the claimant.

The claimant won her case as in the circumstances there was a duty of care to her and it had been breached.

▼ **Figure 38.1** Key cases: the neighbour principle

Key cases	
Case	Law
<i>Donoghue v Stevenson</i> (1932)	Established the modern tort of negligence and the neighbour test
<i>Anns v Merton London Borough Council</i> (1977)	Created a two-part test to establish a duty of care
<i>Caparo Industries plc v Dickman</i> (1990)	Overruled <i>Anns</i> and created the three-part test: reasonable foreseeability; proximity and fairness; just and reasonable to impose a duty
<i>Robinson v Chief Constable of West Yorkshire</i> (2018)	In novel situations, the <i>Caparo</i> test must be used; if there is an existing precedent, this must be followed

38.2 The three-part test

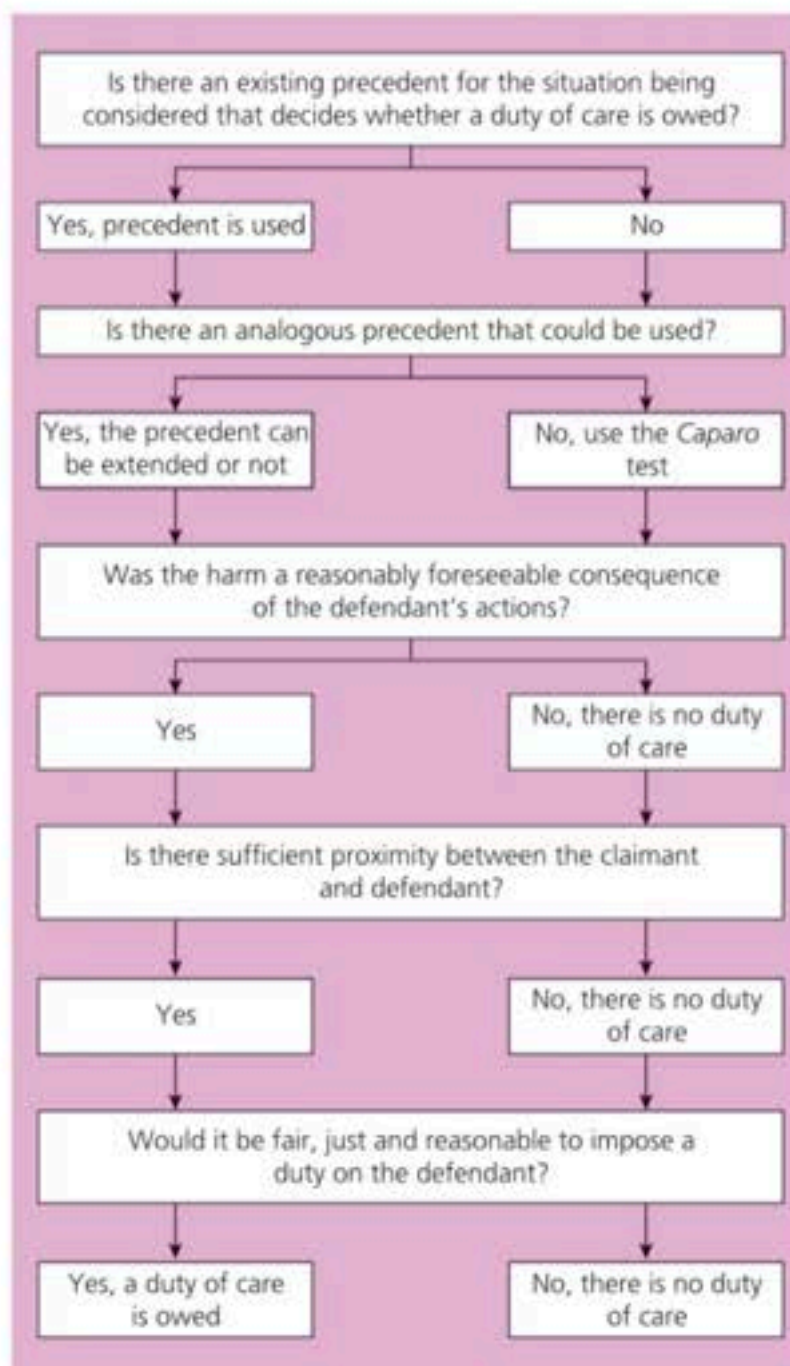
Caparo Industries plc v Dickman (1990) concerned a claim for financial loss that occurred when an investor relied on the contents of audited accounts and a company report that had been negligently prepared by the company's auditor. The claimant lost the claim in negligent misstatement, but the House of Lords took the opportunity to consider the factors to be taken into account when deciding if the defendant should owe a duty of care to the claimant.

The House of Lords wanted to move away from *Donoghue v Stevenson* (1932), where foreseeability of damage was sufficient to establish a duty. The court decided that in future:

- » the claimant must point to an existing precedent or similar precedent where a duty had been imposed, or
- » if there were no relevant precedent as the case presented a novel situation, the court should apply three criteria (the three-part test) to decide if there is a duty of care.

The three-part test comprised the following:

- 1 It was reasonably foreseeable that the defendant's failure to take care could cause damage to the claimant.
- 2 There was a relationship of proximity between the claimant and the defendant.
- 3 It was fair, just and reasonable that the law should recognise a duty on the defendant to take reasonable care not to cause damage to the claimant.



▲ **Figure 38.2** Establishing a duty of care in new cases

Reasonable foreseeability

The claimant must be a member of a class of people who are put at foreseeable risk by the defendant's action; that is, the defendant must have foreseen some damage to the claimant at the time of the careless act. The damage must be of a kind that is foreseeable.

The test for foreseeability is based on what a reasonable person foresaw, not what the particular defendant foresaw.

CASE EXAMPLES

***Bourhill v Young* (1943)**

Physical harm was foreseeable but psychiatric harm was not, when the claimant heard a road traffic accident as she was getting off a tram.

***Haley v London Electricity Board* (1965)**

The claimant, who was blind, tripped over a hammer that had been placed on the pavement by the defendant to prevent pedestrians from walking along the pavement as they carried out their work. As a consequence of the fall, the claimant became almost totally deaf.

The House of Lords held that the defendant's duty to take reasonable care extended to those who might reasonably be expected to walk along the pavement, and this included blind pedestrians.

***Topp v London Bus Company* (1993)**

A woman was killed by a bus that had been stolen and then driven by the defendant. Her death was not foreseeable, even though the theft of the bus was.

Proximity

Generally, proximity will be established if there is an existing relationship between the parties. This could be a legal relationship, or a relationship based on physical proximity. In cases involving psychiatric harm and pure economic loss, the courts will require a very close relationship between the parties, but in claims involving personal injury, proximity is much easier to prove.

The following cases illustrate how the courts will consider the extent of the parties' dealings with each other when defining the scope of the defendant's duty of care to the claimant. As a result, in some cases there may be a degree of proximity (as there is a relationship) between the parties. However, the facts may indicate that the defendant has not taken responsibility for protecting the claimant against their loss.

CASE EXAMPLES

***Hill v Chief Constable of West Yorkshire* (1989)**

The police were aware that there was a serial rapist and murderer on the loose, but they did not know who he was or who his next victim might be. However, Sutcliffe [the killer] had been interviewed during the early part of the investigations but released without charge.

The claimant argued that if the police had not been careless, her daughter would not have died. The House of Lords refused to hold that there was a

duty of care; there was no proximity between the police and the eventual victim because there was no exceptional risk to her personally.

***Swinney v Chief Constable of Northumbria Police Force* (1997)**

A tape, on which the police had recorded sensitive information about a suspect that had been given in confidence by the claimant, was stolen from a police car and came to the attention of the suspect.

There was held to be proximity between the claimant and the defendant. However, at trial it was decided that the police were not negligent, as they had done all they could to protect the claimant.

Fair, just and reasonable

When applying this element, the court will take into account wider issues such as policy considerations. This allows the court to have discretion when deciding whether or not to impose a duty on the defendant. Traditionally, judges have been reluctant to consider policy issues, but recent cases show a trend where they are more willing to discuss the fairness of imposing a duty on the defendant. This allows the law to be developed in a fair manner, with each case considered on an individual basis. This will be considered further in 38.3 below.

CASE EXAMPLE

***XA v YA* (2010)**

The court considered it not to be fair, just and reasonable to impose a duty on a mother who had failed to prevent her son from being assaulted by his father (her husband) over a period of years.

The three-part test in *Caparo* has been criticised, because it does not state when a duty of care is owed. However, it was not the House of Lord's intention to create a rigid test for judges to use, as this would be impractical. The House of Lords in *Caparo* considered that when deciding to impose a duty, the courts had to take a more pragmatic approach. In support of this, their Lordships relied on Brennan J in the Australian case of *Sutherland Shire Council v Heyman* (1985):

'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories.'

This approach has been confirmed in *Robinson*, where the Supreme Court reviewed the development of the law relating to the imposition of a duty of care. The Supreme Court Justices were clear that *Caparo* is to be

used for novel situations, but if there is an existing, similar precedent that is to be followed.

There has been some debate as to whether this element is a question of purely policy issues, or if it consists of policy issues and what is fair, just and reasonable in the circumstances. A case example that can be used here is *Hemmens v Wilson Browne* (1993).

CASE EXAMPLE

Hemmens v Wilson Browne (1993)

The defendant drafted a document at P's request, giving the claimant the right to ask P to pay the claimant £10 000 to buy a house. The document did not give the claimant any rights that were enforceable in the courts, as it was not a contract, did not create a trust and was not a deed. The claimant asked P to carry out the promise to pay £10 000, but P refused.

It was held that a solicitor could owe a duty of care in carrying out this type of transaction. It was reasonably foreseeable that the claimant would suffer harm, and there was proximity between the parties. However, it would not be fair, just and reasonable to impose a duty of care, as the claimant was still alive and able to sort out the situation by instructing another solicitor to draft a document that was enforceable in the courts. The claimant could then sue for breach of contract.

38.3 The importance of policy considerations

In the past, the courts showed a willingness to use public policy reasons to protect certain groups when they are sued in negligence, thereby giving them immunity from being sued. These groups include the police, fire services, local authorities and other public services. Some groups, such as the legal profession, have had their immunity removed completely. However, there has been a move away from protecting these groups, in both negligence and in terms of the Human Rights Act 1998.

Despite this, immunity exists, and the most common reason given is that it would be in the public's interest for those bodies or groups to go about their business without the threat of being sued. It is feared that this threat might encourage defensive practices or lead to

▼ Figure 38.3 Key cases: establishing a duty of care

Key cases		
Element	Case	Law
Reasonable foreseeability	<i>Bourhill v Young</i> (1943)	The claim failed as there was no proximity between the claimant and the incident.
	<i>Haley v London Electricity Board</i> (1965)	It was reasonably foreseeable that blind people would be expected to walk along the pavement, and injury was likely.
	<i>Topp v London Bus Company</i> (1993)	There was no liability as it was not reasonably foreseeable that Mrs Topp would be killed.
Proximity	<i>Hill v Chief Constable of West Yorkshire</i> (1989)	There was no proximity between the police and the claimant during the prevention or investigation of the crime.
	<i>Swinney v Chief Constable of Northumbria Police Force</i> (1997)	There was proximity between the claimant and the defendant through a contractual relationship, as he had been paid for his services.
Fair, just and reasonable	<i>XA v YA</i> (2010)	It was not fair, just and reasonable to impose a duty on a mother who could not prevent assaults on her son.
	<i>Hemmens v Wilson Browne</i> (1993)	It was not fair, just and reasonable to impose a duty, as it was possible to remedy the situation without resorting to imposing a duty of care.

financial problems. Therefore, the immunity is justified on the basis that it is not fair, just and reasonable to impose a duty on policy grounds.

The main policy reasons that the courts rely on are:

- 1 The defendant might assume a defensive approach to their work or provision at the public's expense.
- 2 A liability in tort might undermine protection already provided by the common law or an Act of Parliament.
- 3 Making a person or body liable in negligence might mean that they have to divert financial resources away from the public at large to a small number of successful claimants.

- 4 There is a fear of floodgates opening, creating a large number of potential claimants, especially if the tort is a relatively new one.
- 5 'Crushing liability'; that is, one defendant is made liable for a large amount of compensation that it would be either unfair or economically inefficient to make the defendant responsible for.
- 6 Cases such as *Nettleship v Weston* (1971) (see Chapter 39) show that the courts consider the availability of compulsory insurance to the defendant, as the courts will be concerned that the claimant is able to actually recover any compensation awarded. However, the courts will reflect on the effect of distributive justice on the wider public, as there may be increases in insurance premiums to cover all the costs of litigation.

38.3.1 Advocates' immunity

Traditionally, solicitors and barristers had immunity from being sued for negligent acts, both inside and outside the courtroom, as decided in *Rondel v Worsley* (1969).

CASE EXAMPLES

Rondel v Worsley (1969)

The House of Lords held that a barrister did not owe a duty of care in relation to the conduct of a case in court. The public policy reason behind this decision was that a barrister owes a duty to the court that is higher than the duty to the client. Also, if a barrister was successfully sued, this might lead to cases – particularly criminal cases – being reopened.

Saif Ali v Sydney Mitchell (1980)

The court held that a barrister could be sued for negligence in relation to written advice and opinions. In this case, a barrister had given incorrect advice about whom to sue and, when the mistake was discovered, it was too late for the claimant to sue the correct person as the limitation period had passed.

However, the application of the law became complicated, so the House of Lords resolved the position in *Hall v Simons* (2000). In this case, the court stated that the immunity should be removed for a number of reasons:

- 1 It is the job of the court to provide standards of conduct, so an exposure of incompetent practice at the Bar would strengthen the legal system. The House of Lords believed that public confidence in the legal system was not high, as there was a perception that the legal system provided protection for the people working in it, no matter how negligent the conduct of the advocate. The Law Lords recognised that law had become more commercialised and advocates had to have compulsory insurance to cover negligent behaviour and advice.
- 2 Balanced against this, people have much greater awareness of their rights and expect the right to claim compensation if negligent professional services have been provided.
- 3 In a negligence action against an advocate, the court could be relied on to differentiate between errors of judgement and true negligence. In any event, the claimant would have to establish a causal link between the poor advocacy and the outcome of the claimant's action.

CASE EXAMPLE

Hall v Simons (2000)

The appeal comprised three separate cases against the claimants' former solicitors. Their claims had been struck out at an early stage, because of the immunity that legal professionals enjoyed. They appealed against this.

The House of Lords held that advocates would no longer enjoy immunity in relation to civil proceedings. The judges argued that immunity was no longer needed, because any actions clients brought because they wanted their cases reviewed as a result of their advocate's negligent actions would be dismissed for abuse of process.

Further, immunity was not needed to ensure that advocates would respect their duty to the court. The fact that a client loses a case does not mean that the advocate has acted negligently.

38.3.2 Local authorities

Recently, the courts have made it clear that there are policy reasons why tort should not be used to impose a duty on local authorities so that individuals can obtain a benefit that should be provided by the state. The courts tend not to impose a duty where an Act of Parliament allows a wronged claimant to bring a claim for breach of statutory duty.

Often, the outcome of an action against a local authority will depend on what type of claim is being made; for example, a firm principle is developing that there will be a general duty on the part of local authorities to take care of the welfare of children while they are in education provided by government-funded schools. The court will impose a duty of care on a local authority, so that a school has to supervise the children who attend it.

However, as there is no general duty to take reasonable care of anyone, there are limits on this duty, as illustrated by *Mitchell v Glasgow City Council* (2009).

CASE EXAMPLES

Phelps v Hillingdon London Borough Council (2001)

The claimant suffered from dyslexia as a child that led to her suffering learning difficulties while she was at school. When she was eleven, she was referred to an educational psychologist who failed to notice her dyslexia. She left school at sixteen with no qualifications. The claimant sued the local authority for failing to provide her with an adequate education.

The House of Lords held that a local authority could owe a duty of care to a person regarding the provision of educational services. The claimant was successful.

Bradford-Smart v West Sussex County Council (2002)

The claimant was bullied on the bus to school and on the estate where she lived. While she was at school, she was protected from harassment by the teaching staff.

There was no liability in this case, because it was not fair, just and reasonable to hold that the duty to supervise extended to protecting a child from bullying outside school.

Kearn-Price v Kent County Council (2003)

The claimant, a 14-year-old boy, was hit in the eye by a leather football when he had been playing in the school playground shortly before school began for the day. The school had prohibited the use of such balls, because injuries had been caused on seven previous occasions. However, it had not done very much to ensure that the ban was being complied with, apart from a few reminders not to use leather footballs. At the time of the incident involving the claimant, there were no teachers patrolling the playground.

The Court of Appeal dismissed the defendant's argument that it could not be expected to supervise the welfare of pupils outside school hours.

Mitchell v Glasgow City Council (2009)

The court made it clear that a local authority cannot be expected to owe a duty of care in all circumstances. The claim was based on the allegation that the defendant failed to protect the life of one of its tenants when it did not take any steps to give a warning about the potential actions of a violent neighbour.

The claimant, a council tenant, had told the defendant about the violent and abusive behaviour of his neighbour. The defendant asked the neighbour to go to a meeting, where he was told that he would be evicted if his behaviour did not improve. Shortly after the meeting, the claimant was assaulted by the neighbour and later died because of this. The claimant's widow and daughter brought the action, saying that the defendant owed the claimant a duty to be warned about the meeting so he could take steps to protect himself.

The House of Lords held that a landlord did not owe a duty to a tenant in relation to wrongs committed by a third party, unless there was clear evidence to show that they had assumed responsibility for the claimant's safety. There was no such evidence here, so no duty of care arose.

38.3.3 The police

When deciding if a duty of care should be imposed on a police force, the courts distinguish between careless actions while preventing or investigating crime and careless actions during the operational stage of the process. It is clear that, generally, the police have immunity from being sued in negligence during an investigation stage, but this is by no means a blanket immunity (meaning that the police cannot be sued at all), as all the circumstances need to be taken into account.

The principle of no liability was established in *Hill v Chief Constable of West Yorkshire* (1989), the facts of which are set out in Section 38.2, and was confirmed in *Michael v Chief Constable of South Wales Police* (2015).

However, this position has been considered more recently in *Robinson v Chief Constable of West Yorkshire* (2018). In this case, the Supreme Court recognised that there was a positive act by the officers rather than an omission, as they were arresting a suspect. This was enough to put the police under a duty of care to protect the claimant from a situation of danger that had been created by the police. In applying the three-part test, a duty of care was created, as the claimant's injuries were caused by the actions of the police.

Robinson is now the key case in this area of law:

- » It established that the police have the same duty of care as other members of the public in limited situations. Despite this outcome, the Supreme Court made it clear that it was not its intention to undermine the principle in *Hill*. It appears that any future claim that may place an unrealistic demand on the police, and if the case focuses on an omission rather than an act, will likely fail.

- » The fact that the police cannot be sued for omissions is still a concern. This was an issue that could have been addressed in *Michael* but was not. The only recourse that a claimant can have in relation to omissions is through the Human Rights Act 1998, specifically Article 6 that entitles a claimant to the right to a fair trial. *Osman* (1998) is the key case here.
- » *Robinson* does not change the law in so far as it applies to positive acts done by the police that directly result in harm. However, it is a substantial wearing away of the limits of liability, as the precedent can be extended to include other positive acts that have been committed.

Finally, if the police assume a specific responsibility to take reasonable care to keep specific individuals from harm, there may be liability. The categories of people who may be successful include employees, people in custody and police informants. *Swinney v Chief Constable of Northumbria Police Force* (1997) is an example of an informant successfully establishing a duty of care.

CASE EXAMPLES

Osman v UK (1998)

Osman was a pupil at a school where a teacher formed an inappropriate attachment with him. The teacher, who was later convicted of two manslaughter offences, shot him and was detained in a mental hospital. Osman's mother brought a claim against the police for their failure to arrest and detain the teacher, despite knowing about the specific risk to Osman. The negligence claim was struck out because the precedent of *Hill v Chief Constable of West Yorkshire* (1989) was followed.

The European Court of Human Rights understood that the principle of immunity was legitimate, as it aimed to protect the effectiveness of the police. However, it held that the rights of other competing public interests had not been considered. So, the Osman family was entitled to have a full hearing, where the facts would be found and the proportionality of the police immunity could be weighed up. The court found that there was a breach of Article 6 of the Human Rights Act 1998.

Rigby v Chief Constable of Northamptonshire (1985)

The claimant's gun shop had been under siege and the police had negligently fired a canister of CS gas

into the shop without taking adequate precautions against the high risk of fire. A fire broke out causing damage. The claimant won his claim for compensation.

Mullaney v Chief Constable of West Midlands (2001)

The police were liable when a trainee officer suffered serious injuries when attempting to arrest a suspect. He called for assistance but his fellow officers failed to respond to his calls.

38.3.4 The fire brigade

The main issue with establishing a duty of care between the claimant and the fire brigade is that of proximity as well as the usual public policy issues, as *Capital Counties plc v Hampshire County Council* (1997) shows.

CASE EXAMPLE

Capital Counties plc v Hampshire County Council (1997)

The claimant brought a claim in negligence because when the fire brigade arrived at the scene of a fire, an order was made to turn off the sprinkler system that had been operating.

One issue that needed to be decided by the Court of Appeal was whether there was a sufficient degree of proximity. The court held that the fire brigade's attendance at the scene of a fire did not provide the required degree of proximity. This followed on from the fact that there is no duty to attend a fire in the first place. Here, the incompetence of the fire brigade in ordering the sprinklers to be turned off created a new source of danger to the claimant.

38.3.5 Ambulances

CASE EXAMPLE

Kent v Griffiths (2001)

The Court of Appeal stated that neither policy arguments nor the 'no liability unless the claimant's position is made worse' argument put forward in relation to the fire brigade applied to the provision of an ambulance, because the ambulance service is part of the NHS and not specifically a rescue service.

The claimant suffered an asthma attack, and her doctor made a 999 call for assistance. The ambulance took 40 minutes to arrive. While waiting for the ambulance to arrive, the claimant suffered respiratory arrest that would have been prevented if the ambulance had arrived within a reasonable time. Lord Woolf held that the acceptance of a 999 emergency call established a duty of care between the claimant and the defendant. In this instance, it was breached and damage was caused, so the claimant won the action.

Internet research

Do your own online research on these cases:

- » *Hill v Chief Constable of West Yorkshire* (1989): www.newlawjournal.co.uk/content/missing-point
- » *Brooks v Commissioner of Police* (2005): www.oldsquare.co.uk/news-and-media/cases/brooks-v.-commissioner-of-police-for-the-metropolis
- » *Michael v Chief Constable of South Wales Police* (2015): <https://news.liverpool.ac.uk/2015/01/28/viewpoint-supreme-court-rejects-michael-familys-bid-sue-police>

ACTIVITY

Read the case of *Robinson v Chief Constable of West Yorkshire* [2018] at www.hja.net/robinson-v-chief-constable-of-west-yorkshire-police and answer the questions below:

- 1 State the legal principle in *Hill v Chief Constable of West Yorkshire* (1989).
- 2 What policy considerations do the courts take into account when making decisions about police negligence?
- 3 State the legal principle that was created in *Robinson*.
- 4 What impact has *Robinson* had on the law of negligence?
- 5 Describe the difference in the outcomes of *Michael* and *Robinson*.

▼ Figure 38.4 Key cases: decisions influenced by policy

Key cases		
Body	Case	Point
Legal profession	<i>Rondel v Worsley</i> (1969)	Barristers are immune from negligence claims for work done in court.
	<i>Saif Ali v Sydney Mitchell</i> (1980)	Barristers are immune from negligence claims for work outside the courtroom.
	<i>Hall v Simons</i> (2000)	Immunity from being sued in negligence is removed.
Local authority	<i>Phelps v Hillingdon London Borough Council</i> (2001)	A duty of care is owed regarding the provision of educational services.
	<i>Bradford-Smart v West Sussex County Council</i> (2002)	It was not just, fair and reasonable for a school's duty of care to extend beyond school premises.
	<i>Kearn-Price v Kent County Council</i> (2003)	There is a duty of care to supervise the welfare of children outside school hours.
	<i>Mitchell v Glasgow City Council</i> (2009)	A landlord has not duty of care to a tenant unless there has been an assumption of responsibility for the care of that tenant.
Police	<i>Hill v Chief Constable of West Yorkshire</i> (1989)	There is blanket immunity when preventing or investigating crime.
	<i>Michael v Chief Constable of South Wales Police</i> (2015)	Confirmed <i>Hill</i> .
	<i>Robinson v Chief Constable of West Yorkshire</i> (2018)	A duty of care was owed in the circumstances and there was a breach because of the lack of care.
	<i>Osman v UK</i> (1998)	The European Court of Human Rights recognised the value of the immunity but there was a breach of Article 6 of the Human Rights Act 1998.
	<i>Rigby v Chief Constable of Northamptonshire</i> (1985)	A duty was breached because there was a failure to take reasonable precautions.
	<i>Mullaney v Chief Constable of West Midlands</i> (2001)	There was a duty of care to the officer because of the employer/employee relationship.
Fire brigade	<i>Capital Counties plc v Hampshire County Council</i> (1997)	A duty of care arose because the fire brigade created a new source of danger.
Ambulances	<i>Kent v Griffiths</i> (2001)	A 999 call creates a duty of care to the claimant.

TARGET SKILLS

- 1 Identify the three factors in *Caparo Industries plc v Dickman* [1990] that are used to decide if a duty of care exists.
- 2 Name three cases that can be used to illustrate these factors.
- 3 Assess whether policy considerations provide justice for both parties.
- 4 Evaluate whether the police should have blanket immunity.

COMMENT

Evaluation of the law relating to duty of care

As Lord Atkin failed to provide a clear framework to decide whether a duty of care was owed in *Donoghue v Stevenson*, each new potential duty situation had to be decided on a case-by-case basis. This meant that the law developed rapidly. However, when the two-part test in *Anns* began to be used, it was argued that the test had allowed the courts to make law rather than merely apply it. Some judges were hesitant to do this, as it took them out of their traditional roles and went against British constitutional rules that only Parliament should make law.

Caparo Industries plc v Dickman [1990] was an attempt to put a halt to the expansion in the number of duty situations. On the face of it, the three-part test is not too dissimilar to the two-part test. Even so, it has limited the development of the law, and there is less scope for the imposition of new duty situations.

The use of policy reasons to justify the immunity of certain groups continues to be criticised. However, fears that cases such as *Hall v Simons* [2000] would open the floodgates have not materialised. Also, more effective regulation of the legal profession by the regulatory bodies avoids the abuse of the civil process by claimants.

The issue of blanket immunity has been decided upon in cases such as *Michael and Robinson*. These cases clearly state that the police will only be immune in relation to the investigation of a crime and omissions. Policy reasons for this include the amount of pressure that would be placed on the police while carrying out their job and the pressure on the police budget. There is a concern that ongoing cuts to resources will lead to defensive

work practices and influence how the police resource and prioritise their investigations.

Although the limitation appears harsh on claimants, it would not be fair to impose a general duty of care on the police when none exists on the public generally. Also, it would impose a duty of care in relation to a limitless class of people, and a line has to be drawn somewhere. However, it is possible to have recourse to other avenues of compensation, such as through the Human Rights Act, the Criminal Injuries Compensation Authority and other such bodies.

STRETCH AND CHALLENGE

Beth's property was set on fire because of Simon's negligent repair of the gas boiler. Most of the damage was of an expected kind, such as fire damage, but some damage was more extensive than might have been expected.

- 1 Which case will be used to decide what damage can be compensated?
- 2 Explain the principle in that case.
- 3 Consider whether it is fair and just that there is a limit to the type of damage that can be claimed for.

TEST YOURSELF

- 1 Define negligence.
- 2 Describe the neighbour test.
- 3 What test should a judge use to decide if there is a duty of care in a novel situation?
- 4 List the bodies/people who have traditionally been given immunity from being sued.
- 5 List the policy reasons that the courts use when deciding whether a duty of care exists.

EXAM-STYLE QUESTIONS

- 1 Evaluate whether the development of the law relating to the concept of the duty of care in negligence lacks clarity.
- 2 Discuss the extent to which the judges' approach to imposing a duty of care is fairer to the claimant than to the defendant.

Introduction

Breach of duty is the second element of negligence as defined by Lord Atkin in *Donoghue v Stevenson* (1932).

This element is concerned with the standard of care that the defendant has to meet and whether the defendant's activity has failed to meet it. The standard of care is objective; so, for example, a car driver has to meet the standards of a reasonable car driver. Generally, the standard of care does not take into account the characteristics of an

individual defendant – the standard is one of general reasonableness. However, there are a limited number of instances where the court will take into account individual characteristics.

So, a breach of duty occurs where the party owing a duty of care falls below the standard of behaviour that is needed by the duty that is owed to the claimant in question. This chapter links to the key concept of liability for actions or omissions.

39.1 Standard of care and the objective test

The standard of care is a question of law that is decided by the judge. Falling below that standard is a question of fact, which is proved by looking at the factual evidence.

In court, the defendant is judged by what the 'reasonable man' would do. The concept of the reasonable man first appeared in the case of *Blyth v Proprietors of the Birmingham Waterworks* (1856), where Alderson B defined a breach of duty as:

'The omission to do something that a reasonable man would do or doing something which a reasonable and prudent man would not do.'

While the test is easy to use generally, who is the reasonable man? The reasonable man was defined in *Hall v Brooklands Auto Racing Club* (1933):

'The person concerned is sometimes described as "the man on the street" or "the man on the Clapham Omnibus" or, as I recently read in an American author, "the man who takes the magazines at home and in the evening pushes the lawnmower in his shirt sleeves".'

Sometimes, a defendant is judged against the standard of a reasonable man, despite not having experience. This is the situation with learner drivers. In the case of *Nettleship v Weston* (1971), Lord Denning decided that the learner driver defendant should be judged against the standard of care of a skilled, experienced and careful driver. The court considered both the aims of tort and policy issues in this case. It was decided that the injured person should not be left without compensation (one of the aims of tort). Lord Denning said that there had to be the same standard of care because of reasons of practicality, as it would not be appropriate for the driver of a car to owe different duties to different claimants depending on what they knew or did not know about the driver's competence.

Holding learner drivers to the same standard as experienced drivers may act as a deterrent, as they know that they can be judged against a higher standard. However, as all drivers must have insurance, they never pay the compensation themselves, so this may not be a deterrent in reality. Following a successful claim against a driver, there will be an increase in insurance costs, but this in itself is not likely to deter people from driving carelessly.

CASE EXAMPLE***Glasgow Corporation v Muir* (1943)**

G allowed a church picnic group to go inside their premises as it was raining. A tea urn was being carried through a narrow passage in G's premises where small children were buying ice creams. Some children were burned when the tea urn was dropped. There was no liability, because the tea urn was in the

hands of responsible people who took reasonable care of the children. MacMillan J said:

'The standard of foresight of the reasonable man is an impersonal test. The reasonable man is presumed to be free from both over apprehension and from over confidence.'

▼ Figure 39.1 The 'reasonable man'

Key facts		
Who is the reasonable man?	<i>Hall v Brooklands Auto Racing Club</i> (1933)	'The man on the street' 'The man on the Clapham Omnibus'
What characteristics does he have?	<i>Glasgow Corporation v Muir</i> (1943)	He is 'free from over apprehension and free from over confidence'.

CASE EXAMPLE

Nettleship v Weston (1971)

The claimant was a driving instructor and the defendant was a learner driver. During one of her lessons, the defendant drove into a lamppost and the claimant was injured. The court held that she had to meet the standard of an average competent driver. If

she did not do so, she had breached the standard of care required.

No allowance was made for the fact that she was a learner. The court said: 'He must drive in as good a manner as a driver of skill, experience and care.'

It is important that the judge does not set the standard of care too high, as it would be impossible for the defendant to reach it, and this could lead to unlimited liability being imposed on the defendant. The cases of *Cole v Davis-Gilbert* (2007) and *Harris v Perry* (2008) illustrate how the courts try to avoid this happening.

CASE EXAMPLES

Cole v Davis-Gilbert (2007)

There was no liability on the defendant for the claimant's broken leg because there was no evidence that the occupiers of a village green (common open area of grassland) were, or should have been, aware of a hole that had become exposed 21 months after it had been filled in.

Scott Baker LJ said: 'If the law courts were to set a higher standard of care than what is reasonable, the consequences would be quickly felt.'

Harris v Perry (2008)

During a children's party, one child kicked another in the head while they were both playing on an inflatable bouncy castle. The accident occurred when one of the defendants turned the other way. The Court of Appeal recognised that it was impossible to preclude all risk that where children were playing one child might bump into another and some injury would occur. The court held that the standard of care in this instance was appropriate to protect children against a foreseeable risk of physical harm that fell short of serious injury. This did not mean that the children had to be constantly supervised. The defendant could not have foreseen that, in turning to help another child, she would expose others to an unacceptable risk. There was no liability.

When deciding the standard of care, the judge will take into account a number of factors:

- 1 Foreseeability of the risk
- 2 Magnitude of the risk
- 3 Extent of the possible harm
- 4 Social usefulness of the activity that led to the harm
- 5 Practical precautions taken to minimise the risk
- 6 Common practice in relation to the risk.

39.1.1 Foreseeability of the risk

The risk of harm has to be within the defendant's reasonable contemplation. As a person is not responsible for unforeseeable events, this question should be asked: is the potential risk likely to occur? The risk has to be identified before or at the time of the incident, as in *Roe v Minister of Health* (1954).

CASE EXAMPLE

Roe v Minister of Health (1954)

The claimant went to hospital for minor surgery and came out permanently paralysed from the waist down. A sterilising fluid seeping through invisible cracks in a glass tube contaminated the anaesthetic contained in it that was then injected into the spine during the operation. At the time of the incident, in 1947, the risk of this happening was not known because there had not been a similar incident, so there was no liability.

As soon as the defendant foresees a risk, however, it must be guarded against, as not doing so would be a breach of duty. The case that supports this principle is *Walker v Northumberland County Council* (1995).

CASE EXAMPLE***Walker v Northumberland County Council (1995)***

The claimant was a social worker who suffered a mental breakdown because of stress and pressure at work. He was off work for three months. When he returned to work, the council (defendant) agreed to give him support to reduce his workload, but this was not done properly. Six months later, the claimant had a mental breakdown and was dismissed from his job because of ill health. He sued for negligence and was successful because it was foreseeable that a continuation of the stress he suffered would damage his mental health, and the defendant was negligent in failing to take reasonable steps to prevent that.

39.1.2 Magnitude of the risk

If a person has a duty of care to someone, that person must guard against the risk of harm being done. The size of the risk must be balanced against the action that is being taken to avoid the harm. The defendant must take into account any factors that could increase that risk, such as the claimant's disability. In *Haley v London Electricity Board* (1965), the claimant was successful, as it is foreseeable that a blind person may walk by and be at risk of harm; this risk was not addressed.

39.1.3 Extent of the possible harm

This is called the 'thin skull' or 'eggshell skull' rule. It means that the defendant must take the victim as they find them; that is, the defendant has to take into account the claimant's religious beliefs, illnesses and so on, that may have an impact on the harm caused to the claimant. *Paris v Stepney Borough Council* (1951) demonstrates this.

CASE EXAMPLE***Paris v Stepney Borough Council (1951)***

The defendant employed the claimant, who had sight in one eye only, as a mechanic. As part of his job, he had to do welding. At that time, it was not usual to supply goggles to men involved in this type of work.

A piece of metal flew into the claimant's sighted eye and he became completely blind. The defendant was liable, although they would not have been liable to a person with normal sight. The greater risk to the claimant meant that greater precautions had to be taken.

39.1.4 Social usefulness (utility) of the activity

The defendant may be found not liable if it is possible to show that taking the risk was justified, for example to avoid a potentially worse situation or to save someone. This can be useful in relation to the rescue services, as the following cases illustrate. The taking of any risk at all cannot be justified, and the court must take into account all the circumstances.

CASE EXAMPLES***Watt v Hertfordshire County Council (1954)***

A woman was trapped in a car following a car crash. The fire station that was called to the incident had special equipment to deal with this sort of event. It would usually be secured on its own vehicle. However, on this occasion, the vehicle was elsewhere, so the equipment was unsecured when it was taken to the scene. The driver of the fire engine had to brake sharply and the claimant, a fireman, was injured. However, he was not successful in his claim for damages as the need to save a life outweighed the risk taken with the equipment.

Griffin v Merseyside Regional Ambulance (1998)

The claimant drove through a green traffic light but collided with an ambulance which he had failed to see or hear. He had also ignored other drivers. Under the usual negligence principles, both drivers owed a duty of care. The claimant won his claim but was found to be 60 per cent contributorily negligent, as he should have taken care to move his car out of the way of the ambulance.

The more recent case of *Scout Association v Barnes* (2010) shows the importance of social value.

CASE EXAMPLE***Scout Association v Barnes (2010)***

[The Scout Association provides organised activities for young people.] At the time of the incident, the claimant was 13 years old. He suffered injuries when he was playing a game in the dark with other scouts. The Court of Appeal had to consider what weight needed to be given to the social value of the Scout Association's activities.

The court held that the activities were of great social value. However, there was extra risk of harm because the game was being played in the dark, and this was not outweighed by the social value of the activity. The Scout Association was liable for the injuries.

39.1.5 Practical precautions taken to minimise the risk

The defendant has to do what they can to minimise the risk of harm, but there is a limit to what they can be expected to do before the precautions become burdensome or unrealistic.

CASE EXAMPLE

Latimer v AEG Ltd (1953)

On the day of the claimant's accident, there was an exceptionally heavy rainstorm that flooded the whole of AEG's (the defendant's) factory. Oil rose to the top of the floor surface, so when the water drained away the surface was covered with an oily film. The defendant tried to clean the surface using all the sawdust available to them, but a small area of the factory remained oily.

The claimant went on duty, unaware of the problem with the floor. As he was trying to put a heavy barrel on a trolley, the claimant slipped on the surface and was injured. In the circumstances, the defendant had taken all possible precautions and the only other alternative to minimise the risk was to close the factory, which was unrealistic. The defendant was not liable to the claimant.

39.1.6 Common practice in relation to the risk

The fact that something is generally practised is strong evidence that the action/activity is not a negligent act, but it may be regarded as a negligent practice.

CASE EXAMPLE

Brown v Rolls Royce (1960)

The claimant contracted a skin disease at work. His employers (Rolls Royce) provided washing facilities but not a protective cream which was commonly used in the car industry. There was no liability imposed because there was no evidence that even if it were supplied, the protection cream would have prevented the skin disease.

39.2 Standard of care and different classes of defendant

The standard of care is not the same for everyone, as there are certain categories of people who are treated differently, for example children and medical professionals.

39.2.1 Children

There is very little case law about the duty of care owed by children, and most of the cases involve situations

▼ Figure 39.2 Elements to be considered when deciding if there has been a breach of duty

Key facts		
Element	Definition	Case
Foreseeability of the risk	The risk must be known at the time of the incident.	<i>Roe v Ministry of Health (1954)</i>
Magnitude of the risk	The size of the risk must be balanced against the action needed to avoid the harm.	<i>Haley v London Electricity Board (1965)</i>
Extent of the possible harm	The thin-skull rule – the claimant's beliefs, illnesses etc. are considered if they have an impact on the extent of the harm.	<i>Paris v Stepney Borough Council (1951)</i>
Social usefulness (utility) of the activity	Sometimes taking a risk is justified, e.g. to save a life.	<i>Watt v Hertfordshire County Council (1954)</i>
	Ambulance services must still be aware of road conditions and traffic controls, despite their social value.	<i>Griffin v Merseyside Regional Ambulance (1998)</i>
	The activities of the Scout Association are seen as socially useful.	<i>Scout Association v Barnes (2010)</i>
Practicality of precautions	What can the defendant do to prevent/limit the risk of harm?	<i>Latimer v AEG Ltd (1953)</i>
Common practice	A general practice is strong evidence that an action is not negligent.	<i>Brown v Rolls Royce (1960)</i>

where the child has been playing with the defendant. The existing law states that the standard of care owed depends on the age and experience of the child. This test was set out in *McHale v Watson* (1966) and approved in *Mullin v Richards* (1998).

CASE EXAMPLES

McHale v Watson (1966)

A 12-year-old boy threw a metal dart at a lamp post, but it bounced off and hit a nine-year-old girl in the eye. He was found not to be negligent, because a child of 12 could not be expected to foresee that the dart might not stick in the post. The judgment stated:

'The standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience.'

Mullin v Richards (1998)

The 15-year-old defendant injured the claimant when they were play-fighting with plastic rulers. It was held that the risk of harm suffered was not reasonably foreseeable by a 15-year-old, so there was no liability.

In both cases, it was stated that a child is not expected to have the perceptions of risk that an adult would have. This principle was applied in *Blake v Galloway* (2004), concerning a 15-year-old claimant whose eye had been injured when the defendant threw tree bark at him. The court decided that in the context of rough play there is only a breach of duty where the conduct amounts to recklessness or a very high degree of carelessness.

There is a strong policy reason behind setting a high threshold for children: social benefit. Where children are involved in rough play, there is the social benefit of allowing them to have fun without the worry of being sued for any harm they may cause.

In cases after 2006, s 1 of the Compensation Act 2006 invites the court to consider, when assessing the standard of care in a negligence claim, whether the defendant is engaged in a 'desirable activity' which might be affected if liability were to be imposed on the defendant. Rough play is likely to be regarded as a 'desirable activity', because that is what children do.

However, *Zanner v Zanner* (2010) concerned a child who was not involved in rough play.

CASE EXAMPLE

Zanner v Zanner (2010)

The defendant was 11 years old. He regularly drove his father's car in and out of the father's garage. One day while doing this he ran over his mother. She had been standing in the driveway, directing her son to drive very slowly, when his foot slipped from the brake to the accelerator. The child had regularly carried out this activity, so he had some competence in driving. For this reason, he was found liable for not driving to the same standard as a reasonable driver.

ACTIVITY

In *Orchard v Lee* (2009), the courts considered whether teachers should have rules about rough play or ban it completely. In this case, a lunch-break supervisor was injured when two boys were playing in the school yard. The full facts can be found at <https://www.brownejacobson.com/insurance/training-and-resources/legal-updates/2009/04/orchard-v-leecourt-of-appeal-3rd-april-2009>. You should read these before starting the questions below.

Waller LJ gave the leading judgment. He suggested that while children may appreciate that playing games could lead to bumps and scrapes, this should not mean that the defendant is liable. He went on to say that if a game was being played in an appropriate play area within the rules or accepted norms of the activity, then the defendant should not be liable in negligence.

Questions

- 1 State the standard of care that applies to children when deciding if there has been a breach of duty.
- 2 Name two cases which discuss the standard of care required by children.
- 3 Analyse the impact, if any, of *Orchard v Lee* (2009) on the law relating to children.
- 4 Evaluate the law relating to the standard of care for children.

39.2.2 Medical experts/professionals

Medical professionals do not have to conform to the usual rules on breach of duty in negligence. Their actions are not judged alongside the reasonable man. Instead, they have to comply with the test set down in *Bolam v Friern Hospital Management Committee* (1957). According to this case, the standard expected of the medical professional is that of a competent body of expert opinion. In theory, this means that even if the smallest number of professionals agree, that will be enough to show whether or not there is liability.

CASE EXAMPLE

***Bolam v Friern Hospital Management Committee* (1957)**

The claimant was undergoing electro-convulsive therapy as treatment for his mental illness. The doctor did not give him any relaxant drugs. The claimant suffered a serious fracture to his hip. Medical opinion was divided about whether the relaxant drugs should be given. If the drugs were given, there was a very small risk of death but, on the other hand, if they were not given there was a small risk of the claimant suffering fractured limbs.

The claimant argued that the doctor was in breach of his duty of care by not using the relaxant drugs.

It was held that, although there was a duty of care between the doctor and patient, there was no breach. The House of Lords formulated a test that had to be applied in the case of doctors:

'A medical professional is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.'

In *De Freitas v O'Brian* (1995), only 11 out of 1000 surgeons would have acted as the defendants did – but 11 surgeons were sufficient to be regarded as a competent body of medical opinion. The fact that surgeons disagree does not mean that there has been negligence. This was stated by Lord Scarman in *Maynard v West Midlands Regional Health Authority* (1985):

'A doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will also exist, in the medical profession as in other professions. There is seldom only one answer exclusive of all other to problems of professional judgment. A court may prefer one body of opinion to another but that is no basis for a conclusion of negligence.'

CASE EXAMPLE

***Maynard v West Midlands Regional Health Authority* (1985)**

The claimant had various tests done. However, the consultant defendants operated on her before the results came through. They thought that she had pulmonary tuberculosis, but also felt that she might have a form of cancer and decided to operate immediately.

She brought an action against them, alleging that the operation had damaged her vocal cords. The court held that there was no negligence, as the doctors had followed the approved practice of a body of medical opinion, even though there were conflicting practices at the time.

It has been argued that the *Bolam* test allows the medical profession to close ranks to protect itself, as it appears that it can set its own standard of care, unlike other people who are measured against the reasonable

man. This in turn can undermine confidence in the profession.

The *Bolam* test also extends to Chinese herbal medicine, as *Shakoor v Situ* (2001) shows.

CASE EXAMPLE

***Shakoor v Situ* (2001)**

The claimant suffered from a skin complaint and went to a Chinese herbalist who gave him a remedy. The claimant died of liver failure, which was a reaction to the herbal remedy.

The claimant's widow brought a claim, alleging negligence in the preparation of the remedy or failing to warn of the risks of harm. The court found that the actions of the herbalist were consistent with the standard of care appropriate to traditional Chinese herbal medicine, according to established requirements. There was no breach of duty.

The *Bolam* test is used in relation to the following areas of a doctor's role:

- » consent to treatment, for example an operation
- » examination of the patient and diagnosis
- » choice of treatment given to the patient
- » the doctor's level of expertise.

Consent to treatment

When deciding if the defendant has been negligent in providing information for the claimant to provide real consent to treatment, the court has to consider how much information a doctor must give to the patient.

The issue of consent was discussed in *Hatcher v Black* (1954) and *Sidaway v Governors of the Bethlem Hospital and Maudsley Hospital* (1985). These cases seem to illustrate that the *Bolam* test is biased towards the defendant, although it worked in the claimant's favour in *Chester v Afshar* (2004).

CASE EXAMPLES

Hatcher v Black (1954)

The claimant, a BBC broadcaster, went to hospital suffering from a toxic thyroid gland. It was recommended that she have an operation to deal with this. She asked the doctor if the operation posed a risk to her voice and she was reassured that this was not so; she consented to the operation. During the operation, there was damage to a nerve, which meant that she could no longer speak properly. She alleged that the doctor had been negligent in not telling her about this risk.

In his judgment, Lord Denning said that the doctor could tell the patient as much as they needed to know in the circumstances:

'What should a doctor tell a patient? The surgeon has admitted ... that he told the plaintiff that there was no risk to her voice when she knew that there was some slight risk; but that he did it for her own good ... he did it because in the circumstances it was justifiable ... but the law does not condemn the doctor when he only does what a wise doctor so placed would do.'

Lord Denning also said that the amount of information given to a patient is a clinical decision, rather than a judicial decision. As a result, the courts take an active view when deciding the amount of information that is to be given to a patient before treatment.

It has been suggested that Lord Denning was being overprotective of the medical profession in this judgment, but policy reasons suggest that the profession should be protected so that doctors do not have to worry about being sued in negligence for errors in clinical decisions.

Sidaway v Governors of the Bethlem Hospital and Maudsley Hospital (1985)

The claimant agreed to have an operation on her spine to relieve pain in her right arm and shoulder.

She was not told that there was a risk of less than 1 per cent that she might suffer damage to her spine. However, she did suffer damage to the spine and she became disabled. Although the operation was not carried out negligently, she sued the hospital, because the surgeon did not tell her about the risk of harm to her spine. The court held that in this case, the information given to the claimant by the doctor conformed to 'a practice accepted by a responsible body of neurosurgical opinion'. This meant that the defendant was not negligent.

The majority of the House of Lords was prepared to modify the *Bolam* test for the purpose of giving information to the patient. This modification was that where the court believed that the disclosure of a specific risk was necessary but it was not standard medical practice to disclose it, then following standard practice would not avoid liability.

Chester v Afshar (2004)

The defendant operated on the claimant in order to treat a back problem. When discussing the need for surgery, the defendant did not mention any risk of things going wrong. After the operation, the claimant suffered nerve damage, giving her paralysis in one leg. Later, she discovered that this was a known, if unusual, risk of the surgery. She sued the defendant.

Unlike the case of *Sidaway*, the court held that there was a breach of duty, as the defendant fell below the appropriate standard of care in failing to give full information to the patient. Here, the defendant should have disclosed all risks, no matter how slight they were. The court held that the patient had the right to choose what was done or not done to her, and she could only do this if she had been given all appropriate information. If that information had been given, the claimant would not have had the surgery and she would not have been harmed.

A recent case regarding consent is *Montgomery v Lanarkshire Health Board (2015)*, which shows how the patient/doctor relationship has changed since *Hatcher v Black*. The court highlighted how a patient is now likely to be more informed about risks attached to medical treatment because of the availability of information, for example on the internet.

CASE EXAMPLE

Montgomery v Lanarkshire Health Board (2015)

The claimant alleged that a doctor had been negligent when her son was severely injured at birth. She stated that she had been advised to have a natural birth, but the risks attached to it were not explained to her. The court stated:

'The doctor is therefore under a duty to take reasonable care to ensure that the patient

is aware of any material risks involved in any recommended alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

Examination of the patient and diagnosis

The *Bolam* test extends to the negligent examination of a patient and careless diagnosis.

CASE EXAMPLE

Ryan v East London and City Health Authority (2001)

The claimant suffered a permanent disability following an operation that was carried out after misdiagnosis of a spinal tumour. If the diagnosis had not been negligent, the claimant would have had the correct treatment and would not be disabled. In this instance, there was liability.

Choice of treatment given to the patient

Again, this is something that the courts believe is a clinical decision, as it is often made in emergency situations.

The doctor's level of expertise

It has been suggested that junior doctors should have a lower standard of care than those who are qualified. It is clear from case law that the judiciary does not agree with this proposition. The standard of care applied to junior doctors is the standard that is appropriate to a doctor exercising and professing to have the skill in question.

CASE EXAMPLE

Wilsher v Essex Area Health Authority (1988)

A junior doctor negligently gave a premature baby too much oxygen. The giving of excessive oxygen can lead to blindness, something that was known at the time. The claimant argued that this was the actual cause of the blindness, but there were five other possible causes.

The Court of Appeal rejected the idea that an inexperienced junior doctor owed a lower duty of

care. On appeal to the House of Lords, the court said that the burden of proof was on the claimant to show that the defendant breached the duty of care. However, the House of Lords still found that there was negligence. The court stated that a junior doctor must have the same degree of skill and care as an experienced doctor, but the *Bolam* test will be applied afterwards. Lord Glidewell said:

'The law requires the trainee or learner to be judged by the same standard as his more experienced colleagues. If it did not, inexperience would frequently be urged as a defence to an action or professional negligence.'

Despite the courts indicating that the same standard of care should be applied to doctors with all levels of experience for policy reasons, this is not always the position, as can be seen in *Knight v Home Office* (1990), where the Home Office was not liable for the victim's death.

CASE EXAMPLE

Knight v Home Office (1990)

The claimant was the victim's personal representative and sued the defendant on behalf of the prisoner's son. The prisoner was held in a prison for which the defendant was responsible. The prisoner was known to have suicidal tendencies and was on a 15-minute watch but the supervision of him was not carried out. The prisoner succeeded in killing himself. It was argued that the same standard of care should be applied to prison hospitals as to psychiatric hospitals, but this failed. The reason for this was because the primary function of the prison was to detain inmates, even though the prison hospital was required to provide the same degree of care as hospitals outside. Also, the prison hospital would not have had the same level of financial investment as an external hospital.

The *Bolam* principle has been extended to cover other professionals, such as pharmacists, auctioneers and local authorities. All professionals are measured against the standard held by a reasonably competent body of expert opinion with the particular skill in question.

CASE EXAMPLES

Horton v Evans (2006)

A pharmacist was held liable for the side-effects suffered by a customer whose doctor prescribed drugs eight times stronger than her usual dose. In the circumstances, a reasonably careful and competent pharmacist would have noticed the incorrect dosage and queried it with either the claimant or the doctor, or with both of them.

Luxmoore May v Messenger May and Baverstock (1990)

A firm of auctioneers and valuers assessed two paintings as worth about £50 each. The paintings were sold at auction and fetched about £840, but five months later they were sold for £88000. The original owners of the paintings sued for the difference in value.

The Court of Appeal said that the standard of care owed by the defendant was the same standard of care owed by a general auctioneer, rather than the standard of care owed by a specialist. Using the standard owed by a general auctioneer, the defendant had carried out their work reasonably

competently, and an error of judgement (failing to recognise a painting by a famous artist) did not necessarily breach the duty of care. There was no breach of duty in this instance.

Adams v Rhymney Valley District Council (2000)

The local council fitted double-glazed windows in the claimant's property. The windows could only be opened with a key. A fire broke out at the property; three family members died and one was badly injured when trying to escape the fire, as they were unable to smash the windows in time.

At trial, the judge said that the council was not liable because it had exercised the skill and care of a competent window designer in fitting windows with keys. The Court of Appeal held that in deciding on the window design, the defendant had to balance the risk of children falling out of the window and the risk of fire. Expert opinion was divided on how this balance could be struck. The court held that if a reasonable body of experts agreed with the way in which the council struck the balance, there would be no negligence.

Internet research

Bolam is still a key case in relation to breach of duty for doctors and other professionals.

However, how important is the case now, when patients are becoming more informed about medical issues because of access to information online and in other sources?

Read the article at www.gponline.com/short-history-bolam-test-keystone-medical-negligence-law-60-years/article/1441675 and make notes about how the law has developed and why.

CASE EXAMPLE

Whitehouse v Jordan (1981)

The claimant was a baby who suffered severe brain damage after the mother had difficulty in giving birth. The defendant, a senior hospital registrar, was supervising the delivery in a high-risk pregnancy. After the mother had been in labour for 22 hours, the defendant used forceps to assist the delivery. The mother gave evidence stating that the defendant had pulled too long and too hard when the forceps were used.

The Court of Appeal considered two issues: in what manner did the defendant use the forceps, and was that manner consistent with the degree of skill and

care required by his profession? The evidence was not strong enough for the claimant to prove the allegation that the way in which defendant used the forceps was incorrect. In relation to the second issue, the court relied on the *Bolam* test and rejected any other test. So, the defendant's standard of care did not fall below the standard of a reasonable doctor in the circumstances, and the claim failed.

In *obiter dicta*, the House of Lords said that the same standard of negligence should be applied to doctors as the rest of the world (that is, the reasonable man test should apply), but the House of Lords did not change the decision made by the Court of Appeal.

▼ Figure 39.3 Key cases: special categories of defendant

Key cases		
Category	Case	Comment
Children	<i>McHale v Watson</i> (1966)	The standard of conduct should take into account a similar child's age, intelligence and experience.
	<i>Mullin v Richards</i> (1998)	Is the risk of harm foreseeable by the child?
	<i>Blake v Galloway</i> (2004)	There will always be a breach if the conduct is reckless or there is a very high degree of carelessness.
	<i>Zanner v Zanner</i> (2010)	An eleven year old was held to the same standard of care as a reasonable driver.
Medical experts/ professionals	<i>Bolam v Friern Hospital Management Committee</i> (1957)	The standard expected of the medical professional is that of a competent body of expert opinion.
	<i>De Freitas v O'Brian</i> (1995)	11/1000 surgeons were regarded as a competent body of expert opinion.
	<i>Maynard v West Midlands Regional Health Authority</i> (1985)	No liability as the doctor followed approved medical practice.
	<i>Shakoor v Situ</i> (2001)	There was no breach of duty as the defendant's actions were of the same standard as other Chinese herbalists.
	<i>Hatcher v Black</i> (1954)	In terms of consent, the doctor could tell the patient as much as they needed to know in the circumstances.
	<i>Sidaway v Governors of Bethlem Hospital and Maudsley Hospital</i> (1985)	This modified the <i>Bolam</i> test in relation to giving information to a patient.
	<i>Chester v Afshar</i> (2004)	All risks should have been disclosed to the patient, to ensure that an informed decision could be made.
	<i>Montgomery v Lanarkshire Health Board</i> (2015)	A doctor has a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended alternative or variant treatments.
	<i>Ryan v East London and City Health Authority</i> (2001)	There was a breach of duty as the failure to diagnose correctly led to incorrect treatment being given.
	<i>Wilsher v Essex Area Health Authority</i> (1988)	A junior doctor is regarded as having the same skill and care as an experienced doctor.
	<i>Knight v Home Office</i> (1990)	A prison hospital is not held to the same standard of care as a state funded hospital because of lack of funding.
	<i>Horton v Evans</i> (2006)	A pharmacist is judged against the standard of a careful, competent pharmacist.
	<i>Luxmoore May v Messenger May and Baverstock</i> (1990)	A general auctioneer is not expected to have the same expertise as a specialist art auctioneer.
	<i>Adams v Rhymney Valley District Council</i> (2000)	The council was judged against a reasonable body of experts – in this case, window installers.
	<i>Whitehouse v Jordan</i> (1981)	The evidence was not strong enough, so the standard of care did not fall below the standard of a reasonable doctor in the circumstances.

TARGET SKILLS

- 1 Explain the *Bolam* test.
- 2 Name a case where the court modified the *Bolam* test.
- 3 Assess whether it is fair that doctors are allowed to set their own standard of care.
- 4 Evaluate whether it is fair to have different standards of care.

COMMENT

Evaluation of the law relating to breach of duty

It has been argued that the reasonable man test is an outdated concept, as it was first devised in the nineteenth century when society was different from today, and it fails to take account of gender equality. However, the reasonable man test has attributes that can be applied to both males and females.

The reasonable man test also seems to provide a consistent approach to breach of duty, as the same standard is applied to everyone. The test is not dependent on the characteristics of a specific defendant. This means, for example, that inexperience cannot be used as a defence to avoid liability. Even so, it might be unfair to expect an inexperienced defendant to act in the same way as an experienced defendant.

Although the reasonable man test generally provides a consistent approach, this is not the case in relation to professionals such as doctors. The concept of what is a competent body of professionals can be difficult to determine until it is tested. The body can be as few as 11 people, as *De Freitas* (1995) shows. It has been argued in cases such as *Whitehouse v Jordan* (1981) that the reasonable man test should also apply to doctors, but this thinking has not been acted upon.

Even though the tests are not perfect, they are fairly applied, as a defendant will only be liable for damage for which they are at fault. This can appear harsh, as the claimant might not be compensated for serious harm, but in every civil case there must be a party who is unsuccessful.

STRETCH AND CHALLENGE

In *Nettleship v Weston*, the court said that a learner driver is expected to meet the same standard of care as a reasonable qualified competent driver.

Discuss whether this principle is fair, providing reasons and supporting cases.

TEST YOURSELF

- 1 Define breach of duty.
- 2 State the two elements that are considered by the courts in relation to breach of duty.
- 3 What is the definition of a 'reasonable man'?
- 4 List the factors which the courts consider when deciding on standard of care.
- 5 Describe the thin-skull rule, including a relevant case.

EXAM-STYLE QUESTIONS

- 1 Kennedy suffers from serious back problems and, having paid a visit to his local hospital, he is advised by Nicholls, a consultant surgeon, that it will require corrective surgery. He decides to undergo the operation.

As a consequence of the operation carried out by Nicholls, Kennedy suffers paralysis in both legs and is unable to walk again; he consequently loses his job as a lorry driver which is his only source of income.

Kennedy later discovers that paralysis was a known, slight risk with such operations to the back. He claims that Nicholls should have told him about the risk before he decided to undergo the surgery.

Assess Nicholls' potential liability in tort for the losses sustained by Kennedy.

Cambridge AS and A Level Law 9084 Paper 43 Q4 October/November 2014

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- 2 Evaluate the extent to which the rules for proving a breach of duty are just to all types of claimant.

Introduction

Causation is the third element that needs to be proved to establish negligence according to *Donoghue v Stevenson* (1932). The claimant must show, on the facts, that the defendant's breach of duty caused their harm and/or loss.

The courts have devised the 'but for' test to establish factual causation, before considering remoteness of damage (causation in law).

Liability can be avoided if the defendant can show that damage of that type is not reasonably foreseeable, or that it would not be reasonable to impose liability for that type of harm. This chapter links to the key concept of liability for actions or omissions.

40.1 Factual causation: the 'but for' test

The defendant's breach of duty must be the cause of the damage – either totally, or at the very least it must have 'materially contributed' to the damage. The use of the 'but for' test removes the factors that could not have had any causal effect.

The 'but for' test is described in *Cork v Kirby Maclean Ltd* (1952):

'If the damage would not have happened but for a particular fault then that fault is the cause of the damage; if it would have happened just the same, fault or no fault, the fault is not the cause of the damage.'

This is the test that is used to establish causation in fact. If the harm would not have happened 'but for' the defendant's negligent behaviour, the negligence is the cause of that harm.

This test was used in *Barnett v Chelsea and Kensington Hospital Management Committee* (1968).

CASE EXAMPLE***Barnett v Chelsea and Kensington Hospital Management Committee* (1968)**

The claimant's husband went to hospital, as he was ill after drinking some tea. The doctor told a nurse over the phone to tell him to go home and call his own doctor. He died. It was later discovered that he had been poisoned.

The claim failed. The question that the court had to decide was whether the harm would not have occurred 'but for' the defendant's breach of duty.

The hospital was able to show that even if the claimant's husband had been examined with proper care, he would still have died. Since the death would have happened anyway, the defendant's breach of duty was not the factual cause of death.

Sometimes, it is not clear what would have happened 'but for' the defendant's negligence. You will remember the case of *Chester v Afshar* (2004) in subsection 39.2.2, and the fact that causation was an issue for the court to decide upon. The court said that in this specific case, it was difficult to prove causation using the 'but for' test. Policy considerations required a judge to decide whether justice demanded that the usual approach to causation (the 'but for' test) should be modified. So, on policy grounds, the causation test was met and the claimant won her claim. In the judgment, the Law Lords made it clear that the case was unusual and decided on its own particular facts.

The 'but for' test is simple to use where there is one cause of harm and one defendant, but it is not always adequate in other instances, such as where:

- » the claimant has lost the chance of a full recovery
- » there are several concurrent causes of harm
- » there are consecutive causes of harm.

40.2 Problems with the 'but for' test**40.2.1 Loss of chance cases**

Loss of chance cases usually involve medical negligence. The claimant will have a percentage chance of being cured, but that percentage is reduced by the doctor's delay in diagnosing or treating the illness. The court has to decide if the delay can be said to have caused the patient not to be cured, or whether that would have been the situation even if the doctor had not acted negligently.

CASE EXAMPLE

Hotson v East Berkshire Area Health Authority (1987)

The claimant was rushed to hospital when he suffered a hip injury following a fall from a tree. The damage to his hip created a 75 per cent chance that he would develop a permanent disability. The defendants negligently failed to diagnose the claimant's hip condition and it went untreated for five days. By the time the mistake was discovered, the claimant had a permanent disability.

At trial, the court held that the delayed treatment had deprived the claimant of a 25 per cent chance of recovery. He was awarded 25 per cent of the full amount of compensation.

On appeal to the House of Lords, the decision was reversed. There was no basis for the judge's decision to award damages for loss of chance of complete recovery. If the claimant had to prove on the balance of probabilities that he would have recovered if given proper treatment, he was entitled to full compensation. If the claimant could not do this, there would be no compensation payable.

As can be seen by this case, the courts are not willing to award compensation to the claimant for this type of claim. This was reinforced in *Gregg v Scott* (2005), where the claimant was claiming damages for loss of chance of a more favourable outcome.

CASE EXAMPLE

Gregg v Scott (2005)

The claimant visited his doctor, complaining of a lump under his left arm. The doctor said that there was nothing to worry about. Nine months later, as the lump was still there, the claimant consulted another doctor, who referred him to a surgeon. The claimant was diagnosed with cancer. The claimant was treated and went into remission, but it was not clear whether he was actually cured.

At trial, the court held that the misdiagnosis had reduced the claimant's chances of surviving for more than ten years from 42 per cent to 25 per cent. The judge dismissed the claim, because the delay had not deprived him of the prospect of a cure. At the time of the diagnosis, the claimant had less than a 50 per cent of surviving more than ten years anyway. The decision was upheld in the House of Lords, with the court stating that liability for loss of chance of a more favourable outcome should not be introduced into personal injury claims.

CASE EXAMPLE

Bonnington Castings Ltd v Wardlaw (1956)

The claimant was a steel worker who contracted a lung disease by inhaling silica particles. The defendant failed to provide an extractor fan. If the defendant had done so, the number of silica particles that the claimant would have been exposed to would have been reduced but not eliminated.

There were two potential causes of the claimant's illness: the 'guilty' dust that should not have been in the working environment, and the 'innocent' dust that would have been present anyway.

At trial, the defendant was found liable because he could not show that the 'guilty' dust did not cause the harm to the defendant. On appeal, the House of Lords held that the claimant only had to prove that the 'guilty' dust had made a material contribution to the disease. The claimant did not have to demonstrate on the balance of probabilities that the 'guilty' dust was the only cause of the disease.

40.2.2 Several concurrent causes of harm

Where there is more than one possible cause of damage, the courts have modified the 'but for' test, in an effort to find a fair way of deciding whether liability should be imposed on the defendant. Initially, the courts looked at whether the defendant's conduct led to a material increase of harm.

The House of Lords did not indicate what amounted to 'material contribution' in this case. There was no definition or percentage attached, but the courts finally addressed this in *Sienkiewicz v Greif (UK) Ltd* (2011), which followed the case of *McGhee v NCB* (1973), in which it was held that where there is more than one possible cause of injury, causation can be proved if the claimant can show that the defendant's negligence materially increased the risk of the injury occurring.

CASE EXAMPLE

McGhee v NCB (1973)

The claimant worked in a brick kiln and developed a skin disease. One possible cause of this was exposure to brick dust in the kiln. Another possible cause was the failure of the defendant to provide washing facilities. This meant that when the claimant cycled home, the dust rubbed his skin.

The evidence was unable to show that if the washing facilities had been provided, the claimant would not have got dermatitis. This meant that the 'but for' test could not be used, because it was impossible to say that the claimant's injuries would not have happened

but for the defendant's negligence. Equally, it was impossible to say that they would definitely have happened without the negligence.

The court devised a modification of the 'but for' test, as there was more than one possible cause of harm. It stated that causation could be proved if the claimant could show that the defendant's negligence had 'materially increased' the risk of the injury occurring. The claimant does not have to show that the defendant's negligence was the only cause of harm. In this case, the lack of washing facilities was held to substantially increase the risk of the claimant's harm, so he won his action.

This 'material increase' approach was used in *Bailey v Ministry of Defence* (2008).

CASE EXAMPLE

Bailey v Ministry of Defence (2008)

The claimant suffered brain damage while she was in a hospital run by the defendants. The defendants admitted negligence in the early stages of her care. The brain damage was caused after this, when the claimant suffered a heart attack after inhaling her own vomit. This was something that could have happened because she was in a weakened state, and she was in this condition because of the earlier negligence.

The Court of Appeal decided in favour of the claimant, on the grounds that 'but for' the defendants' negligence, she would not have been in that weakened state. Therefore, the defendants' negligence made a material contribution to what happened.

Sometimes, the court will use a different approach from *McGhee*, where a claimant must prove on the balance of probabilities that the defendant's negligence was a material cause of their injury. It is not sufficient to show that the defendant merely increased the risk of damage. This was the basis of the decision in *Wilsher v Essex Area Health Authority* (1988).

CASE EXAMPLE

Wilsher v Essex Area Health Authority (1988)

The claimant's blindness could have been caused by any one of five separate medical conditions that he suffered from. The House of Lords decided

that the claimant had to prove, on the balance of probabilities, that the defendant's breach of duty was a material cause of the injury. It was not enough to prove that the defendant had increased the risk that harm might occur.

On the facts, the defendant's negligence was only one of the possible causes, and this was not enough to prove causation, so the claimant lost his claim.

40.2.3 Consecutive causes of harm

Where two independent events cause the damage, and the second defendant's breach of duty causes the same damage as that caused by the first defendant, the first event should be treated as the cause.

CASE EXAMPLES

Baker v Willoughby (1970)

The claimant suffered an injury to his left leg in a road traffic accident caused by the defendant's negligence. Before the trial for the negligence claim, the claimant was the victim of an armed robbery at his place of work. He suffered gunshot wounds to his left leg, and as a result of his injuries, his leg had to be amputated.

The defendant admitted negligence for the first injury but argued that his responsibility ended when the claimant was shot. The defendant argued that the claimant would be over-compensated for the injury caused by the defendant if all losses from the date of the shooting were included. The House of Lords rejected this argument, as it produced an injustice on the claimant's part. So, the defendant was liable for the full extent of the claimant's injury. If this decision had not been reached, the claimant would have been under-compensated, because

there was no one to sue for the second injury (the amputation).

Jobling v Associated Dairies (1981)

The defendant was liable in negligence when the claimant sustained a back injury at work. The injury led to a 50 per cent reduction in his earning capacity.

Three years later, and before the trial for the negligence claim, the claimant contracted a spinal disease, making him totally unfit for work. Relying on *Baker v Willoughby*, the claimant claimed compensation for the first injury and the spinal disease.

However, the House of Lords held that the defendant was liable for the reduced earning capacity up to the date of the onset of the spinal disease. This was because the spinal disease was brought about by natural causes.

Fitzgerald v Lane (1989)

A pedestrian was hit by two negligently driven cars in a very short space of time. Each driver was held liable for all the injuries, as it could not be shown which impact had caused the claimant's harm.

ACTIVITY

In *Performance Cars Ltd v Abraham (1962)*, the defendant hit the claimant's car (a Silver Cloud Rolls Royce) as a result of his admitted breach of duty. Two weeks prior to this incident, the Rolls Royce had been in a previous incident, whereby another negligent driver had hit the car.

As result of the first incident, the car required a respray. The claimant claimed £75 for the respray and obtained judgment by default. However, the claimant never received the sum. The claimant sought to claim the £75 from the defendant. It was conceded that the claimant could not recover the same loss twice. The question for the court was which defendant should pay, or whether they should be jointly liable.

The first defendant was held responsible for the whole amount. The second defendant was therefore absolved from all liability to pay.

Questions

- 1 What was the court concerned might happen if the claimant could recover from both the defendants?
- 2 Why did the 'but for' test have to be modified in this instance?

40.2.4 Multiple tortfeasors

What happens if there are multiple tortfeasors? That is, what if there is more than one defendant who could be responsible for the harm, in whole or in part?

This is sometimes an issue when the claimant has suffered a work-related illness that has taken years to develop, and so it is not clear at what point the harm was done. The law is set out in a line of cases, beginning with *Holtby v Brigham and Cowan (2000)*.

CASE EXAMPLE

Holtby v Brigham and Cowan (2000)

The claimant suffered from asbestosis (a serious, long-term lung condition) as a result of breathing in asbestos fibres at work over a long period of time. He had been employed by the defendants for about half that time and by other companies doing similar work for the rest of the time.

The defendants were liable, as it was shown that their negligence had made a material contribution to the claimant's harm. If the harm to the claimant had been caused by the negligence of others also, then the defendants would be liable for a proportion of the compensation payable. This was assessed to be 75 per cent.

This principle can work harshly against the claimant, as they may not recover compensation in full. This problem was partially corrected by *Fairchild v Glenhaven Funeral Services (2002)*.

CASE EXAMPLE

Fairchild v Glenhaven Funeral Services (2002)

The claimant suffered from mesothelioma, a form of cancer that develops after inhaling asbestos fibres. He had been exposed to the fibres during the course of employment with several different employers. Some of the former employers had gone out of business and could not be sued. Unlike asbestosis, it is impossible to medically prove when the disease was contracted because of the way in which it develops. So, it was impossible to prove precisely which defendant was responsible for the negligent exposure.

Each defendant denied liability, on the basis that the claimant could not prove that 'their' asbestos made the critical contact.

The Court of Appeal used the 'but for' test, so the claimant failed on the balance of probabilities of which period of employment had caused or

materially contributed to the harm to the claimant. On appeal to the House of Lords, their Lordships applied and extended *McGhee*. On the balance of probabilities, each defendant's breach of duty to the claimant had materially increased the risk of him contracting mesothelioma. It was enough to show that the asbestos exposure for which any one defendant was responsible had contributed materially to the risk of harm.

This case is very much a policy decision. The Law Lords found that the injustice caused by denying compensation to employees who had suffered terminal harm outweighed the potential unfairness in imposing liability on successive employers who could not be proved to have caused harm.

Each defendant was under a duty to protect the claimant from mesothelioma and they breached that duty. Policy decided that each should be held liable, as they had each increased the risk of harm. The claimant was entitled to compensation in full. This was seen as fair, although the defendants did not see it this way, as they had to pay compensation even if they were not to blame for the harm.

The courts took the chance to amend the situation in a similar case called *Barker v Corus UK Ltd* (2006).

CASE EXAMPLE

Barker v Corus UK Ltd (2006)

The claimant contracted mesothelioma after working for a number of employers. He worked for the defendant between 1960 and 1968. He then worked for another employer for a period of six weeks, where he was also exposed to asbestos. After 1968, he was self-employed for twenty years. During this time, he was exposed to asbestos on three occasions.

The defendant argued that the claimant's exposure to asbestos while he was self-employed prevented him from being able to rely on the causation principle created in *Fairchild* – the claimant is able to prove the defendant's breach materially increased the risk of the claimant contracting mesothelioma.

It was held in the Court of Appeal that *Fairchild* applied, so the claimant was successful. However, his damages were reduced by 20 per cent for contributory negligence for the periods where he exposed himself to asbestos.

Barker had the effect of partially overruling *Fairchild*. Although the defendant could still be liable without proof of causation, liability was several rather than joint, so the defendant's contribution was limited to the extent that their negligence exposed the claimant to the risk of contracting mesothelioma.

The insurance companies that were paying the compensation saw this case as a victory, as it would save them millions of pounds, but trade unions and mesothelioma support groups were not so happy. Adverse publicity about the case put pressure on the Labour government who were in power at the time to introduce emergency legislation to restore the *Fairchild* principle in full in relation to mesothelioma cases only.

Section 3(1) was inserted into the Compensation Act 2006, which states that where an employee has contracted mesothelioma as a result of exposure to asbestos, causation can be proved by showing that the exposure made a 'material contribution to the risk'. This section was interpreted in *Sienkiewicz v Greif (UK) Ltd* (2011).

CASE EXAMPLE

Sienkiewicz v Greif (UK) Ltd (2011)

The claimant died of mesothelioma. From 1966 to 1984, she was an office worker at the defendant's factory that manufactured steel drums. During the manufacturing process, asbestos fibres were released into the air. Although the claimant did not work on the factory floor, her duties took her all over the premises. As with other people in the area, she would have been exposed to a low level of asbestos in the general atmosphere.

The defendant argued that:

- any negligent exposure to asbestos while the claimant was at work was minimal and far less than the usual environmental exposure

- the *Fairchild* principle did not apply because this was a single exposure to asbestos (the defendant was the only known source of occupational exposure) and the exposure was not 'material' but minimal
- the appropriate causation test was the 'doubles the risk' test; that is, there would only be liability if the occupational exposure could be shown to have at least doubled the risk of the claimant contracting mesothelioma.

The trial judge agreed with the defendant, stating that there was no liability because the exposure at work increased the risk of harm by only 18 per cent.

The Court of Appeal held on appeal that the proper test was whether the occupational exposure had materially increased the risk of contracting mesothelioma. It did not matter whether 'the other exposure' was negligent or non-negligent; the claimant could prove causation by any available test, including a material (more than minimal) increase in risk.

The defendant appealed to the Supreme Court, which dismissed the case. The court held that the 'doubles the risk' test was unsuitable as a test for causation in mesothelioma cases. The *Fairchild* exception or principle was developed for mesothelioma cases because of the medical uncertainty about the disease's biological cause. The principle will apply regardless of whether it is a case of single or

multiple exposures. The Supreme Court considered what could be regarded as a material increase in risk. This was some time in coming, as it had been mentioned initially in 1956.

Lord Phillips stated the problem that the judiciary had in this regard:

'I doubt whether it is ever possible to define in quantitative terms what for the purposes of the application of any principle of law is *de minimis*. This must be a question for the judge on the facts of the case.'

In this case, material contribution was considered to be 18 per cent.

▼ Figure 40.1 Key cases: modifications to the 'but for' test

Key cases		
Area	Case	Principle
Factual causation	<i>Barnett v Chelsea and Kensington Hospital Management Committee</i> (1968)	This case established the 'but for' test.
Loss of chance	<i>Hotson v East Berkshire Area Health Authority</i> (1987)	In loss of a chance of recovery cases, the claimant must prove causation on the balance of probabilities. That is, the claimant must prove that it was more likely than not that the negligence caused the injury.
	<i>Gregg v Scott</i> (2005)	Liability for loss of chance should not be introduced to increase claims.
Several concurrent causes of harm	<i>Bonnington Castings Ltd v Wardlaw</i> (1956)	Did the defendant materially contribute to the harm?
	<i>McGhee v NCB</i> (1973)	Where there is more than one possible cause of harm, causation can be proved if the defendant's negligence materially increased the risk of harm.
	<i>Bailey v Ministry of Defence</i> (2008)	If medical science cannot prove that 'but for' the defendant's negligence the damage would not have happened, the claimant can prove causation if the defendant made a 'material contribution' to the damage.
	<i>Wilsher v Essex Area Health Authority</i> (1988)	The claimant must prove, on the balance of probabilities, that the defendant's negligence was a material cause of their injury.
Consecutive causes of harm	<i>Baker v Willoughby</i> (1970)	Where two independent events cause the damage, and the second defendant's breach creates the same damage as the first defendant, the first event is treated as the cause.
	<i>Jobling v Associated Dairies</i> (1981)	Liability for the claimant's first injury and the later disease was placed on the defendant as the disease was brought on by natural causes.
	<i>Fitzgerald v Lane</i> (1989)	It was not possible to prove who caused the harm so both defendants were liable.
Multiple tortfeasors	<i>Holtby v Brigham and Cowan</i> (2000)	If there are multiple tortfeasors, a defendant will be liable if it can be shown that the defendant made a material contribution to the harm suffered.
	<i>Fairchild v Glenhaven Funeral Services</i> (2002)	Each defendant will be liable if it can be shown that they made a material contribution to the risk of harm.
	<i>Barker v Corus UK Ltd</i> (2006)	The defendant's contribution to the harm was limited to the extent that they negligently exposed the claimant to harm.
	<i>Sienkiewicz v Greif (UK) Ltd</i> (2011)	Material contribution to harm was said to be 18%.

40.3 Intervening acts

If the defendant can show that an intervening act (*novus actus interveniens*) has caused the damage rather than the defendant, it may break the causal link between the defendant's breach of duty and the harm. This means that the defendant will not be liable to the claimant. The intervening act can arise in two main ways:

- » intervention by the claimant
- » intervention by a third party.

40.3.1 Intervention by the claimant

Usually in tort, when the claimant's actions are called into question, it is in relation to contributory negligence. The defence of contributory negligence is discussed in Section 47.2. If a claimant is found to be contributorily negligent, their damages are reduced in proportion to their blame. Sometimes, however, the defendant may allege that the claimant's behaviour breaks the chain of causation.

Lord Reid summed up this type of intervention in his judgment in *McKew v Holland and Hannen and Cubitts* (1969):

'If the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is *novus actus interveniens*.'

The claim failed in this case, in contrast to *Wieland v Cyril Lord Carpets* (1969) in which the defendant was liable for additional injuries.

CASE EXAMPLES

McKew v Holland and Hannen and Cubitts (1969)

The claimant suffered an injury to his leg, caused by the defendant's negligence. For some time after the accident, he suffered from a condition that meant his leg frequently gave way under him.

While he had this condition, he tried to walk down a steep flight of stairs that had no handrail, without any assistance and while carrying his daughter. His leg gave way, and he fell and suffered further injuries.

He claimed that the defendant was liable for the original injury *and* for the injuries he sustained when he fell down the stairs. The court held that the defendant was not liable for the additional injuries, as the claimant's action was an intervening act. He was fully aware of the weakness in his leg and his behaviour was unreasonable.

Wieland v Cyril Lord Carpets (1969)

The claimant had been negligently injured by the defendant and forced to wear a surgical collar. The collar restricted her ability to focus her bifocal glasses and as a result, she sustained further injuries when she fell down some steps. The defendant was found liable for the whole extent of the injuries, because the claimant had not acted unreasonably. The chain of causation was not broken.

It is clear that not all irresponsible behaviour by the claimant will be enough to break the chain of causation. It will break the chain if a fair result needs to be achieved, however, as happened in *Spencer v Wincanton Holdings* (2009).

CASE EXAMPLE

Spencer v Wincanton Holdings (2009)

The claimant had a false leg, but fell over one day when he was not wearing it. The Court of Appeal considered the fairness and unfairness to both parties when deciding if the claimant's failure to wear his false leg broke the chain of causation. The court decided that this was contributory negligence rather than an act that broke the chain of causation.

Internet research

Spencer v Wincanton Holdings (2009) can be explored in more detail here: www.brownejacobson.com/insurance/training-and-resources/legal-updates/2010/01/spencer-v-wincanton-holdings-ltdcourt-of-appeal-21st-december-2009

40.3.2 Intervention by a third party

If the defendant's breach of duty is followed by a third-party act that also causes the claimant damage, the court has to decide the extent to which the defendant is liable. If the third-party action is an intervening act, the defendant will not be liable for any harm occurring after the second act. In order to break the chain of causation, the third-party action must be voluntary and independent of the breach of duty.

Where a later event in the chain is the intervening act of a third party, negligent behaviour is more likely to break the chain of causation than behaviour that is not.

CASE EXAMPLE

***Knightley v Johns* (1982)**

The defendant's negligent driving had blocked a busy road tunnel. The police inspector in charge sent the claimant (a police officer) to drive against the traffic flow to close the tunnel entrance. The claimant was injured by a car being driven in the opposite direction as he was driving back into the tunnel.

The claimant brought an action against the defendant. The court found that the chain of causation was broken by the police inspector's actions. It was probable and foreseeable that the police would deal with the accident and that there might be risk-taking. However, there were so many errors before the claimant was sent back into the tunnel that the inspector's negligent behaviour was the cause of the claimant's injuries, not the defendant's negligent behaviour.

The court held that the defendant was not liable for the injuries to the claimant.

▼ Figure 40.2 Key cases: intervening acts

Key cases	
Case	Principle
<i>McKew v Holland and Hannen and Cubitts</i> (1969)	No liability for the additional injuries as the claimant's walk down steep stairs with weakened legs was an intervening act.
<i>Wieland v Cyril Lord Carpets</i> (1969)	There was liability for harm caused following the use of bifocal glasses as the wearing of the glasses was not an intervening act.
<i>Spencer v Wincanton Holdings</i> (2009)	Failure to wear a false leg was not an intervening act but was considered to be contributory negligence so that a fair result could be achieved.
<i>Knightley v Johns</i> (1982)	No liability as the police inspector's negligent behaviour was an intervening act.

40.4 The test for remoteness of damage

In tort, there is one test for remoteness of damage (causation in law), and this can be found in *The Wagon Mound (No. 1)* (1961). This overruled the test in *Re Polemis* (1921).

Even if causation in fact can be proved, the defendant may still avoid liability if it is not possible to prove causation in law. That is, the claimant has to prove that the damage or harm caused is not too remote. Again, this area of law is affected by policy considerations, so

that neither the defendant nor the defendant's insurers are overburdened.

As stated above, the courts used the *Polemis* test to prove legal causation. In this case, the courts said that the test was whether the damage was a direct consequence of the breach of duty. This was overruled by *The Wagon Mound (No. 1)* (1961).

CASE EXAMPLE

***The Wagon Mound (No. 1)* (1961)**

▲ Figure 40.3 Sydney Harbour Bridge, where fuel oil was discharged in *The Wagon Mound (No. 1)*

Due to the carelessness of the defendants, a large quantity of fuel oil was discharged from their ship in Sydney Harbour. The oil was carried by wind and tide to the claimants' wharf about 600 feet away, where welding was being carried out on another ship. After making enquiries, the claimants were advised that it was safe to continue with the welding on the wharf. Two days later, the oil caught fire, and the wharf and the ships being repaired were extensively damaged. The oil had also congealed on the slipways and interfered with the claimants' use of the ships.

At trial, the court found that there was a breach of duty, and causation in fact and law was proved as the decision in *Re Polemis* was followed. The case was appealed to the Privy Council. That court reversed the decision, holding that the fact that some of the damage suffered (the damage to the slipway) was foreseeable did not make the defendants liable for the fire damage that was not foreseeable.

The Privy Council stated that the test for remoteness of damage was whether the kind of damage sustained was reasonably foreseeable. The court went on to state that the test for remoteness in *Re Polemis* should no longer be regarded as good law.

If the type (kind) of damage suffered is reasonably foreseeable, the precise way in which it occurred need not have been foreseeable. The following cases are examples of how this has worked in practice.

CASE EXAMPLE

Doughty v Turner Manufacturing (1964)

An asbestos cover was knocked into a cauldron of a molten chemical. A minute or two later, due to a chemical reaction that was not known at the time, the liquid erupted and the defendant suffered burns as a result. The Court of Appeal accepted that it was previously unknown that there would be such a reaction. *The Wagon Mound (No 1)* was applied to the facts. The chemical reaction was unforeseeable and the damage was too remote (not reasonably foreseeable) to impose liability on the defendant. The claimant's claim failed.

CASE EXAMPLE

Smith v Leech Brain and Co. (1962)

The claimant suffered a burn to his lip because of inadequate safety measures at the defendant's factory. The claimant's lip was in a pre-malignant condition and the burn caused him to develop cancer that led to his death. The defendant argued that it was not reasonably foreseeable that the claimant would suffer cancer from being burned.

The defendant was liable, even though the only foreseeable injury was a burn caused by a splash. However, the thin-skull rule applied, so the only question to be asked was whether the burn was foreseeable, not whether the cancer was foreseeable.

▼ Figure 40.4 Key cases: legal causation – remoteness of damage

Key cases	
Case	Principle
<i>Re Polemis</i> (1921)	The defendant is liable for all the direct consequences of their negligent behaviour, no matter how unusual or unexpected.
<i>The Wagon Mound (No. 1)</i> (1961)	The defendant is not liable for all direct losses; the type (kind) of harm suffered by the claimant must be reasonably foreseeable.
<i>Doughty v Turner Manufacturing</i> (1964)	The harm caused was too remote using the <i>Wagon Mound (No. 1)</i> test.
<i>Smith v Leech Brain and Co.</i> (1962)	The thin-skull rule applies – the amount of harm that the claimant suffers because of the negligence depends on their characteristics and well-being.

COMMENT

Evaluation of the law relating to causation

Causation can be a complex area of law because of the number of circumstances that can arise. The judiciary uses a mixture of legal principle, policy and a common-sense approach to reach its decisions. There have been a number of key cases which have been criticised because they appear to be pro-claimant (for example the cases following *Fairchild*). This can make it difficult for a defendant to successfully defend their claim. In reality, the law works in favour of both parties, but policy considerations may lead to an inconsistent application of the law.

Fairness of the rules of causation

It is fair to both parties that the rules relating to causation are aimed at compensating the claimant

for all foreseeable loss attributable to the defendant. This means that the claimant will get the appropriate amount of compensation, and the defendant will only pay compensation to the extent that they are liable.

The basic 'but for' test is fair in itself, as it works well where there is a single cause of harm. However, its strict application can mean that a claimant can remain uncompensated even though there has been a breach of duty.

Fairchild principle

The *Fairchild* approach provides both fairness and justice on the part of the claimant where it is impossible to pinpoint the exact cause of harm. This is to the detriment of the defendant, who may be ordered to pay compensation for harm for which they are not responsible, but the interests of justice

dictate that the claimant should receive some compensation. The cases following *Fairchild* appear to be contrived so that a claimant can succeed. This makes it difficult for case outcomes to be predicted, as judges tend to rely on policy reasons rather than legal principle to justify their decisions.

The use of the Compensation Act 2006 in mesothelioma claims, such as *Fairchild*, appears to favour the claimant at the expense of an innocent defendant in relation to the apportionment of damages.

Intervening acts

If the chain of causation is broken, this means that a claimant will not be compensated, unless there is

some negligent third party to whom blame can be attached. This may be considered unjust, as harm will have occurred.

The Wagon Mound (No. 1)

This is a method of limiting liability that is said to be unfair to the claimant. However, the defendant is not made to pay damages for harm that they have not caused. Also, the courts seem to impose arbitrary justice, as they take different approaches when considering the type of harm claimed for.

Generally, the law is applied consistently and fairly but it is an area that is policy-driven, and there are inevitable issues of inconsistency in an attempt to achieve justice for both parties.

TARGET SKILLS

- 1 Define causation.
- 2 Name the two types of causation.
- 3 Assess whether the *Fairchild* principle achieves justice for all parties.
- 4 Consider whether the law relating to multiple causes of harm is certain.

STRETCH AND CHALLENGE

Discuss the main issues that arise relating to the law of causation. Support your response with cases.

TEST YOURSELF

- 1 Describe the 'but for' test.
- 2 State the case that created the 'but for' test.
- 3 List the ways in which the chain of causation can be broken.
- 4 Name the case that created the test used in relation to legal causation.
- 5 Describe the test used to prove legal causation.

EXAM-STYLE QUESTIONS

- 1 In negligence cases it is the court's aim to compensate the innocent victims of the tort.

Critically assess the extent to which the application of rules relating to causation and remoteness in decided cases has impacted on this aim.

Cambridge AS and A Level Law 9084 Paper 41 Q3 October/November 2012

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- 2 Discuss the extent to which the rules on causation are able to provide a just outcome for defendants.

Introduction

The tort of negligence is based on a duty of care owed to a claimant. There are many situations where the courts have recognised that a duty of care exists. A number of relationships exist where a duty of care is expected, such as employer and employee, doctor and patient, and manufacturer and consumer. Chapter 38 sets out the principles and case law relating to duty of care.

However, there are situations where the courts have decided that there is a duty of care because of specific circumstances, rather than the relationship between the claimant and the defendant. These situations relate to the torts of negligent misstatement and nervous shock (psychiatric harm). This chapter links to the key concept of liability for actions or omissions.

41.1 Pure economic loss and liability for negligent misstatement

41.1.1 Basic principles

Pure economic loss occurs when the claimant suffers a financial loss due to the negligence of the defendant, and this loss was not the result of any personal injury or damage to property. It may occur where a person has lost the value in their house, lost a salary because they failed to get a job, or lost money on an investment. While it is clear that financial loss can be claimed where it is connected to personal injury or property damage, it is more difficult to do so where the financial loss is pure economic loss.

Traditionally, the law of tort has been prepared to compensate people for pure economic loss that is the result of fraud through the tort of deceit, as in *Derry v Peek* (1889), where it was established that a defendant must either know that the statement is false, or be reckless as to whether or not it is true. Recklessness in the tort of deceit means to be indifferent about whether the statement or advice was true or not. It is not the same as recklessness in criminal law.

However, where negligent words cause pure economic loss, the courts are reluctant to give compensation, even if that loss is foreseeable. This reluctance was justified by Lord Pearce in *Hedley Byrne v Heller* (1964), on the basis that there would be a flood of claims into the legal system. Also, it was considered by the courts that contract law was a more appropriate area of law in which to bring a claim. The law in this area has developed in an inconsistent way, as it is influenced by both social policy and judicial attitudes.

Decisions such as *Candler v Crane Christmas and Co.* (1951) made it clear that people giving advice or information, such as accountants or solicitors, had no duty of care to third parties, as there was no contractual relationship between them. In this case, Lord Denning held the opinion that there should be a duty of care to claimants if the defendants knew that the information was going to be used and for what purpose. His dissenting judgment in *Candler* was followed in *Hedley Byrne*, which is the key case in this area of tort as it created the tort of negligent misstatement.

In this case, the House of Lords set out a number of requirements which claimants would need to prove to establish a duty of care:

- » a special relationship between the parties
- » a voluntary assumption of responsibility by the party giving the advice, and
- » the party giving the advice must know that it will be relied on and it must be reasonable for the party to rely on that advice.

CASE EXAMPLES

Candler v Crane Christmas and Co. (1951)

The Court of Appeal held that no duty of care was owed in relation to careless advice given by accountants in preparing a company's accounts, when they knew it would be relied on by third parties. However, in a dissenting judgment, Lord Denning argued that a duty of care was owed to any employer or client 'and any third person to whom they themselves show the accounts so as to induce them to invest money or take some other action upon them'.

Hedley Byrne v Heller and Partners (1964)

The claimant (an advertising agent) became concerned about the financial status of one of their clients, Easipower Ltd. They asked the defendant bankers, with whom Easipower Ltd had an account, about the company's financial status. The defendant replied both verbally and in writing that the company was financially sound. The claimant relied on this advice and suffered financial loss when the company went into liquidation.

The court relied on Lord Denning's dissenting judgment and held that a duty of care would arise in relation to statements where there is a special relationship between the giver and the recipient of the advice.

However, there was no liability in the case of *Hedley Byrne* itself, because a disclaimer that had been included in the written statement protected the bank. The House of Lords said that, had it not been for the disclaimer, there would have been liability.

The court did not explain what a special relationship is, but it did set out the requirements for the existence of a special relationship:

- 1 A reliance by the claimant on the defendant's special skill and judgement
- 2 Reasonable knowledge that the claimant would be relying on the statement
- 3 It being reasonable in the circumstances for the claimant to rely on the defendant.

Caparo Industries plc v Dickman (1990) added an extra requirement: that the claimant acted to their detriment when relying on the advice/information.

CASE EXAMPLE**Caparo Industries plc v Dickman (1990)**

The claimant owned shares in a public company, whose accounts were audited by the defendant for the annual statutory audit. Relying on the audit, the claimant bought more shares in the company and made a successful takeover bid for it. Later, the claimant suffered substantial losses and brought an action to recover pure economic loss in negligent misstatement from the defendant. The claimant alleged that the shares had been bought in reliance on the audit that was negligently prepared and gave a misleading impression of the company's financial position.

The claim failed. The defendant did not owe a duty of care regarding the accuracy of the accounts

to either members of the public or existing shareholders when they rely on such an audit to invest in the company because there is no proximity. Also, the audit was prepared so that the shareholders could exercise control over the company. It was not prepared for the purpose of providing information for investors. The House of Lords said that the purpose for which the statement was made was crucial in cases like this. The statement (the audit) in *Caparo* was unconnected with the purpose for which it was relied upon.

Lord Bridge said that an essential ingredient of the required proximity, in situations where a statement is put into more or less general circulation, is to prove that:

'... the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind ... and that the plaintiff would be very likely to rely on it.'

It is clear from the judgment in *Caparo* that the House of Lords preferred a case-by-case approach to the development of the law relating to negligent misstatement, based on existing legal principles.

Lord Oliver set out five requirements to be proved before a duty of care could exist:

- 1 The advice requested must be for a specific or general purpose.
- 2 The specific or general purpose must be known to the adviser (defendant) when the defendant is asked for the advice.
- 3 The defendant must know that the advice will be given to the claimant, either a specific individual or a known class of people, so that it can be used by the person asking for the advice for the known purpose.
- 4 It must be known that the advice will probably be acted upon for that purpose without independent advice being obtained.
- 5 The advice must be acted upon to the detriment of the claimant (that is, the claimant must have suffered some financial loss).

The House of Lords took this new approach as a reaction to the earlier expansion in the law in respect of negligence. This decision is based on policy reasons, mainly the fear of floodgates opening leading to a rush of claims, or liability 'in an indeterminate amount for an indeterminate time to an indeterminate class' (Cardozo LJ in the American case of *Ultramares Corporation v Touche* (1931)).

▼ **Figure 41.1** *Hedley Byrne* and *Caparo* requirements for negligent misstatement

Key facts	
<i>Hedley Byrne v Heller and Partners</i> (1964)	<i>Caparo Industries plc v Dickman</i> (1990)
• There must be reliance by the claimant on the defendant's special skill and judgement. • There must be reasonable knowledge that the claimant would be relying on the statement. • It must be reasonable in the circumstances for the claimant to rely on the defendant.	• The advice must be for a specific or general purpose. • The purpose is known to the defendant. • The defendant must know to whom the advice will be given. • It must be known that the advice will be used for the purpose it is given. • The claimant must have suffered some financial loss.

41.1.2 Special relationships

There must be reasonable reliance by the claimant as part of a special relationship with the defendant. Initially, a 'special relationship' was taken to be a relationship where the person giving advice was in the business, or appeared to be in the course of business, of giving the advice that was being requested, as the phrase was interpreted narrowly.

In *Mutual Life Assurance v Evatt* (1971), it was suggested that a special relationship could be any business or professional relationship. This was confirmed in *Howard Marine and Dredging Co. Ltd v Ogden and Sons Ltd* (1978). Following these cases, most professional advisers, such as solicitors and accountants, will insure against claims based on negligent misstatement. They also began to ensure that disclaimers in their client contracts covered negligent misstatement, so that they could avoid liability.

CASE EXAMPLE

Mutual Life Assurance v Evatt (1971)

The claimant requested advice from his insurance company about the financial soundness of an associated company. On the basis of the information he was given, he kept his investment in the company and then invested more money in it. The defendant insurance company had given him incorrect information, and he suffered financial loss.

The Privy Council took a narrow approach to the requirement of special relationship and special

skill. The majority of the judges held that the insurance company was not in the business of giving advice about investments, and that the duty of care to the claimant only arose when the defendant was in the business of giving the advice in question. So, no duty was owed to the claimant and the claim failed.

Generally, social relationships are not included in the term 'special relationship', unless there is evidence to show that the claimant needed carefully considered advice. This occurred in the anomalous case of *Chaudry v Prabhakar* (1988).

CASE EXAMPLE

Chaudry v Prabhakar (1988)

The claimant asked a friend who had some knowledge of cars to find a suitable car that had not been involved in an accident. The friend was not a mechanic. The defendant found the claimant a car that he recommended, but it was later discovered to have been involved in a serious accident, poorly repaired and not roadworthy.

Liability was imposed, but the Court of Appeal made it very clear that this was an unusual case that had its own special facts and that, as a general rule, there would be no liability if the parties had a social relationship.

41.1.3 Reasonable reliance by the claimant

The legal principle here is that the defendant must have known, or have been in a position to be reasonably expected to have known, that the other person (the claimant) was relying on the statement, and reliance must have been reasonable.

Put more simply, the claimant must show that they relied on the defendant's statement and it was reasonable for them to do so. Reliance is less likely to be proved if both the claimant and defendant are experts than if only the defendant is professionally qualified. Equally, if the relationship is based on a contract, it is more likely that reliance can be proved, and a duty of care is therefore more likely to arise between the claimant and the defendant.

If the statement does not influence the claimant's decision, there will be no claim in negligent misstatement.

CASE EXAMPLE

JEB Fasteners v Marks Bloom and Co. (1983)

The defendants (a firm of accountants) prepared accounts for their client and negligently overstated the value of the stock of the company. The defendants were aware that their client was in financial difficulty and seeking financial assistance.

The claimant took over the company after seeing the accounts. The claimant brought a claim against the

defendants. However, the evidence showed that the reason the claimant took over the company was to acquire the expertise of the directors, and he was not concerned about the value of the stock. It was held that although a duty of care was owed to the claimant, the action failed because causation could not be proved.

41.1.4 Voluntary assumption of responsibility

When a person is asked for advice in a business context, they may respond in one of three ways. They may:

- » choose not to give advice
- » give advice but warn that it should not be relied on
- » give advice without any warnings at all.

Those who choose to give advice without any warnings are considered to have voluntarily assumed responsibility for that advice.

CASE EXAMPLES

Commissioner of Police of the Metropolis v Lennon (2004)

The claimant and the defendant were in a non-contractual relationship that was similar to an employment relationship. The claimant was moving to a new force and called the defendant for advice on taking time off and the effect it might have on his entitlement to housing allowance. On the basis of what he was told, he took time off before he started his new job. However, he lost his entitlement, because the time off was regarded as a break in continuity of employment.

The court held that the facts fell within the scope of *Hedley Byrne*. The police adviser had voluntarily assumed responsibility for advising the claimant, who had acted on negligent advice as he had relied on the information.

Patchett v Swimming Pool and Allied Trades (SPATA) Association (2009)

This case is unusual, because the advice was given on a website run by the defendant.

The claimants agreed for a swimming pool to be installed in their garden by a company they

found on the defendant's website. The company became insolvent before the pool was completed. It became clear that the installation company was not a full member of SPATA and was not subject to the vetting procedure and SPATA's bond and warranty scheme. The claimants wanted to claim for their financial loss from the defendant, alleging negligent misstatement on the grounds that the statement about the installation company was inaccurate.

There was no liability in this case, because there was no assumption of responsibility for the information by the defendant. The degree of reliance was limited by its advice in a statement to customers to obtain an information pack. The statements on the website had to be taken into account as a whole, and it was reasonable to expect potential customers to consider all the information available on the website.

If the claimants had obtained an information pack as suggested, they would have discovered that the installation company was not a full member of SPATA and not covered by its warranty scheme.

41.1.5 Recovery of damages without reliance

The law relating to negligent misstatement went through an expansion in the 1980s that reflected the development of negligence at that time. More categories of special relationship were created, where the court placed an emphasis on reliance on the advice. One of the original precedents created at this time came in *Yianni v Edwin Evans* (1982), where a surveyor became liable to a house buyer, even though he was employed by a lender to carry out the survey.

However, it may not always be reasonable for all buyers to rely on the lender's valuer/surveyor, for example

where the buyer is purchasing a very expensive house or if the property is a commercial property. Lord Griffiths in *Smith v Eric S Bush* (1990) stated:

'It should only be in cases where the advisor knows that there is a high degree of probability that some other identifiable person (other than the immediate recipient of the advice) will act upon the advice that a duty of care should be imposed.'

CASE EXAMPLES

Yianni v Edwin Evans (1982)

A prospective house buyer (the claimant) relied upon advice given by a surveyor (the defendant) to the building society from which he was obtaining a mortgage. The lender had required payment of a fee by the claimant, so that it could instruct the defendant to value the property. The lender even informed the claimant in writing that he should instruct his own independent surveyor, but he did not do this.

The defendant's survey was negligently prepared and the claimant had to carry out repairs to the property at considerable expense. The defendant was liable because the test of reasonably foreseeable reliance was satisfied. The court had been shown evidence that only 15 per cent of private house buyers like the claimant had a separate independent survey before buying a house. The court concluded that it was reasonable for a buyer to rely on the survey if the lender was content to rely on it also.

Smith v Eric S Bush (1990)

It was held that because the surveyor knew that the buyer was relying on his survey, a duty of care was owed.

In this case, the cost of the house was small when compared with the cost of obtaining an independent survey. This was an important factor when categorising the claimant's reasonable reliance on the advice given by the survey.

The claimant has to show that the defendant knew, or ought to have known, that the advice given by the defendant was likely to be acted on without being checked independently. The claimant's reliance on the defendant's statements must be reasonable in the circumstances. As stated earlier, the need for 'reasonable reliance' has given judges some scope for

discretion, and they will use policy factors to limit this. These factors were a consideration in *Goodwill v British Pregnancy Advisory Service* (1996).

CASE EXAMPLE

Goodwill v British Pregnancy Advisory Service (1996)

The claimant became pregnant by her boyfriend, who had been told three years previously that he no longer needed to use contraception because his vasectomy had been successful. Unfortunately, the operation had reversed itself, and the claimant became pregnant after she stopped using contraception.

The Court of Appeal took the view that for the claimant to succeed in a claim for pure economic loss caused by negligent misstatement, the claimant has to prove that the defendant knew, or ought to have known, that the advice was likely to be acted upon without the claimant having to make further enquiries from a third party.

In this instance, the claimant was not known to the defendant and was just one of a potentially large class of women who might have a relationship with the patient. The defendant could not be reasonably expected to foresee that some years later the patient would pass on that advice and that it would be relied on.

If the relationship between the claimant and the defendant is based on a contract, it is more likely that there will be reliance by one party on the other, and a duty of care will exist.

During the period of expansion of the law relating to negligence, there were some cases that did not seem to fit into the pattern that had been put in place by the judiciary. One such case was *White v Jones* (1995). This decision was surprising because it followed *Ross v Caunters* (1980), which had allowed a claimant to succeed in claiming for pure economic loss because of a negligent act rather than a negligent statement. It is usually argued that liability will not be imposed in claims for pure economic loss, because of the concerns about unlimited liability and the floodgates opening. However, in *White v Jones* (1995) this was not a consideration, because the loss to the daughters was limited in both amount and potential claimants, unlike in *Gibbons v Nelsons* (2000).

CASE EXAMPLES

White v Jones (1995)

The claimants were sisters who were removed from their father's will after a family argument. Six months later, they reconciled, and the father gave instructions to his solicitor to draft a new will giving his daughters £9000 each. The solicitors delayed in carrying out these instructions and so the father contacted them again. Once again, the solicitors failed to act and the father died shortly after.

The House of Lords held that the *Hedley Byrne* principle was to be extended and the sisters could recover compensation, even though there was no reliance by them on the solicitor's advice. The House of Lords stated that by accepting instructions to draw up a will, a solicitor had a 'special relationship' with those who intended to benefit from the will. This imposed a duty on the solicitor to act with care on behalf of the beneficiaries.

The case seems at odds with the *Hedley Byrne* principle, because beneficiaries in a will are usually not aware that they are going to benefit, so that they cannot be said to rely on the solicitor's skill and care. The solicitor had assumed responsibility in relation to the testator, but it is not clear whether they had done so in relation to the beneficiaries. On appeal, two of the judges argued that when taking on the job of drafting the will, the solicitor had voluntarily accepted the task of doing it properly, and it was up to the court to decide if this extended to the beneficiaries. In this instance, they held that it did.

Gibbons v Nelsons (2000)

The court stated that a solicitor's duty of care to an intended beneficiary of whom he was unaware was limited. The duty was only owed if the solicitor knew about both the benefit that the testator wanted to give and the person or class of persons upon whom the benefit was intended to be given.

▼ Figure 41.2 Key cases: negligent misstatement

Key cases	
Case	Law
<i>Candler v Crane Christmas and Co.</i> (1951)	No duty of care was owed to third parties regarding careless advice given by the defendant.
<i>Hedley Byrne v Heller</i> (1964)	This case sets out the three principles to establish negligent misstatement.
<i>Caparo Industries plc v Dickman</i> (1990)	This case sets out the modern approach to negligent misstatement.
<i>Mutual Life Assurance v Evatt</i> (1971)	A special relationship is usually a business relationship.
<i>Chaudry v Prabakhar</i> (1988)	A social relationship may very rarely be a special relationship.
<i>JEB Fasteners v Marks Bloom and Co.</i> (1983)	A duty of care was owed to the claimant because of how the information was going to be used by the claimant.
<i>Commissioner of Police of the Metropolis v Lennon</i> (2004)	Even if there is a non-contractual relationship, there may still be a voluntary assumption of responsibility.
<i>Patchett v Swimming Pool and Allied Trades (SPATA) Association</i> (2009)	There was no assumption of responsibility as the defendant advised customers to obtain an information pack.
<i>Yianni v Edwin Evans</i> (1982)	A known third party may reasonably rely on the advice.
<i>Smith v Eric S Bush</i> (1990)	A borrower was owed a duty of care by a surveyor despite being instructed by the lender as he was aware that it would be relied on by the borrower.
<i>Goodwill v British Pregnancy Advisory Service</i> (1996)	A claimant cannot be just one of a limitless class of unknown people.
<i>White v Jones</i> (1995)	The voluntary assumption of responsibility is for a task, not for any risk of loss.
<i>Gibbons v Nelsons</i> (2000)	A duty of care is owed to a beneficiary if a solicitor knew about the benefit being given and the person/people to whom the benefit is given.
<i>Banca Nazionale del Lavoro SPA v Playboy Club London Ltd</i> (2018)	The appeal emphasised that the <i>Hedley Byrne</i> principles should be applied.

COMMENT

Evaluation of the law relating to negligent misstatement

Negligent misstatement is a tort where the courts have shown a reluctance to extend the law. Initially, a claim in pure economic loss could only be made if there had been some deceit on the part of the defendant. This made it difficult for a claimant to be successful from the outset. The courts felt that it would be more appropriate for claimants to bring an action for misstatement in contract law. Also, the courts were mindful of the floodgates opening, if it were possible for successful claims to be made for pure economic loss. The cases in this subsection demonstrate that the requirements that need to be met by the claimant have addressed this particular issue, and in more recent cases, the courts have made it clear that expansion of the tort will not occur in the near future.

When the law in relation to duty of care in negligence itself was being developed in the 1970s and 1980s, many of the cases involved claims for pure economic loss. During this period of rapid expansion of the law of negligence, the courts made it possible to claim for pure economic loss arising from negligent acts. Later, this was seen as a step too far, and the courts have retreated from this position. Despite the apparent reluctance to extend the law, recent cases show that it is possible to bring claims for the negligent provision of services, rather than simply negligent misstatement. Again, some judges and legal commentators believe that this has extended the tort beyond its intended boundaries. This extension of the law has allowed claimants to obtain compensation more easily. As most actions are against businesses, they are generally insured against such claims, so the cost of losing is usually restricted to the cost of the insurance premium.

Before *Hedley Byrne*, the courts refused to impose liability because of the floodgates argument. This

has failed to materialise, even during the years of expansion, because the requirements that were put in place by *Hedley Byrne* have restricted claims. The later requirement added in *Caparo* has made it more difficult for claimants to be successful.

It appears that the requirements in *Hedley Byrne* have not been consistently applied. This can lead to injustice, and it makes it difficult for lawyers to advise their clients; for example, a business relationship must exist between the claimant and the defendant. However, in the anomalous case of *Chaudry v Prabhakar* [1988] (see subsection 41.1.2), a statement made in a social context was regarded as negligent. This poses the question of how far liability should extend and what situations can rightly be regarded as a business relationship.

What is clear, however, is that with the courts' continued reluctance to expand the law, it is highly unlikely to expand too rapidly. However, with an evolving business environment, the law could change in response to this. In two recent cases involving negligent misstatement, *Steel v NRAM* [2018] and *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd* [2018], the Supreme Court has acknowledged that *Hedley Byrne* will stand, and while there is some scope to develop the law, the court will not allow an opening of the floodgates. Both of these cases do not create new law but clarify the law.

In *Steel v NRAM*, the claimant solicitor was not liable for pure economic loss suffered by the lender bank when she gave incorrect information regarding the payment of a mortgage. The court made it clear that a prudent lender should always check information that was given by a third party.

As a result of *Steel* and *Banca Nazionale* and cases like these, banks and other institutions which provide financial references should continue to review standard procedures to avoid litigation.

41.2 Liability for nervous shock

The law relating to nervous shock (psychiatric injury) is a relatively recent development in the law of tort. During the nineteenth century, the law of negligence was concerned mainly with accidents leading to a physical injury. Very little was known about psychological harm arising from an accident. The courts were reluctant to allow such claims, because it was felt that symptoms could easily be imitated. In *Victoria Railway Commissioners v Coultas* (1888), a claim for psychiatric harm following a train crash was refused because there was insufficient

understanding of the harm and there was no evidence of actual physical injury.

As well as refusing claims because of a lack of medical understanding, the courts rejected them because of the 'floodgates' argument. In *Victoria Railway Commissioners*, the judge thought that if the claim succeeded, it would open up a 'wide range of imaginary claims'.

It was not until the case of *Dulieu v White and Sons* in 1901 that it became possible for a person to bring a successful claim for nervous shock.

Nervous shock is a broad term that has been used by the courts to describe psychiatric injury or harm. The psychiatric harm must be of a type that is medically recognised, such as clinical depression, myalgic encephalopathy (ME), personality changes or PTSD. It does not include ordinary human emotion such as upset or grief. The cases of *Hinz v Berry* (1970) and *Reilly v Merseyside Regional Health Authority* (1994) are important here. In *Hinz v Berry*, the claimant became morbidly depressed when she witnessed the death of her husband and severe injuries being inflicted on three of her foster children. She succeeded because morbid depression was held to be psychiatric harm, as opposed to merely feelings of grief and sorrow. By contrast, in *Reilly v Merseyside Regional Health Authority*, the claimants suffered difficulty in breathing, dizziness and claustrophobia, insomnia and had nightmares. These were not recognised psychiatric harm for the purposes of nervous shock.

If the claimant suffers both ordinary human emotion and a psychiatric illness, the courts use the approach taken in *Vernon v Bosley (No. 1)* (1996). Here, the claimant witnessed his children being drowned in a car that had been negligently driven by the children's nanny. He was able to successfully claim for pathological grief and bereavement, as the court took this to mean that an abnormal degree of grief could lead to psychiatric harm.

The psychiatric harm must come from a single shocking event. This requirement can exclude cases where a

person has suffered psychiatric harm as a result of the grief of bereavement. The case of *Sion v Hampstead Health Authority* (1994) is an example. The claimant suffered a stress-related psychiatric illness as a result of watching his son die slowly in intensive care because of negligent medical treatment. As the illness was not caused by a sudden shock, the claim was lost.

Sometimes, the courts consider a series of incidents to be one event, as in *North Glamorgan NHS Trust v Walters* (2002) where the claimant's son died because of the defendant's negligent hospital treatment. She was told that he would not suffer serious harm when she found him choking and coughing up blood. The boy was transferred to another hospital where it was discovered that he had brain damage. The claimant was asked to switch off his life-support machine. She suffered psychiatric harm. The Court of Appeal held that the 'horrible event' could be made up of a series of events, so the claimant succeeded.

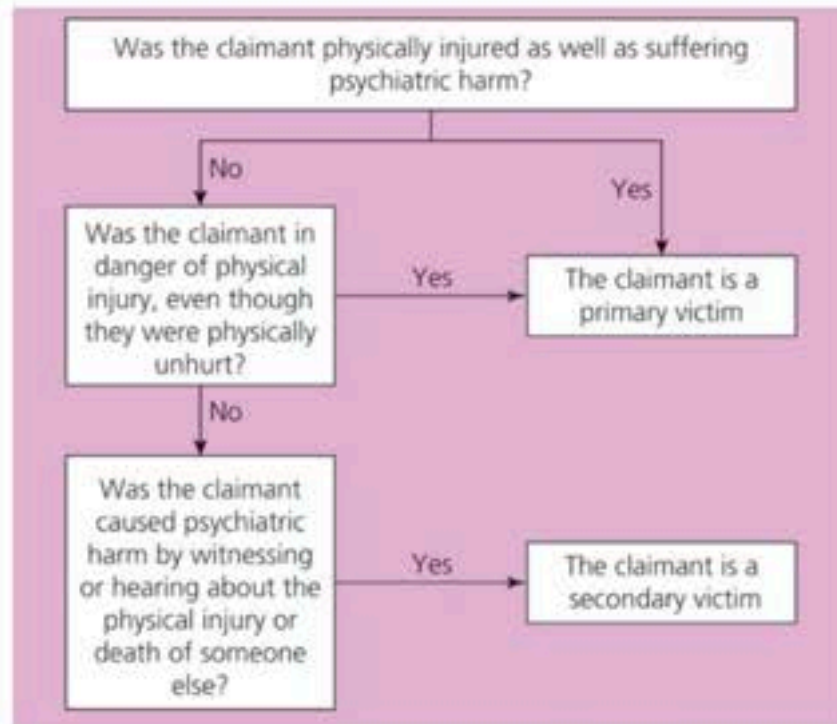
Most cases concerning nervous shock arise from an incident where the claimant suffers physical harm, is at the risk of harm, or sees or hears someone else being harmed, but it is possible to claim for nervous shock arising from damage to property. The anomalous case of *Attia v British Gas* (1988) illustrates this. Here, the claimant returned to her house to find it on fire because of the defendant's negligent installation of central heating. Her claim for nervous shock succeeded because she had spent many years decorating and improving her home and she had become attached to it.

▼ Figure 41.3 Key cases: nature and cause of nervous shock

Key cases		
Case	Facts	Law
<i>Hinz v Berry</i> (1970)	The claimant became morbidly depressed after witnessing an accident involving her family.	Morbid depression is a recognised psychiatric illness, but grief and sorrow are not.
<i>Reilly v Merseyside Regional Health Authority</i> (1994)	The claimants had insomnia, nightmares and feelings of claustrophobia after being trapped in a lift.	The claimants suffered normal human emotion only.
<i>Vernon v Bosley (No. 1)</i> (1996)	The claimant suffered pathological grief and bereavement.	It is possible to claim for psychiatric injury even though it is based on profound grief.
<i>Alcock v Chief Constable of South Yorkshire</i> (1991)	Various claimants suffered shock following the Hillsborough stadium disaster.	Psychiatric illness must arise from a single shocking event.
<i>Sion v Hampstead Health Authority</i> (1994)	The claimant suffered a stress-related psychiatric illness as a result of seeing his son die over a 14-day period.	A 14-day period could not be a single shocking event.
<i>North Glamorgan NHS Trust v Walters</i> (2002)	The claimant suffered psychiatric injury after her son's death due to the defendant's negligence.	A 'horrible event' could be made up of a series of events.
<i>Attia v British Gas</i> (1988)	The claimant suffered shock after she saw her house on fire.	It is possible to claim for psychiatric injury where there is damage to property, if an attachment is shown.

The law recognises two categories of victim:

- » A primary victim is a person present at the scene of an incident who is either harmed or at risk of harm. Lord Oliver stated: 'Primary victims are those who are involved 'mediately or immediately as a participant.'
- » A secondary victim is someone who is 'a passive or unwilling witness of injury caused to others', as stated by Lord Oliver in *Alcock v Chief Constable of South Yorkshire* (1992).



▲ **Figure 41.4** Identifying primary and secondary victims in psychiatric injury claims

41.2.1 Primary victims

The duty of care to a primary victim was first recognised in *Dulieu v White and Sons* (1901), where the claimant feared for her own safety when the defendant's horse ran into the public house where she was working. Although she did not have any physical injuries, she was badly frightened and suffered a miscarriage. The defendant was liable because the employee should have foreseen that the claimant would suffer shock because of the incident.

This case states that a person is able to bring a claim for psychiatric harm caused by actual physical injury or from a reasonable fear for their physical safety. Harm or injury of some kind must be reasonably foreseeable.

The thin-skull rule applies to primary victims. In *Page v Smith* (1996), the claimant was able to successfully claim for ME, which recurred when he was involved in a car accident. He said that this was because of the shock of being in the accident. The court held that this was a foreseeable injury in the circumstances.

41.2.2 Secondary victims

A secondary victim is a person who suffers psychiatric harm as a result of seeing or hearing someone else

being harmed or at risk of harm, at the event itself or in the aftermath. This was established in the case of *Hambrook v Stokes* (1925), where the claimant's wife feared for the safety of close family in the area of impact.

CASE EXAMPLE

Hambrook v Stokes (1925)

The claimant's wife saw a runaway lorry going downhill towards the place where she had left her three children. The children were out of sight but she was afraid for their safety and suffered shock. She died because of the fright. The claim succeeded, even though the wife was not within the foreseeable area of impact and the shock suffered was from the fear for another person's safety.

However, the court stated that the shock should occur because of what the claimant witnessed with their own unaided senses rather than what they were told later.

The success of a claimant who is a secondary victim can be limited by policy-based control mechanisms. The psychiatric harm suffered by the secondary victim must be reasonably foreseeable in a person of 'ordinary phlegm [composure] and fortitude' in the same circumstances; that is, if the secondary victim suffers shock where an ordinary person would not, the defendant will not be liable, even if severe psychiatric harm is suffered.

For example, in *Bourhill v Young* (1943), the concept of ordinary phlegm and fortitude was used as a means of assessing the claimant's emotional reactions to a traumatic event.

CASE EXAMPLE

Bourhill v Young (1943)

The claimant, a pregnant woman, was getting off a tram when she heard the impact of an accident involving the defendant. She later saw blood on the road. She claimed that the shock led to the stillbirth of her baby. However, the House of Lords held that her injuries were not foreseeable as she was not in physical danger and that, as a pregnant woman, she was more susceptible to shock.

The foundations of the current approach to secondary victims are set out in *McLoughlin v O'Brian* (1983). The court took the opportunity to set limits what can be regarded as the 'immediate aftermath' of an incident.

CASE EXAMPLE

McLoughlin v O'Brian (1983)

The claimant suffered psychiatric harm when she witnessed the 'immediate aftermath' of a serious car accident. She was told by telephone that there had been an incident involving her family. She went to the hospital two hours after the accident and she was met with circumstances that were 'distressing in the extreme and ... capable of producing an effect going well beyond that of grief and sorrow'.

All the Law Lords agreed that she should succeed, as she witnessed the 'immediate aftermath'. They relied on three policy-based factors to reach their decision: the closeness of the relationship with the primary victim, proximity to the accident, and the shock must be induced by what the claimant saw or heard [experienced].



▲ **Figure 41.5** The law relating to secondary victims was clarified following the Hillsborough stadium disaster in 1989

However, the law relating to secondary victims was restated in the key case of *Alcock v Chief Constable of South Yorkshire* (1991).

CASE EXAMPLE

Alcock v Chief Constable of South Yorkshire (1991)

As a result of overcrowding at the Leppings Lane end of the Hillsborough football stadium, 95 people died of crushing injuries and 400 had to be treated for their injuries. The police were sued because they were responsible for policing the event and failed to do so to a reasonable standard.

The police admitted negligence and settled out of court in relation to the primary victims. However, there were two groups of people who wanted to sue the police for psychiatric harm. The first group was composed of relatives and friends of those who were killed or injured. The other group were police officers who were on duty at the ground [these were dealt with in *White v Chief Constable of South Yorkshire* (1998)].

The claimants included grandparents, parents, brothers, brothers-in-law, fiancés and friends. Some of the claimants had been in the stadium where they had seen the event, and others had seen it on television or heard it on the radio; others had identified bodies at the mortuary, and others had suffered shock on hearing news of the event.

The claimants' legal advisers argued that the test for whether they were owed a duty of care was whether their psychiatric harm was reasonably foreseeable. The Law Lords held that while it was clear that death and injury in traumatic incidents often caused harm to people beyond the primary victims, it was the court's policy not to award damages to third parties (secondary victims). They said that the giving of damages should be strictly controlled, and Lord Oliver set out four control mechanisms to restrict claims. As a result of these restrictions, no claims succeeded on appeal.

The controls were policy-driven, and Lord Steyn in his judgment gave four reasons why psychiatric harm should be dealt with as a special area of law:

- 1 The task of identifying the categories of psychiatric harm is based on complex expert evidence.
- 2 There is a risk that the possibility of being awarded compensation prevents the claimant's condition from improving.
- 3 The floodgates argument – broadening the law would widen the scope of potential claimants.
- 4 Potential defendants would be exposed to a risk of liability that would be disproportionate to the negligent action.

Internet research

Read a summary of the Hillsborough stadium disaster at www.bbc.co.uk/news/uk-19545126

41.2.3 Restrictions on the scope of nervous shock

As a primary victim claimant is favoured by the courts there are few restrictions other than the primary victim must be at the scene and suffer some harm. The harm must include a recognised psychiatric illness.

In contrast, there are further restrictions that the secondary victim must prove. These have been restated in *Alcock*. The secondary victim has to prove:

- 1 the harm was reasonably foreseeable (that is, a person of reasonable fortitude would suffer psychiatric harm)
- 2 a close tie of love and affection to the primary victim
- 3 proximity in time and space to the accident, and
- 4 the secondary victim witnessed the accident or aftermath with their own unaided senses.

Close tie of love and affection

In *Alcock*, Lord Ackner said that:

'The degree of love and affection in any given relationship ... has to be decided on a case by case basis.'

This suggests that the House of Lords did not intend to create a rigid list of relationships where there is a close tie of love and affection, but this is what has happened because a close tie of love and affection is presumed in the case of spouses, parents and children.

People in other relationships have to prove a close tie, for example in *Robertson v Forth Road Bridge Joint Board* (1996), the claimant failed in his claim for psychiatric harm suffered after his colleague died at work, despite having known him as a colleague and friend for a number of years.

Proximity in time and space

The secondary victim must have been present at the scene of the incident or have witnessed the immediate aftermath. Following *McLoughlin v O'Brian* (1983), the aftermath is considered to be two hours.

However, the court's approach in relation to proximity has not been consistent. This issue was discussed in *Alcock*, but the House of Lords refused to set out a specific definition or time limit of what can be regarded

as 'immediate aftermath'. However, the case of *Jaensch v Coffey* (1984) was approved, where the aftermath continued as long as the victim remained in the state caused by the accident. However, *Taylor v A Novo (UK) Ltd* (2013) provides some insight.

CASE EXAMPLE

Taylor v A Novo (UK) Ltd (2013)

A daughter, who was not present when her mother was injured at work, claimed damages for psychiatric illness when her mother suddenly died three weeks later from complications.

The Court of Appeal reaffirmed that strict controls on secondary victims should continue. It held that it could not extend the law to allow damages from an event three weeks after an accident.

Unaided senses

This control means that the claimant has directly witnessed the incident or its aftermath. Being informed of an incident by a third party, or witnessing the event on television or radio, will not fulfil this limitation.

In *Tan v East London and City Health Authority* (1999), the claimant was informed by telephone that his baby would be stillborn as it had died in its mother's womb. The court said that the shocking event was the death before the child's birth. The claim was unsuccessful, because the claimant had been told about this over the telephone.

The Law Lords in *Alcock* discussed watching live and recorded television broadcasts in the context of watching the event with unaided senses. They held that recorded broadcasts would never fulfil this control. If a person suffered psychiatric harm when watching live broadcasts, a claim would rarely succeed because of broadcasting guidelines, which state that shocking pictures of people suffering and dying would not be transmitted. This control needs to be reconsidered because of the changes in technology since this decision was made.

▼ Figure 41.6 Key cases: secondary victims

Key cases		
Case	Facts	Law
<i>Hambrook v Stokes</i> (1925)	The claimant was a mother who believed that her children were involved in an accident; she died of shock.	Claims for nervous shock were extended to include those in the area of the accident – she feared for the safety of someone else.
<i>Bourhill v Young</i> (1943)	The pregnant claimant heard the impact of an accident involving the defendant. She later saw blood on the road. She claimed that the shock led to the stillbirth of her baby.	The claimant's injuries were not foreseeable, as she was not in physical danger and, as a pregnant woman, she was more susceptible to shock.

Key cases		
Case	Facts	Law
<i>McLoughlin v O'Brian</i> (1983)	The claimant suffered shock after seeing dead and injured relatives at the hospital following a road accident.	Two hours is regarded as the limit for 'immediate aftermath'.
<i>Alcock v Chief Constable of South Yorkshire</i> (1991)	Numerous claimants claimed as secondary victims for shock following the Hillsborough stadium disaster.	The House of Lords established the controls to be satisfied for secondary victims: • close tie of love and affection • proximity in time and space • witnessed the event with unaided senses.
<i>Jaensch v Coffey</i> (1984)	The claimant saw her husband at hospital following a road traffic collision.	The aftermath continues as long as the victim remains in the state caused by the accident, up to and including immediate post-accident treatment.
<i>Taylor v A Novo (UK) Ltd</i> (2013)	A daughter suffered shock following her mother's death three weeks after her mother's accident at work.	Three weeks was too long to be considered immediate aftermath.
<i>Tan v East London and City Health Authority</i> (1999)	The claimant was told by telephone that his baby had died in his wife's womb; he suffered shock.	The telephone is not an example of a person witnessing an incident with unaided senses.

Policy

This area of law is policy-driven, particularly the issue of opening floodgates to claims. This was a concern as far back as *Victoria Railway Commissioners*, where a claim was rejected because of the ease that the claimant may have in mimicking symptoms of psychiatric harm. To prevent this from happening, the courts have ensured that the claimant must prove that the harm is a recognised medical condition.

While primary victims are treated favourably by the courts, secondary victims are not, for fear of opening the floodgates. For example, if a limit were not placed on how the incident is seen or heard, there could be thousands of potential claimants. As an example, in *Alcock* there were tens of thousands of people in the stadium and millions at home watching or listening to the event. All of these were potential claimants.

There is also the issue of distributive justice to be considered. Most claims for compensation in this tort are paid by insurance companies, who distribute their losses onto other policy holders. While justice may be served for the claimant, and arguably the defendant as they will only have to pay an increased insurance premium, this is not the case for policy holders, who will have increased insurance premiums despite not being involved in the case.

41.2.4 Possible reforms to the law relating to nervous shock

Both Parliament and the courts have considered the possible reform of this area of law. In the main, the potential reforms have focused on the law relating to secondary victims.

The law relating to secondary victims has been heavily criticised since *Alcock*. In 1998, the Law Commission Report *Liability for Psychiatric Illness* found the law too restrictive. The commission agreed that there should be a close tie between the primary and secondary victims, but that there should be enough for there to be a successful claim. The commission considered that proximity and sudden shock should be removed.

Cases such as *White* show that the expansion of the law suggested by the Law Commission is not favoured by the judiciary. In this case, Lord Hoffman stated that 'the search for principle in this part of the law has been called off'.

Since then, neither the courts nor any government has attempted to deal with the concerns of the Law Commission, although a Private Members' Bill was presented in Parliament which attempted to deal with the issues that the common law produced.

The Bill proposed that anyone could make a claim for damages for psychiatric harm, if the harm was reasonably foreseeable (and if they had developed that injury) as a result of the close tie of love and affection between the primary and the secondary victim. The primary victim will be called the 'immediate victim', and the broader definition of victims who have a close tie will include friends and colleagues. It proposed that claimants would still need to have a recognisable psychiatric condition, but there would be no need to prove a sudden shock or proximity in time and space.

The Bill had its First Reading but did not progress any further. It had been hoped that the proposal to expand the potential claimants list would have provided an

indication of how family and societal relationships had changed since the controls in *Alcock* had been imposed.

Alcock is clear that a secondary victim must be at the scene or immediate aftermath of an incident. The concept of immediate aftermath has been considered to be unfair and arbitrary and has been challenged, for example in *Taylor v A Novo (UK) Ltd*. More recently, the case of *Paul v Wolverhampton NHS Trust* has addressed the issue.

CASE EXAMPLE

Paul v Wolverhampton NHS Trust (2020)

Two girls are suing for psychiatric harm, following the failure of the hospital to diagnose the heart condition which killed their father in front of them. The case was initially rejected by the High Court, as the negligent event was over one year before the death. The girls were not present at the time of the negligent event. This meant that they failed the *Alcock* test.

On appeal, the court decided that there could be a trial because:

'... the event would have been horrifying to any close family member who witnessed it and especially to children of twelve and nine. The fact that event occurred 14 and a half months after the negligent omission which caused it does not, in and of itself, preclude liability.'

In other words, it may not be necessary in future to meet all the *Alcock* limitations – this change may come in *Paul*.

ACTIVITY

Read the article at www.oxbridgenotes.co.uk/law_cases/alcock-v-chief-constable-of-south-yorkshire regarding the case of *Alcock*. The article is a discussion of the distinction between primary and secondary victims, and the control mechanisms that are in place regarding secondary victims.

Questions

- 1 Describe the three controls relating to secondary victims.
- 2 Describe the current law relating to bystanders and their ability to make a claim for psychiatric harm.
- 3 According to Lord Ackner, it may be appropriate to allow a bystander to successfully claim for psychiatric harm in the future. Describe when it might be appropriate and discuss the policy reasons which may prevent this development of the law.

TARGET SKILLS

- 1 Identify and describe the key elements that need to be proved in a claim for negligent misstatement.
- 2 Name at least three cases which can be used to illustrate the *Alcock* control mechanisms.
- 3 Assess the effectiveness of the requirements set out in *Hedley Byrne*.
- 4 Consider the potential reforms which could be made to the law relating to nervous shock.

STRETCH AND CHALLENGE

Consider whether the courts should make distinctions between primary victims and secondary victims in a claim for nervous shock.

TEST YOURSELF

- 1 Define pure economic loss.
- 2 Define negligent misstatement.
- 3 List the elements needed to prove negligent misstatement.
- 4 Define nervous shock.
- 5 Define the terms 'primary victim' and 'secondary victim'.

EXAM-STYLE QUESTIONS

- 1 Describe and evaluate the elements which must be present to establish liability for a negligent misstatement.

Cambridge AS and A Level Law May/June 2018, Paper 41, Q1

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- 2 John is employed to operate a crane (a large machine used to lift heavy loads) by ABC Ltd on a construction site in Barchester. John lifts a load which is too heavy for the crane and the loads falls on a nearby wall, causing it to collapse. Bilal, the site manager, is trapped under the wall when it collapses.

Sanjeev, another employee on the site, sees the wall collapse and hears Bilal call for help. Sanjeev attempts to free Bilal. Bob, who works in a shop nearby, hears the wall collapse, rushes over to the site and starts to help.

Bilal is taken to hospital suffering from a broken leg and severe shock. Sanjeev and Bob are both traumatised by the event.

Advise the parties as to their liability in this situation.

Cambridge AS and A Level Law May/June 2018, Paper 41, Q5

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42

Occupiers' liability

Introduction

This tort recognises that people who occupy land (including buildings on the land) have a duty of care towards others who come onto the land. The duty relates to the dangerous condition of the land, rather than its use.

It is primarily a statutory tort, as the law is contained in two acts: the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984. These Acts will be abbreviated and referred to as OLA 1957 and OLA 1984. This chapter links to the key concept of liability for actions or omissions.

42.1 Definitions

Before 1957, the law of negligence covered liability for harm caused by dangerous premises. However, it was difficult to apply because there were different levels of protection for different people. There was a potential for injustice, especially in relation to children. OLA 1957 was passed to make the law more consistent and less complex, but it did not provide protection for trespassers, only visitors. The 1984 Act was a way of combatting the problem in relation to trespassers who were injured, even though they have a more limited protection.

Liability will only be imposed on the defendant if the injury or damage is the result of:

- » the condition of the land, or
- » dangerous conduct that is a continuing source of danger.

The Acts do not apply where the harm arises because of the isolated action of the occupier.

42.1.1 Who is an occupier?

Neither Act gives a definition of 'occupier'. However, Lord Denning provided a definition in *Wheat v Lacon* (1966).

The occupier does not have to be in physical possession, as illustrated by *Harris v Birkenhead Corporation* (1976).

CASE EXAMPLE***Harris v Birkenhead Corporation* (1976)**

The defendant had issued a compulsory purchase order and a notice of entry of a house that allowed them to take over the premises after 14 days. The house was not vacated for months. However, when it was vacated, the defendant did not take any steps to board up the house.

The claimant, a four-year-old boy, entered the house through an unlocked door and was injured when he fell from a second-floor window. The Court of Appeal held that actual physical possession was not needed for a person to have control over premises. It was sufficient that the defendant had the legal right of control, so they were regarded as an occupier.

CASE EXAMPLE***Wheat v Lacon* (1966)**

The defendants owned a public house that was run by a manager and his wife who lived on the first floor. They had been given permission to take in paying guests.

While trying to get to a bar on the first floor, a paying guest was killed on the emergency staircase. The

staircase was badly lit, as someone had removed the light bulb. The House of Lords held that both the managers and owners were occupiers, as they had control over the premises; that is, the occupier has control over who is allowed to enter the premises. However, there was no liability on either defendant, as a stranger had removed the light bulb and they were not responsible for the stranger's actions.

42.1.2 What are premises?

Both Acts impose liability on 'occupiers of premises'.

Premises are defined in s 1(3) OLA 1957 as including land, buildings and 'any fixed or movable structure'. This definition includes any vessel, vehicle or aircraft. It is a very wide definition, and case law shows that it can include: a lift (*Haseldine v Daw* (1941) – see Section 42.2.3); a park (*Tomlinson v Congleton Borough Council* (2003) – see Section 42.3); and a boat (*Jolley v Sutton London Borough Council* (2000) – see Section 42.2.1).

42.2 Lawful visitors and OLA 1957

Visitors are protected by OLA 1957. A visitor is someone who has express or implied permission from the occupier to enter their premises. Permission can be implied from the circumstances, for example people delivering goods to a property.

Section 2(1) OLA 1957 sets out the duty of care that is owed by an occupier to the visitor:

'An occupier of premises owes the same duty, the common duty of care to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.'

If the duty is breached, the claimant can bring an action for personal injury and damage to property, but not for pure economic loss. This means that a claimant cannot bring a successful claim if the only loss suffered is loss of profit or a reduction in value of an item.

The standard of care required by the Act is set out in s 2(2):

'Occupiers have a duty towards visitors to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there.'

This is called the common duty of care, and it requires the occupier to make the visitor safe. Occupiers are not required to provide absolute safety, as this would be impracticable – they have a duty only to take reasonable care to make the visitor safe, which can be done by, for example, giving reasonable warning of the danger.

▼ Figure 42.1 Definitions of terms for occupiers' liability

Key facts		
Term	Definition	Case/statute
Occupier	A person in control of the premises who may not be in physical possession	<i>Wheat v Lacon</i> (1966) <i>Harris v Birkenhead Corporation</i> (1976)
Premises	Land, buildings and 'any fixed or movable structure'	Section 1(3) OLA 1957
Visitor	Someone with implied or express permission to be on the premises	<i>Horton v Jackson</i> (1996)
Trespasser	A person who has no permission to be on the premises at all, or who has remained on the premises when permission has been withdrawn	<i>Addie v Dumbreck</i> (1929)

CASE EXAMPLES

Horton v Jackson (1996)

The claimant was a golfer who lost the sight in one eye after being hit by a golf ball. He sued the other golfer and the golf club where the golfer was playing. He argued that OLA 1957 had not been complied with, because the defendant had not placed a screen between two tees to prevent balls hit at one tee from hitting people playing at the other tee. There was a sign warning people to wait until others at the first tee had moved on.

The Court of Appeal disagreed with the claimant, as only two incidents had ever occurred at that tee, so the trial judge was entitled to hold that the existing precautions (the sign) were reasonable and there was no breach of duty.

Darby v National Trust (2001)

The claimant drowned while swimming in a pond at a National Trust property. His wife sued the defendant under the 1957 Act, claiming that as there had been no warnings about the danger of drowning, the defendant had not taken reasonable care.

The Court of Appeal disagreed with the claimant, because in the circumstances drowning was an obvious risk, so there was no need for a warning.

Internet research

Another case on this point can be found at <https://www.brownejacobson.com/insurance/training-and-resources/legal-updates/2005/01/clare-v-roderick-w-p-perry-ta-widemouth-manor-hotel-court-of-appeal-13th-january-2005>

Cases such as *Wood v Smith and Western Restaurants* (2016) confirm that the occupier does not have to make premises absolutely safe. In this case, the claimant fell at a restaurant because of the unevenness and the gaps in old floorboards. The claim failed, because minor defects that are not dangerous need not be rectified by the occupier.

42.2.1 Children

The law relating to child visitors is set out in s 2(3)(a) OLA 1957:

'An occupier must be prepared for children to be less careful than adults. If the occupier allows a child to enter the premises then the premises must be reasonably safe for a child of that age.'

There is a range of cases that illustrate what the occupier needs to do to make a child visitor safe. The occupier has to consider whether the premises are safe for a child of a particular age, whether the child is accompanied and the provision of warnings.

An occupier will be allowed to assume that very young children will be accompanied by someone supervising them. This can reduce the degree of care required by the occupier, as seen in *Phipps v Rochester Corporation* (1955).

CASE EXAMPLES

Glasgow Corporation v Taylor (1922)

A seven-year-old boy died from eating poisonous berries that he had picked from a shrub in a public park. The berries looked like cherries or blackcurrants. It was alleged that the defendant knew of the poisonous nature of the berries but had failed to fence the shrub or give any warning of the danger. As the berries were an allurements to the child, the defendant breached their duty by leaving the berries as they were.

Phipps v Rochester Corporation (1955)

A boy aged five and his sister aged seven walked across a large open space that was being developed by the defendant. The defendant knew that people crossed their land but did nothing to prevent this. A long deep trench had been dug in the middle of the space. The claimant fell in and broke his leg. The trench would have been an obvious danger to an adult.

The court stated that reasonable parents would not send their children into danger without some form of protection, and that both parents

and occupier should act reasonably. In the circumstances, the defendant was not liable, as responsible parents would not have allowed children to play in that area.

Lord Devlin said:

'The responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to.'

Simkiss v Rhondda Borough Council (1983)

The claimant fell off a steep slope that was situated opposite the block of flats where she lived. The slope was on land that was owned by the defendant council. The claimant's father gave evidence that he did not consider the slope to be dangerous. In the circumstances, the court would not make the defendant council liable.

The court stated that an occupier should not be asked to achieve a higher standard of care than a parent who did not consider the premises a risk to the child.

Jolley v Sutton London Borough Council (2000)

This is an important case in relation to occupiers' liability. The boat was said to be an allurements to boys of the claimant's age, and the defendant had been negligent in not removing it.

42.2.2 People carrying out a trade or calling

Section 2(3)(b) OLA 1957 sets out the law relating to someone who is exercising their 'common calling' on the occupier's property. This refers to a person whom the occupier has invited on the premises to carry out a job and who has been injured as a result.

The section states:

'An occupier may expect a person, in the exercise of their calling, will appreciate and safeguard against special risks that are usually connected with it.'

CASE EXAMPLES

Roles v Nathan (1963)

Two chimney sweeps were called by the defendant to clean an old coal boiler that had been smoking badly. The claimants were warned by an expert that the sweep hole and inspection chamber should be sealed before they lit the boiler. They ignored this warning and were overcome with fumes.

The defendant was not liable because they could assume that the sweeps would be aware of this particular danger. In this instance, they were aware as they had received a warning.

General Cleaning Contractors v Christmas (1953)

A window cleaner fell when a defective window closed suddenly while he was cleaning it. This caused him an injury. Defective windows were a risk that window cleaners should guard against. His claim against the householder failed, but he was able to successfully claim against his employers for failing to train him properly. Note that this case is before the 1957 Act, but the same outcome would have been reached.

Generally, in order to fulfil the element of competency, the occupier needs to do very little; checks with local trade associations, obtaining references or checking insurance will be sufficient. It has been suggested that if the occupier is a company, then more checks would need to be made.

The following two cases are examples of how some checks need to be made and how a job may be too technical to check.

CASE EXAMPLES

Woodward v The Mayor of Hastings (1945)

The claimant was a child who slipped at school on an icy step and was injured. A cleaner had negligently cleaned the step. The defendants were liable because no technical knowledge was needed to check the cleaning of the step.

Haseldine v Daw (1941)

The claimant was killed when he stepped into a lift that had been negligently repaired by the defendant. The firm had previously been competent and the technicality of the work meant that the occupier was not expected to check it had been done properly.

42.2.3 Liability for torts of independent contractors

Independent contractors are employed by an occupier to do specific, usually specialist, work, and s 2(4)(b) OLA 1957 is the relevant section when a person is harmed by the defective work that the independent contractor has carried out.

An occupier will not be liable for damage caused to a visitor due to the faulty execution of work by an independent contractor, as long as:

- 1 It was reasonable to entrust the work to an independent contractor.
- 2 The occupier had taken reasonable care to see that the independent contractor was competent.
- 3 The occupier had taken reasonable care to see that the work had been done properly.

There are a number of points to make in relation to this section. First, it will only apply where there is evidence of 'faulty execution of ... construction, maintenance or repair'. If there is no evidence of this, the normal negligence principles will apply.

Usually, the more technical the work, the more likely it will be reasonable to appoint an independent contractor. If the occupier does not have any technical skill, most jobs that need a technical ability will be regarded as reasonable for appointment of an independent contractor.

The occupier will be liable if they fail to take precautions for extra-hazardous activities, for example failing to check that the independent contractor has the relevant public liability insurance and risk assessment for the activity.



▲ **Figure 42.2** Hiring a bouncy castle for a party brings legal responsibilities

Guidelines about what is expected from an occupier regarding an independent contractor's insurance were laid out in *Gwilliam v West Hertfordshire NHS Trust* (2002), but this advice was not followed in *Bottomley v Todmorden Cricket Club* (2003).

CASE EXAMPLES

***Gwilliam v West Hertfordshire NHS Trust* (2002)**

The claimant went to a funfair organised by the defendant where there was an inflatable wall. She had to dress in a Velcro outfit and then jump off a trampoline and throw herself against the wall. Unfortunately, she was injured, as the wall had been set up negligently.

The defendant had organised the inflatable wall through an independent contractor, by looking them up in the telephone directory. The defendant had checked the independent contractor's insurance was valid at the time of the booking, but it had expired at the time of the incident.

The claimant was successful against the independent contractor but also sued the defendant, because she alleged that the defendant had failed to provide a safe environment for her as a visitor. The court held that there was a duty of care. When it considered breach, it stated that s 2(2)(b) could not be used, but the nature of the event demanded that the defendant had to

establish that the independent contractor was competent. This included checking the independent contractor's insurance status. In this case, it was an unreasonable requirement for the defendant to check the policy document; it was sufficient that the independent contractor was asked about insurance at the time of the booking. This meant that there was no breach of duty.

***Bottomley v Todmorden Cricket Club* (2003)**

The claimant was working as a volunteer for a firm that had been hired to prepare a firework display. The firm was not insured and had inadequate experience for the type of show that they were putting on. The claimant sued the firework firm and the defendant as occupier of the land. The defendant argued that they could not owe a duty of care to someone who was an employee of the firework firm, as the firm owed that duty only.

The court held that the defendant was liable, because insufficient care had been taken to make sure that the firework firm was competent and there was adequate insurance.

▼ **Figure 42.3** Key cases: categories of visitor with special considerations

Key cases		
Category	Case	Comment
Children	<i>Glasgow Corporation v Taylor</i> (1922)	Some items on premises can be an allurement (berries).
	<i>Phipps v Rochester Corporation</i> (1955)	Parents should take responsibility for small children.
	<i>Simkiss v Rhondda Borough Council</i> (1983)	An occupier should not be asked to achieve a higher standard of care than a parent who did not consider the premises a risk to the child.
	<i>Jolley v Sutton London Borough Council</i> (2000)	A boat was an allurement for 14-year-old boys.
Common calling	<i>Roles v Nathan</i> (1963)	There was a failure to take advice to guard against the risk of harm.
	<i>General Cleaning Contractors v Christmas</i> (1953)	There is no claim if the risk is known and guarded against.
Independent contractors	<i>Woodward v The Mayor of Hastings</i> (1945)	Jobs completed with no technical skill must be checked.
	<i>Haseldine v Daw</i> (1941)	The more technical a job, the less likely it needs to be checked.
	<i>Gwilliam v West Hertfordshire NHS Trust</i> (2002)	It was sufficient for a defendant to enquire about an insurance policy at the time of hiring an independent contractor even though the policy later expired.
	<i>Bottomley v Todmorden Cricket Club</i> (2003)	Checking for competency can include checking insurance status and previous records in doing the job the defendant is hired to do.

42.2.4 Exclusion of liability and defences

The defendant can avoid liability under both Acts. Indeed, OLA 1957 states that duty of care can be restricted, modified or excluded. The defences are the same as for other torts, either complete or partial.

Exclusion of liability (s 2(1))

The duty of care can be extended, restricted, modified or excluded. This is usually done by way of contract or notice. However, the Unfair Contract Terms Act 1977 will apply if the premises are being used for business purposes.

However, an occupier cannot exclude liability for death or personal injury caused by negligence. If an occupier tries to exclude liability for property damage, the reasonableness test will apply. There is one case, though, where there was no liability for death, and that is *White v Blackmore* (1972).

CASE EXAMPLE

White v Blackmore (1972)

The claimant's husband was killed at a race involving old, unsafe cars, when a car's wheel got tangled in the safety ropes. He was thrown twenty feet into the air.

A notice had been posted at the entrance to the course, and at other points about the field, stating that the defendant would not be responsible for any accidents. As the defendant had taken all reasonable precautions to bring to the claimant's attention the conditions attached to the permission, there was no liability.

Contributory negligence

The Law Reform (Contributory Negligence) Act 1945 applies. Where the visitor's failure to take reasonable care for their own safety is a cause of the harm suffered, the amount of damages awarded will be reduced.

Warnings (s 2(4)(a))

If a visitor is given sufficient warning of a danger to make them reasonably safe, the occupier will not be liable for any damage that the claimant suffers because of the danger. The positioning, size and wording of the warning are vital. The warning must refer to the precise risk or danger that the visitor would be facing.

However, in some instances, the danger is so obvious that there is no need for a warning sign, as in *Cotton v Derbyshire Dales District Council* (1994). In contrast,

a warning would have been useless in *Rae v Mars (UK) Ltd* (1990), given that the hole in the ground was immediately inside the door.

CASE EXAMPLES

Cotton v Derbyshire Dales District Council (1994)

The claimant and a party of friends had spent the afternoon together and they were in high spirits when they decided to go for a hillside walk. After a while, one of the party realised that she had to go back to her car. Rather than retracing their steps, the claimant and the rest of the group found what they thought was a path leading to the river. The path was not a path at all, but a steep slope of loose stones, at the end of which was a 60-foot cliff. The claimant ended up sliding off the edge of the cliff.

The claimant argued that there should be a sign placed at both ends of the main path, warning that the cliff could be dangerous. He alleged that he would not have acted as he did, if he had known about the danger.

The claim failed, because there was no obligation to warn of an obvious risk. The claimant would have been aware of the risk that the cliff posed, so a sign would not have affected the events that occurred. Henry LJ said:

'There was no duty to warn of dangers which are obvious. Once it was appreciated that there was no path, the danger of going down a steep slope on a loose surface without being able to see over the brow, was obvious to anyone who had reasonable judgement of the situation.'

Rae v Mars (UK) Ltd (1990)

The claimant, a surveyor, was visiting a vacant factory site when he fell into a deep pit just inside the door of an unlit shed. On the evidence, he was not warned specifically about the exceptional danger created by the pit. He had fallen into it before he had time to switch on his torch.

The defendant was liable, because the company had failed to give adequate warning, and the claimant was awarded damages. In an *obiter dicta* statement, one of the judges said that even if there had been a warning, it was likely to be ineffective without a barrier around the pit, because of the immediacy of the danger to a visitor.

▼ Figure 42.4 Duty of care and responsibility for others (OLA 1957)

Key facts		
Category	Definition	Section
Duty of care	The common duty of care is owed to a visitor.	Section 2(1) OLA 1957
Standard of care	There is a requirement to take enough care to ensure that the visitor will be reasonably safe when using the premises for the purposes for which they are invited or permitted to be there.	Section 2(2) OLA 1957
Children	An occupier must be prepared for children to be less careful than adults. The premises must be reasonably safe for a child of that age.	Section 2(3)(a) OLA 1957
Common calling	A person who has entered premises to carry on their common calling must identify and guard against any risks.	Section 2(3)(b) OLA 1957
Independent contractors	Liability will not attach to an occupier if it has been reasonable to give work to a competent independent contractor whose work has been checked, if appropriate.	Section 2(4)(b) OLA 1957

***Volenti non fit injuria* (consent) (s 2(5))**

The common duty of care does not impose upon an occupier any obligation to take care if the risk of harm has been willingly accepted by the visitor. In contrast, however, a visitor does not always willingly accept a risk just because the occupier has placed a warning sign on the premises. The sign must state the type of harm that may occur, and it has to be clear.

42.3 Unlawful visitors and OLA 1984**42.3.1 Scope of the duty**

Before 1984, the common duty of humanity applied to trespassers who were injured on an occupier's premises, as OLA 1957 did not cover this category of claimant. The 1984 Act was passed following recommendations made by the Law Commission and the decision made in *British Railways Board v Herrington* (1972).

The term 'unlawful visitor' usually refers to people who go onto premises without permission, but there are broadly three categories of people who fall into the definition:

- 1 trespassers
- 2 those lawfully exercising a right to roam
- 3 those lawfully exercising a private right of way.

We are concerned only with trespassers. A trespasser is a person who has:

- » entered the premises without permission, or
- » remained on the premises once permission has expired or been withdrawn.

The person's presence on the premises must be objected to. Trespassers include burglars, squatters or people who have innocently wandered somewhere they are not allowed to.

It is possible to become a trespasser in specific parts of a building or land, as shown in *Tomlinson v Congleton Borough Council* (2003).

CASE EXAMPLE***Tomlinson v Congleton Borough Council* (2003)**

The claimant was visiting a lake in a public park. Swimming in the lake was forbidden, and the defendant, who owned the park, had put warning notices around the lake. The claimant swam anyway and was injured when he dived into a shallow part of the lake.

The House of Lords held that OLA 1984 applied because, although he was a visitor to the park generally, he did not have permission to enter the lake and became a trespasser when he dived in.

[See also subsection 42.3.2 for more information on this case.]

What is the duty of care?

According to s 1(1)(a), the occupier will owe a duty of care to persons other than visitors. The Act applies in respect of any risk of a trespasser suffering injury on the premises because of:

- » any danger on the premises, or
- » things done or omitted to be done on the premises.

So that the law acknowledges that trespassers should have lesser rights, the trespasser can claim for personal injury only. A trespasser cannot recover damages for property damage or pure economic loss.

The case of *Keown v Coventry Healthcare NHS Trust* (2006) is an example of a claim failing because the premises were not dangerous.

Keown v Coventry Health Care Trust (2006)

A man who claimed that brain damage caused him to commit offences had only himself to blame for the childhood accident which caused his condition, the Court of Appeal ruled.

Martyn Keown was nearly 12 when he fell 30 feet from the underside of an external fire escape at Gulson Hospital in Coventry in 1995.

He broke his arm and suffered a significant brain injury which caused a loss of intellectual function and a personality change which allegedly caused him to be subsequently convicted of various offences.

When his damages action against Coventry Healthcare NHS Trust came to Nuneaton County Court, in May last year, he was brought from prison to give evidence.

He told Mr Recorder Dooley at that hearing that he knew he should not be climbing the fire escape as it was dangerous but he was showing off to his younger sister and a friend.

The court found that the trust was in breach of duty to Mr Keown under the Occupiers' Liability Act 1984, but reduced any damages by two thirds because of his contributory negligence in undertaking what the judge called a "foolhardy and rash enterprise".

Allowing the trust's appeal against that one-third finding of liability, Lord Justice Longmore said that it would be a great disappointment to Mr Keown, who had suffered a "severe and debilitating injury".

But, the Recorder's decision could not be justified under the terms of the 1984 Act.

Mr Justice Lewison said that if the Recorder was right, occupiers of buildings up and down the country would have to "child-proof" their buildings in case children tried to climb them. For Mr Keown to succeed, it had to be shown that the premises were inherently dangerous – and there was nothing inherently dangerous about the fire escape.

"There was no physical defect in it: no element of disrepair or structural deficiency. Nor was there any hidden danger. The only danger arose from the activity of Mr Keown in choosing to climb up the outside, knowing it was dangerous to do so," said the judge.

Birmingham Post, 3 February 2006

Questions

- 1 What harm had Keown suffered because of the alleged poor state of the premises?
- 2 What was the legal argument that Keown used to support his claim?
- 3 What duty of care was owed to Keown?
- 4 Why was Keown considered to be contributorily negligent in the County Court?
- 5 What were the two reasons why the court decided against Keown?
- 6 What policy reasons were included in the decision against Keown?

What is the extent of the duty owed to a trespasser?

The duty to trespassers will only exist if all three requirements in s 1(3) are met:

- (a) (the occupier) is aware of the danger or has reasonable grounds to believe that it exists;
- (b) he knows or has reasonable grounds to believe that the other (the trespasser) is in the vicinity of the danger concerned or that he may come in the vicinity of the danger ...; and
- (c) the risk is one which in all the circumstances of the case, (the occupier) may reasonably be expected to offer the other some protection from.

All the criteria must be met, and they must be considered in the light of the circumstances in which the alleged breach caused injury.

What is the standard of care?

The standard of care is set out in s 1(4): to take such care as is reasonable in all the circumstances of the

case to see that the other does not suffer injury on the premises because of the danger concerned.

Unlike the common law duty of care to trespassers, this is objective rather than subjective. The court will take into account factors such as the:

- » age of the trespasser
- » nature of the premises
- » extent of the risk
- » practicability of precautions.

Any factors that are personal to the defendant are not considered and do not form part of 'all the circumstances'.

In *Donoghue v Folkestone Properties Ltd* (2003), the circumstances that needed to be considered were the time of year that the incident occurred and the fact that there was no reason to believe that anyone would be swimming then. In *Ratcliff v McConnell* (1999), the risk of harm was obvious and the defendant had done everything they could to deal with it.

CASE EXAMPLES

Donoghue v Folkestone Properties Ltd (2003)

The claimant (Donoghue) spent Boxing Day drinking, and he intended to go for a midnight swim in the sea with his friends. He dived from a slipway in the harbour and struck his head on an underwater obstruction. He broke his neck. At trial, he gave evidence that other people had used the slipway to dive from during the summer months. Although there were no warning signs, security guards had prevented people from doing this.

The obstruction that had injured the claimant was a permanent feature of the harbour, and with a high tide it would not have been a danger. As soon as the tide went out, it posed a danger. Donoghue was a trained diver in the Royal Navy and it was part of his training that he would assess water levels and obstructions before diving. The claimant was successful at trial but his damages were reduced by 75 per cent for contributory negligence.

The defendant appealed on the basis that the claimant's characteristics and the circumstances of the incident had to be considered. The appeal was allowed as the circumstances had to be considered: as the dive had taken place in winter, the defendant had no reason to believe that the claimant or anyone else would be swimming in the harbour. So, the criteria were not satisfied and no duty of care existed.

Ratcliff v McConnell (1999)

The claimant was a student who had been out socialising with his friends. They decided to go for a swim in the college pool, and had to climb over a locked gate to gain entry to the pool. The pool had a notice stating when it would be locked and when it could not be used. There was a notice at the shallow end indicating that it was shallow, but the boys did not see the signs because there was no light. All of the boys lined up to dive in, but unfortunately where the claimant dived was shallower than where the others dived. He suffered a broken neck and became paralysed.

At trial, he was classed as a trespasser. The 1984 Act applied and the college owed a duty of care, as it was aware that students were using the pool outside the permitted hours. The duty was breached because the college could have done more to prevent this happening. The claimant's damages were reduced by 60 per cent for contributory negligence. The defendant appealed.

The appeal was allowed. There had only been one instance of trespassing at the pool in the four years before the claimant's accident, so there was no reason for the college to suspect that students had gone into danger. Also, it was not the pool that was dangerous but the activity – diving into the pool in the dark. This was an obvious risk that the defendant did not have a duty to warn about.

42.3.2 Exclusion of liability and defences

Unlike the 1957 Act, the 1984 Act does not say that the duty to take reasonable care can be excluded. Some academics have suggested that exclusion of liability is possible, since the Act does not say that exclusion is not possible. However, others suggest that it is not possible, as the duty in the 1984 Act reflects the common law duty of humanity – this cannot be excluded, as it is the minimum standard below which occupiers cannot fall.

There is no case law to support either argument, so this is still open to debate.

Contributory negligence

As with OLA 1957, this provides a partial defence, and damages will be reduced accordingly. This has been raised as a defence in some of the cases already mentioned, where the claimant contributed in some way to the harm suffered.

CASE EXAMPLE

Young v Kent County Council (2005)

The claimant climbed onto a school roof using an extractor fan attached to the building. The skylight was brittle, and a health and safety report suggested that there had been problems with access to the roof. The court held that the defendant (the school) had a duty to protect children from known risks. There was a breach of the duty, as the defendant had failed to protect child trespassers, even though it would not have cost much money to deal with the roof problem. The claimant's contributory negligence was assessed at 50 per cent.

Warnings (s 1(5))

An occupier will fulfil their duty to a trespasser by taking reasonable steps to:

- » give a warning of the specific danger, or
- » discourage people from taking a risk in relation to the danger.

Tomlinson v Congleton Borough Council (2003) (see also Section 42.3.1) is a case example where a warning was used to good effect.

CASE EXAMPLE

Tomlinson v Congleton Borough Council (2003)

The claimant was severely injured when he dived into a shallow lake after ignoring the signs that prohibited diving for that reason. In the Court of Appeal, the defendant was held liable for the claimant's injuries because of the inadequate steps taken to prevent him from trespassing. It also stated that the warning signs may have acted as an allurements to macho young men. The claimant conceded that he was a trespasser. The House of Lords reversed the Court of Appeal decision.

The House of Lords held that the harm was caused by the claimant's own actions, not by the state of the premises. Lord Hoffmann said that there was no duty to warn or take steps to prevent the claimant from diving, as the dangers were obvious. This was based on the principle that the claimant had free will, and to suggest otherwise would deny the benefit the lake gave to other users.

This decision was policy-driven, as it emphasised the public benefit of the lake. If the case was found in the claimant's favour, it might lead other defendants to close their parks for fear of being sued. Also, the court felt that the claimant should be able to take responsibility for his own reckless actions.

Volenti non fit injuria (consent) [s 1(6)]

There is no duty of care owed to someone who willingly accepts the risk of known danger.

CASE EXAMPLES

Ratcliff v McConnell (1999)

It was held that the claimant knew of the dangers of diving into shallow water, as he had known that the pool was closed and contained less water than usual. So the claimant had willingly consented to the risk of harm from the danger of the pool. The defendant had done all they could to prevent harm in the circumstances.

Titchener v British Railways Board (1983)

The court stated that adult claimants are assumed to have accepted any risk that they knew about when entering the land. This case dealt with liability under the 1957 Act, so if it applies equally to the 1984 Act, this defence will give greater protection for occupiers against trespassers, because the defence will only apply to visitors if they know enough to be reasonably safe.



▲ Figure 42.5 There is no duty of care owed to someone who willingly accepts the risk of known danger

COMMENT

Evaluation of the law relating to occupiers' liability

The Occupiers' Liability Act 1957 was an attempt to clarify the law in relation to harm to visitors. However, it seems to have raised more questions than it solved. There is no statutory definition of 'occupier', and the current definition has been created through case law. As a result, it can be difficult to determine who this person is, which can lead to a claimant being without a remedy. However, since there can be two occupiers, as in *Wheat v Lacon* (1966), a claimant may have more opportunity to succeed.

Premises

The broad interpretation of this word has increased the claimant's chance of success. However, it means that an occupier has to take responsibility for a wide range of objects as well as land and property, which can appear to be onerous. But this needs to be balanced against the 1957 Act imposing liability only for any harm caused as a result of the state of the premises, rather than a person's conduct on the premises.

Children

Children are given extra protection, as they are susceptible to 'allurements'. However, this is counterbalanced by cases such as *Phipps* (1955), which states that the law expects parents to take some responsibility for the actions of their children.

Avoidance of liability

Special rules relating to independent contractors move liability from the occupier to the contractor if appropriate. Cases such as *Gwilliam* (2002) show how easy it can be for an occupier to evade liability for harm caused by the state of their property.

Trespassers

Trespassers are specifically protected by OLA 1984, however, there are two main issues that arise from this. These are discussed below.

A trespasser is owed a lower standard of care. This means that it is easier for the occupier to avoid liability. However, justice dictates that trespassers should be treated differently, as they have either not been invited onto premises or have overstayed their welcome.

It appears from recent case law that the courts are expecting both visitors and trespassers to take more responsibility for themselves, otherwise occupiers would be expected to second-guess the behaviour of both categories of people. The question remains: should the law protect everyone from everything?

TARGET SKILLS

- 1 Describe the duty of care owed to children in OLA 1957.
- 2 Name three cases relating to an occupier's liability for children.
- 3 Assess whether the defences in OLA 1957 and OLA 1984 provide sufficient protection for a defendant.
- 4 Evaluate whether the law in OLA 1984 allows trespassers to obtain compensation too easily.

▼ Figure 42.6 Avoiding liability: OLA 1957 and OLA 1984

Key facts		
Method of avoiding	OLA 1957	OLA 1984
Exclusion	Section 2(1) – duty can be extended, excluded or modified by notice.	No provision or cases covering this point.
Contributory negligence	Section 2(3) – reduction in damages to the extent that the claimant causes own harm.	The same principle applies here.
Warnings	Section 2(4)(a) – warning must be sufficient; consider positioning, size and wording.	Section 1(5) – there is no obligation to ensure that the claimant is reasonably safe.
<i>Volenti</i>	Section 2(5) – no duty is owed if the claimant willingly accepts the risk.	Section 1(6) – there is no duty owed if the claimant willingly accepts the risk of harm.

STRETCH AND CHALLENGE

In *Young v Kent County Council* (2005), the claimant was 12. The court made it clear that if the claimant had been an adult, there would have been no liability. The case can be read at www.lawteacher.net/cases/young-v-kent-county-council.php

Discuss whether a 12-year-old child should be aware of the consequences of risky behaviour and therefore treated like an adult for the purposes of OLA 1957 and OLA 1984. Refer to relevant cases in your response.

TEST YOURSELF

- 1 Describe the statutory duty owed to visitors.
- 2 Define 'occupier' according to *Wheat v Lacon* (1966).
- 3 Describe how an occupier can avoid liability if they employ an independent contractor to do work on their premises.
- 4 Describe when a duty of care is owed to a trespasser.
- 5 Explain why a trespasser can make a claim for personal injury only.

EXAM-STYLE QUESTIONS

- 1 Pinot takes his 8-year-old daughter, Chardonnay, to see the Ruritanian State Circus. As they pay their entrance fee, they see notices displayed which state that visitors enter at their own risk.

The seats on which they have to sit for the performance are very old and Pinot injures his back severely when his seat collapses under his weight and he falls to the floor. Later, as the circus performance ends and they are trying to leave the circus tent, Chardonnay runs ahead through the crowd. She sees the performing bear tied up nearby, climbs into its enclosure and tries to stroke it, but the bear mauls her face so badly that she subsequently loses the sight in one eye.

Assess the potential liability in tort for the losses sustained by Pinot and Chardonnay. Might the Ruritanian State Circus successfully raise any defences?

Cambridge AS and A Level Law 9084 Paper 43 Q4 October/November 2013

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- 2 The Occupiers' Liability Acts 1957 and 1984 seek to ensure that the interests of the occupiers of land never completely override the rights of people who enter their land.

Discuss this statement and debate the extent to which the legislation achieves what it set out to do.

*Cambridge AS and A Level Law 9084 Paper 41 Q2
October/November 2012*

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43

Private nuisance

Introduction

The tort of private nuisance attempts to balance the rights of a person to use their land as they want with the claimant's right to enjoy their land without interference from others.

This tort involves situations where a person has been unable to enjoy their property because of another

person's activity. The activity could range from a neighbour who is making too much noise to one who is polluting the environment (such as smoke from factories in an industrial area). This chapter links to the key concept of rights, duties and responsibilities, and freedoms.

43.1 Nature of liability

Private nuisance has been defined as the substantial and unreasonable indirect interference with the claimant's land or with their enjoyment (use) of it.

In order for a claimant to succeed in a claim for nuisance, they must prove three elements:

- 1 There must be an indirect interference with the use or enjoyment of land or property.
- 2 The interference must be unreasonable.
- 3 The interference must have caused damage.

43.1.1 Indirect interference

The interference can come from sources such as smoke, smells, noise, vibrations or water.

43.1.2 Unreasonable interference

Generally, a person is able to do what they want on their own property, as long as the activity does not interfere with another's enjoyment of their land. The law works on the basis that there must be give and take between neighbours. An unreasonable interference is one that goes beyond acceptable behaviour, so not every activity or interference will be a nuisance.

43.1.3 Damage

The interference must have caused material damage. That is, the damage must be more than trivial. This is usually discomfort or interference with use of land, but it can also be actual physical damage to property. Personal injury is not usually recoverable in nuisance, as this is covered by the tort of negligence.

Personal discomfort is measured by reference to the standards of an ordinary person who might occupy the claimant's property.

Where the interference causes discomfort rather than physical damage, the court will apply a reasonableness test to decide if there is an actionable nuisance. A number of factors are considered, which are set out in Section 43.3. These may be considered in isolation or together.

Since the case of *Hunter v Canary Wharf* (1997), the court will concentrate on damage to the land itself rather than the landowner. This means that the landowner must find a way of demonstrating how their land has been affected by the unreasonable activity.

CASE EXAMPLE

Southwark London Borough Council v Mills (1999)

Southwark London Borough Council had converted a house into flats and Mills lived in one of them. She sued the council, claiming that the building was poorly soundproofed and she was bothered by the

everyday noise from the other occupants in the other flats.

The ordinary use of the flats was not a nuisance, as there was nothing unusual about the way in which the building had been converted. The noise was normal for this type of residential building.

▼ Figure 43.1 Types of interference and key cases

Activity	Case example
Trees spreading onto the claimant's land	<i>Davey v Harrow Corporation</i> (1957)
Water flooding onto land	<i>Sedleigh-Denfield v O'Callaghan</i> (1940)
Noise, e.g. blowing whistles and hitting trays	<i>Christie v Davey</i> (1893)
Smells, e.g. fast food	<i>Adams v Ursell</i> (1913)

43.2 Parties to the case

43.2.1 Who can sue?

The claimant must have a proprietary interest in the land, so only the owner or tenant of land can sue for nuisance. This principle was confirmed in *Hunter v Canary Wharf Ltd* (1997).

CASE EXAMPLE

Hunter v Canary Wharf Ltd (1997)

The claimants claimed for damages:

- in nuisance for interference with television signals caused by the erection of the Canary Wharf tower
- in negligence and nuisance for dust created by the construction of the link road in the area.

The Court of Appeal dismissed the action relating to the interference to television signals because, on the facts, the interference was not capable of being a nuisance. The action relating to the dust was allowed to proceed.

On appeal, the House of Lords considered two questions:

- 1 Is interference with television reception capable of amounting to an actionable nuisance?
- 2 Is it necessary to have an interest in the property affected to claim in private nuisance? If so, what interest?

A majority of the House of Lords held that it was necessary for the claimant in a nuisance action to prove an interest in the land affected. This established that this tort is one that is against the land. Occupation of the property as a home was not sufficient to bring a claim. An action in nuisance can be brought by the owner or tenant or by a person who enjoyed exclusive possession but lacked any proprietary interest. A licensee without exclusive possession cannot bring a claim; in this instance, spouses and children of tenants of a property affected by the dust that had become a nuisance did not have a successful claim.

ACTIVITY

Answer the following questions on *Hunter v Canary Wharf Ltd* (1997).

- 1 Which torts were the claimants using to obtain compensation?
- 2 What were the two main issues in the case?
- 3 Is it possible for interference with television signals to be an actionable nuisance?
- 4 Why is it necessary for the claimant to have an interest in land to bring a claim in nuisance?
- 5 Is it fair that a person without an interest in land cannot bring a claim in nuisance even if they have suffered physical harm?

Internet research

Read these news stories. Summarise the facts and outcome of each case.

Were fireworks the cause of the deaths of road users? www.bbc.co.uk/news/uk-england-somerset-27067020

News report of *Hunter v Canary Wharf*: www.independent.co.uk/news/people/law-report-no-nuisance-caused-by-canary-wharf-tower-1259249.html

43.2.2 Who can be sued?

Generally, the people who can be sued can be placed into one of three categories:

- 1 The creator of the nuisance – even when they no longer occupy the land from which the nuisance originates. An occupier is liable for nuisances created by themselves and their employees, but is not generally liable for independent contractors or trespassers. If an occupier becomes aware of a nuisance arising out of a natural condition on their land, they must take positive action to prevent it.
- 2 The person who authorises the nuisance – such a person was successfully sued in *Tetley v Chitty* (1986).
- 3 Anyone who adopts the nuisance – this person may be sued as they have allowed the nuisance to carry on. An example can be found in *Sedleigh-Denfield v O'Callaghan* (1940).

CASE EXAMPLES

Tetley v Chitty (1986)

Residents in a town complained about the noise coming from a go-karting track that could be heard in their houses. The local council had granted planning permission for the track on its land and had granted a lease to a go-karting club. The council was no longer in occupation of the land, the club was. However, the council was made liable, because excessive noise was a foreseeable consequence of the use for which the land had been let.

Sedleigh-Denfield v O'Callaghan (1940)

Without the defendant's permission, and technically while trespassing, a local council laid a pipe in a ditch on the defendant's land. The workmen involved did not place a grid near the mouth of the pipe to prevent leaves blocking it. The defendant was aware of the trespass and the ditch was cleaned out twice a year.

Some years later, after a heavy rainstorm, the pipe became blocked and caused flooding on the claimant's land. The defendant was liable for the nuisance because they were aware of its presence, and therefore should have taken reasonable steps to prevent it.



▲ Figure 43.2 Excessive noise can cause a nuisance

43.3 Unreasonable interference and factors considered by the court

When deciding whether the interference is a nuisance, the court will apply a reasonableness test.

There are a number of factors to be considered that may make an activity unreasonable:

- » locality
- » duration
- » sensitivity
- » malice.

43.3.1 Locality

This element is vital when the courts are deciding whether the activity is a nuisance. A property owner in the middle of a city cannot reasonably expect the same peace and quiet as someone who lives in the countryside. A specific use of land may be reasonable in one area but not in another. However, this rule does not apply in cases where the interference causes physical damage to property.

CASE EXAMPLES

St Helen's Smelting v Tipping (1865)

The claimant bought a valuable estate, which was located within two and a half kilometres of a smelting works. Fumes from a copper smelter damaged trees and crops on the claimant's land. The defendant argued that the whole neighbourhood was devoted to similar manufacturing processes and that smelting should be allowed to continue as it was not a nuisance.

The defendant was liable. The court distinguished between nuisances causing physical damage and those causing personal discomfort.

Sturges v Bridgman (1879)

The defendant, a sweet manufacturer, had used industrial equipment to make sweets for more than 20 years. This caused no interference until the claimant, a doctor, built a consulting room that extended into his garden that was adjacent to the defendant's premises. The claimant argued that the noise and vibration from the equipment was a nuisance. The claim succeeded. The court took into account the fact that the area was one dominated by the doctors' consulting rooms, and so any industrial activity would be a nuisance. Thesiger J stated:

'What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.'

This judgment can make it difficult for those who live in industrial areas to succeed in nuisance claims.



▲ Figure 43.3 Pollution can be a nuisance in law

The character of a locality can be changed when planning permission is granted. For example, the East End of London was an industrial area originally but was redeveloped so that London could host the 2012 Olympic Games. This means that activity that might have been considered unreasonable before the change occurred is now considered reasonable. Two cases that considered the character of a locality are described below.

CASE EXAMPLES

Gillingham Borough Council v Medway (Chatham) Dock Co. (1993)

Medway had been granted planning permission in order to operate a dock. It was only possible to access the dock through residential areas, and this traffic made a lot of noise. The council sued in nuisance to get an injunction to reduce the amount of traffic at night. The court held that just because planning permission had been granted for a specific activity, it did not mean that the activity could not become a nuisance. However, as the planning permission had changed the character of the area, the alleged noise nuisance was now considered to be reasonable, so there was no liability on the part of the defendant.

Barr v Biffa Waste Services Ltd (2012)

The claim commenced in 2009, when a group of local residents issued High Court proceedings against Biffa Waste Services for nuisance, because of an odour that was being emitted from a landfill site.

At trial, the court found in favour of the defendant, stating that, in the absence of negligence or a breach of the operating permit, the company should not be liable for the inevitable consequences of its actions.

The Court of Appeal applied a more traditional approach, finding that it was not a defence to a nuisance claim to show that the activities causing the nuisance were authorised by the operating permit. The court made it clear that it is a question of degree whether the interference with the enjoyment of the claimant's land was sufficiently serious to create a nuisance. It had to take into account the character of the area when assessing if the use of land is reasonable, and that character can change over time, for

example because of planning permission. The Court of Appeal, reversing the decision, held that the granting of an environmental permit for a particular use does not have the same effect on what is and is not to be considered the reasonable use of land in a particular area.

This decision is important because it means that waste-disposal companies can still be liable for nuisance even if they are operating in accordance with their permit.

43.3.2 Duration

The longer the interference continues, the more likely it is to be a nuisance. However, there can be liability for a short interference if it causes substantial harm.

CASE EXAMPLE

Bolton v Stone (1951)

The claimant was standing outside her house when she was struck by a cricket ball that had been hit over the fence from a nearby cricket pitch. The cricket club had erected a 17-foot fence around the ground, as it was aware of this problem. Balls had been hit out of the ground six times in about 30 years. As a result, the claim was unsuccessful.

In *Crown River Cruises Ltd v Kimbolton Fireworks Ltd (1996)*, the unreasonable interference only lasted a short period of time, but there was an actionable nuisance because of the amount of damage caused.

CASE EXAMPLE

Crown River Cruises Ltd v Kimbolton Fireworks Ltd (1996)

A barge was set alight when sparks and burning debris from fireworks fell onto it. The firework display only lasted 20 minutes, but the nuisance was sufficiently serious to counterbalance the short duration of the display. The claimant was successful in both nuisance and negligence.

A defendant may be liable in nuisance for a one-off interference with the use of the claimant's land.

43.3.3 Sensitivity

The law does not take into account abnormal sensitivity in either a person or that person's property. As a result, the defendant will not be responsible for damage caused to another person's property that occurred only because of its unusually sensitive character.

CASE EXAMPLES

Robinson v Kilvert (1839)

The defendant manufactured paper boxes in a cellar of a building. This required hot and dry air, so they heated the cellar accordingly. This raised the temperature on the floor above, which meant that the claimant's stock of brown paper was damaged. The heat would not have harmed normal paper, so the defendant was not liable.

If the nuisance had harmed a person or property that was not abnormally sensitive, the defendant would be liable.

McKinnon Industries v Walker (1951)

The claimant grew orchids, an unusually sensitive activity. At the time of the case, orchids were considered to be a rare plant and difficult to grow. The toxic fumes from the defendant's factory damaged them. However, the fumes would have also damaged non-sensitive plants. The claimant was able to recover the full extent of his loss, including the damage to the sensitive orchids.

The claimant will not have a successful claim if the interference in enjoyment to land would not have affected or disturbed ordinary, healthy people.

As soon as the claimant has proved that the defendant has interfered with their right to the ordinary enjoyment of their land, they can also claim protection from any other problems caused by the unusual sensitivity.

43.3.4 Malice

Generally in tort, the defendant's motive when doing something is not important. However, it can become relevant in the tort of nuisance when the court is considering the reasonableness of a person's activity on their land. Behaviour that is motivated by malice may make an otherwise reasonable act into a nuisance.

CASE EXAMPLES

Christie v Davey (1893)

The claimant and the defendant were neighbours. The claimant was a music teacher who gave lessons at home and sometimes held music parties. The defendant objected to these activities and retaliated by blowing whistles, banging on metal trays, shouting and generally making noise to annoy his neighbour.

The court granted an injunction against the defendant to prevent his actions from continuing to be a nuisance, indicating that it may have taken a different view of the situation had the defendant's actions not been motivated by malice.

Hollywood Silver Fox Farm Ltd v Emmett (1936)

The defendant's premises were attached to the claimant's silver fox farm. (A fox is a wild animal about the same size as a medium domestic dog.) It was once fashionable to wear coats made out of fox fur. The silver foxes were bred specifically for their fur. The females are very nervous during breeding time and are likely to eat their young if disturbed in any way. The defendant knew this.

In an attempt to prevent the foxes from breeding, the defendant fired his guns on his own land, as near as possible to the boundary with the claimant's land, in order to frighten the foxes.

The court considered the intention of the defendant to be relevant in nuisance. Therefore, both an injunction and damages were awarded to the claimant. Nonetheless, the court made it clear that, in general, shooting guns on a person's own land was not a nuisance, but as the claimant had acted maliciously, he had behaved in an unreasonable way.

▼ Figure 43.4 Key cases: unreasonable interference in nuisance

Key cases		
Factor	Case	Outcome
Locality	<i>St Helen's Smelting v Tipping</i> (1865)	A claimant who suffers property damage is more likely to have a claim in nuisance.
	<i>Sturges v Bridgman</i> (1879)	'What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.'
	<i>Gillingham Borough Council v Medway (Chatham) Dock Co.</i> (1993)	Planning permission can change the nature of a locality.
	<i>Barr v Biffa Waste Services Ltd</i> (2012)	The granting of a permit does not affect the reasonableness of use of land in a particular area.
Duration	<i>Bolton v Stone</i> (1951)	There is no nuisance where balls were an interference only five times in 30 years.
	<i>Crown River Cruises Ltd v Kimbolton Fireworks Ltd</i> (1996)	Even if the unlawful interference lasts a short time, there can be actionable nuisance because of the amount of damage caused.
Sensitivity	<i>Robinson v Kilvert</i> (1839)	A claim is possible if other people have been affected.
	<i>McKinnon Industries v Walker</i> (1951)	Damage to ordinary plants meant that the nuisance claim was successful.
Malice	<i>Christie v Davey</i> (1893)	Malice will make ordinary activity a nuisance.
	<i>Hollywood Silver Fox Farm Ltd v Emmett</i> (1936)	Gun shooting on a farm was an ordinary activity but the defendant had acted maliciously.

43.4 Defences

A defendant will have two main defences to a claim in nuisance:

- » prescription
- » statutory authority.

43.4.1 Prescription

In a claim for private nuisance, it will be a defence to show that the nuisance had been actionable (capable of being claimed for) for 20 years and the claimant was

aware that it had affected their interest during that time. So, if an activity continues for 20 years, this will legalise any potential nuisance.

In *Sturges v Bridgman* (1879), the defence failed because the noise from the sweet maker's activities only became a nuisance when the doctor extended his consulting room. The 20 years began to run from that date. However, it is not enough for a defendant to show that the activity has been carried on for 20 years; the interference must have been actionable as a nuisance for that period of time.

CASE EXAMPLE

Coventry v Lawrence (2014)

Speedway (motorcycle) races had taken place in a stadium since the 1970s. There were some neighbouring properties, including a property later owned by the claimant some 500 metres from the stadium. The claimant moved into the property during 2006, but the property had been occupied since the 1950s. They sued the operators of the speedway races in nuisance, because of the interference made by the noise.

The defendants argued that they had planning permission to hold the speedway races, and therefore the courts had to balance the interests of the public and the claimant. Also, the events had taken place for years. In contrast, the claimant argued that this was irrelevant and the defendants were making far too much noise.

Two issues were raised during the case: locality and prescription.

- 1 In relation to locality, the court held that a defendant could not rely on their own wrongdoing to change the nature of the locality. A noisy activity or activities may be relevant to the character of a locality, but the character of a locality could not be used to justify noises that were so loud that it amounted to a nuisance.
- 2 Prescription can be a defence if the noise has been so bad for more than 20 years that it has amounted to a nuisance. Here, the defendant could not prove that the noise throughout the 20 years before the claim was started was enough to amount to a nuisance.

The claimant was awarded damages.

43.4.2 Statutory authority

If an Act of Parliament authorises the defendant's activity, the defendant will not be liable for interferences

of enjoyment that are an inevitable outcome of that activity. An inevitable outcome is one that cannot be avoided by the use of skill and care by the defendant.

CASE EXAMPLES

Metropolitan Asylum District v Hill (1881)

A local authority was given statutory authority to build a smallpox hospital. It was prevented from erecting it in a place that would have been a source of danger to the local community. In this case, the authority to build could have been used without committing a nuisance by putting the hospital in a less-populated area.

Allen v Gulf Oil Refining (1981)

A private Act of Parliament authorised the defendant to acquire land by compulsory purchase to build an oil refinery to import and refine crude oil and petrol products. However, the Act did not include the authority for using and operating the refinery once it

had been completed. After the refinery had been in operation for a while, the claimant, who lived in the vicinity, maintained that it caused a nuisance by way of smell, noise and vibration.

When deciding if the defendant had statutory authority to commit a nuisance, the court considered the preamble to the Act, the public demand for oil and the fact that Parliament would not have authorised the building of the refinery without also authorising its use.

The defendant was entitled to statutory immunity in respect of any nuisance that they were able to prove was an inevitable outcome of building the refinery, which conformed to the intention of Parliament when it passed the Act. So, the claimant lost their claim.

▼ Figure 43.5 Key terms for private nuisance

Key terms		
Key term	Comment	Case
Indirect interference	The interference is indirectly caused by the actions of the defendant, e.g. noise.	<i>Christie v Davey</i> (1893)
Unreasonable interference	The defendant's activity goes beyond acceptable behaviour.	<i>Southwark London Borough Council v Mills</i> (1999)
Damage	The damage must be material (more than trivial).	<i>Hunter v Canary Wharf</i> (1997)
Claimant	This is someone with a proprietary interest.	<i>Hunter v Canary Wharf</i> (1997)
Defendant	This can be the: • creator of the nuisance • authoriser of the nuisance • adopter of the nuisance.	<i>Tetley v Chitty</i> (1986) <i>Sedleigh-Denfield v O'Callaghan</i> (1940)

TARGET SKILLS

- 1 Describe the defences that are available in the tort of nuisance.
- 2 Name appropriate cases that illustrate the use of the nuisance defences.
- 3 Analyse the case of *Coventry v Lawrence* (2014) and its impact on the tort of nuisance.
- 4 Consider whether the remedies available in the tort of nuisance are adequate.

COMMENT

Evaluation of the law relating to nuisance

The tort of nuisance has been described as the law of 'give and take', as it attempts to balance

competing interests between two individuals. This element of compromise can come with a price: one person's interests will be protected at the expense of another's.

It can be difficult to establish liability, because competing interests can give rise to complex issues – one party might be a homeowner who is adversely affected by the activities of a business that needs to trade.

The law allows a claimant to be compensated easily where there is physical damage, but compensation is much more difficult to quantify where there is lack of enjoyment of the property. This may leave a claimant under-compensated.

Reasonable use

On the one hand, it can be difficult for the court to decide how much importance to attach to the factors relating to reasonable use. On the other hand, it gives the courts a degree of flexibility when determining unreasonableness, but it can limit the claimant's success in the tort.

As there is no set standard of what is unreasonable and therefore a nuisance, it means that a claimant can be left uncompensated for a nuisance. There is a fine line between what one person might think is a tolerable annoyance and what another might think is an actionable nuisance.

Claimants and defendants

The pool of potential claimants is smaller than, say, that of trespass, because the claimant must either be a tenant or an owner. This can make the tort of

nuisance ineffective for a large proportion of people who may have suffered loss of enjoyment in the land, for example people who are under the age of 18 or licensees. This limitation was put in place to prevent floodgates opening, but it is to the detriment of people who may have suffered damage or harm.

In contrast, there are three categories of potential defendant who may be sued, which gives a claimant a broader range to receive compensation. Currently, the law allows a person to sue someone who authorised or adopted a nuisance. This could mean that a person is a defendant even though they are not actually committing the nuisance, so it is important, for example, that landlords do not authorise the activities of a tenant, otherwise liability might attach to them.

Human Rights Act 1998

Article 8 of this Act is being used more frequently as an alternative argument in nuisance cases. This Article gives a person the right to a private and family life. If successful, the claimant will receive compensation, which might not always be an appropriate remedy for the claimant.

The tort of nuisance allows for a wider range of remedies, including an injunction. This allows the court to award the remedy that is most suitable for specific claimants. The injunction allows both parties to enjoy their land, but it also means that ongoing and possible future nuisances can be addressed.

STRETCH AND CHALLENGE

Consider whether it is possible to balance the interests of both parties in a nuisance claim.

TEST YOURSELF

- 1 Define nuisance.
- 2 Describe the damage which must be caused by the interference, and state cases you can use to support this.
- 3 According to *Hunter v Canary Wharf* [1997], who can bring a claim in nuisance?
- 4 Describe the categories of people who can be sued in nuisance. State cases which support your answer.
- 5 List and describe the factors that can make an activity unreasonable.

EXAM-STYLE QUESTION

Snuff & Co has a factory located next to a housing estate which was built for workers at the factory. Fumes and smoke from the factory often blow across the estate. As a consequence, local residents frequently find that they have to keep their windows closed even during the heat of the summer months.

Bill and Ted are elderly residents of the estate who suffer from breathing problems and their health has deteriorated considerably because of many years' exposure to air pollution from the factory.

Snuff & Co has tried to encourage the smoke and fumes to travel away from the estate, but the measures taken resulted in interference with mobile (cell) phone reception in the area. A group of local residents has made numerous complaints.

Assess the likely success of any claims in the tort of private nuisance brought against Snuff & Co.

Cambridge AS and A Level Law 9084 Paper 41 Q4 October/November 2012

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44

Rylands v Fletcher

Introduction

Rylands v Fletcher (1868) was a ground-breaking case that changed tort law in the English legal system. It introduced the principle that would be used to protect individuals from damage caused by 'things' that escaped from the defendant's land.

Even though it is a tort in its own right, its origins are in the tort of nuisance. In recent years, it has not

been as popular, because of the development of more appropriate torts. However, it is still seen as a tort that protects against environmental damage. This chapter links to the key concept of liability for actions or omissions.

44.1 Nature of strict liability

The rule in *Rylands v Fletcher* (1868) was established at a time when increased industrialisation caused damage such as fires, floods or escapes of fumes. Initially, *Rylands v Fletcher* was a strict liability tort to ensure that 'social justice' was achieved, in order to protect people against the problems caused by industrialisation.

The rule is set out in the case of the same name.

44.1.1 The facts of the case

The defendant, a mill owner, had paid independent contractors to make a reservoir on his land which was intended to supply water to the mill. While working on the reservoir, the contractors discovered the shafts and passages of an old coalmine. Some of the passages joined up with a mine on the claimant's neighbouring land. The contractors could have blocked up the shafts, but did not. When the reservoir was filled, the water burst through the shafts and flooded the claimant's mine, causing damage worth £937.



The defendant had not been negligent as he did not know about the shafts, and he could not be vicariously liable as the contractors were not employees. There could be no claim in trespass to land, because the damage

◀ **Figure 44.1** Blackburn J, who set out the principle in *Rylands v Fletcher*

was not direct and immediate. Also, at the time, nuisance did not apply to a one-off incident.

The decision: the defendant was still liable in tort. The House of Lords claimed that the foundation for the rule had been set out in previous nuisance cases, so the court took the opportunity to create a new legal principle.

Blackburn J set out the principle:

'We think that the true rule of law is, that the person who for his own purposes brings onto land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.'

The House of Lords approved the principle, although Lord Cairns added the stipulation that the defendant must be carrying out a 'non-natural' use of the land.

To succeed in the tort, the claimant must show the following:

- 1 The defendant must control the land from which the mischief has come.
- 2 The defendant must have brought and accumulated something in the course of some non-natural use of the land.
- 3 The thing accumulated must be likely to do damage if it escapes.
- 4 The dangerous thing must escape.
- 5 There must be damage because of the escape.

Put simply, a defendant who brings onto their land something that is likely to cause damage if it escapes, is liable for the damage it causes when it does escape.

The law of tort is predominantly fault-based, which means that some blame must be attached to someone, but sometimes a tortfeasor can be made strictly liable. Originally, *Rylands v Fletcher* was a

strict liability tort. This means that a defendant could be liable for damage even though they did not know that there was a risk of damage or could not have prevented the damage; for example, an employer can be held vicariously liable for the torts of its employees. More recently, an element of fault has been introduced, based on the type of harm being reasonably foreseeable to the defendant.

CASE EXAMPLE

Cambridge Water v Eastern Counties Leather (1994)

The defendants had carried out a leather-manufacturing business for many years. In the tanning process, they used a particular solvent, until 1976 when they began to use a different process. Before 1976 there were frequent spillages on the floor, which, over the years, seeped into the concrete and into the soil itself. It polluted an area where the claimants had their pumping station, extracting water for domestic use.

There was no liability because the defendant could not have foreseen the seepage.

In *Transco plc v Stockport Metropolitan Borough Council* (2004), the 'likely to do mischief' test was changed into a foreseeability test. A defendant will not incur liability if they could not have foreseen a high risk of danger if the thing escaped from their land (see subsection 44.2.1 for further case details). However, liability under the rule in *Rylands* should be strict. It should not be a case of whether the defendant could have or should have foreseen that a thing would give rise to a high risk of danger if it escaped.

44.1.2 Who can sue?

Traditionally, even though *Rylands* does not indicate that the claimant needs to be a landowner, it was thought that the claimant must have an interest in the land affected by the escape. However, the position was unclear.

The cases of *Weller v Foot and Mouth Disease Research Institute* (1966) and *Read v Lyons* (1947) seem to support this. In *Weller*, the claimant did not succeed in their claim, as they did not have an interest in the land affected by the foot and mouth disease virus that escaped from their research centre. In *Read v Lyons*, it was said in *obiter dicta* that the claimant must be an occupier.

But this does not mean that the claimant and the defendant have to own/occupy separate areas of land;

for example, in *Hale v Jennings Bros* (1938), there was liability although both parties occupied the same ground. In this case, the claimant's claim was successful when hit by a chair that had broken loose from the defendant's fairground ride.

The case of *Transco plc* does not expressly deal with the issue of who can sue, but the court stated that *Rylands v Fletcher* is an aspect of nuisance, which suggests that an interest in land is needed to bring it into line with *Hunter v Canary Wharf* (1997) (see subsection 43.2.1).

44.1.3 Who can be sued?

The defendant must be someone who is in control of the dangerous thing. It is not necessary for the defendant to have a proprietary interest in the land from which the dangerous thing escapes.

In *Read v Lyons* (1947), the court said that the defendant would be the person from whose land the 'thing' escaped, even if that person were only a licensee (someone without an interest in the land).

However, the court in *British Celanese v Hunt* (1969) said that the person from whose control the 'thing' escaped would be liable.

So, the issue is still unclear.

ACTIVITY

Decide whether any of the following can bring a claim in *Rylands v Fletcher*. Give a reason for your answer.

- 1 Jack is a lodger in Louise's house.
- 2 Eve is the owner of a plot of land.
- 3 Rahul is the tenant of a factory on an industrial estate.
- 4 Kudzai lives with her parents.

44.1.4 Relationship with other torts relating to land

The rule in *Rylands v Fletcher* has its origins in nuisance, but because the damage was not caused intentionally, the tort was not appropriate. In *Rylands*, the claimants relied almost exclusively on authorities regarding nuisance. It has been argued that *Rylands v Fletcher* is used in a much more restrictive way, because of the specific requirements of accumulation and of a thing likely to cause harm if it escaped. The requirement of non-natural use, although similar to the unreasonable use of land in nuisance, usually involves some degree of exceptional risk, but unreasonable use does not.

In many instances, claimants will succeed equally well under *Rylands v Fletcher* or in nuisance. However, there are very few cases brought solely using the rule in *Rylands*, and those cases that have been brought have not been successful.

In *Transco plc v Stockport Metropolitan Borough Council* (2004) (see subsection 44.2.1 for full case details), the House of Lords was asked to review the use of *Rylands v Fletcher* in modern situations. Generally, their Lordships contended that it was a subset of nuisance and should remain that way; it should not be incorporated into either the tort of nuisance or the tort of negligence. Certainly, they wanted to keep the tort alive, as there are instances where it should be used to provide the claimant with a remedy. Furthermore, different tests are applied to prove the tort; for example *Rylands* is primarily concerned with one-off incidents, but in nuisance the claimant has to prove the element of duration; nuisance tends to take place over a period of time but occasionally, if the damage is significant enough, there can be nuisance from a one-off incident. Even so, in *obiter* in *Barr v Biffa Waste Services Ltd* (2012), the court stated that duration is not a factor that is vital to the tort of nuisance.

The cases of *Crown River Cruises Ltd v Kimbolton Fireworks Ltd* (1996) and *Rigby v Chief Constable of Northamptonshire* (1985) are relevant here, as the courts discussed the intentional escape of something that has a non-natural use.

Despite the apparent similarities between the rule in *Rylands* and nuisance, there are a number of differences:

- » *Rylands* is concerned with escapes from the land, rather than interference with the land.
- » In an action in *Rylands*, the emphasis appears to be on the ownership of or interest in land, unlike in nuisance where the emphasis is on the individual's use or enjoyment of the land.
- » Initially, *Rylands* was seen as a tort of strict liability (nuisance requires an element of fault), but this is not necessarily the case in modern times, as there are fault-based defences available to the defendant. Also, *Cambridge Water v Eastern Counties Leather* (1994) has introduced an element of foreseeability.

It is likely that the torts will remain separate for the foreseeable future, giving a claimant who has suffered property damage two avenues of compensation.

44.2 Definition and conditions of liability

44.2.1 Things brought onto the land

There is no liability for an escape of things naturally on the land, such as plants (*Giles v Walker* (1890) – thistles), rocks that fall because of weathering

(*Pontardawe Rural District Council v Moore-Gwyn* (1929)) or water that is naturally present on the land.

The courts have interpreted 'natural' to mean something ordinary and usual. So, 'non-natural' use is regarded to be extraordinary use or activity.

Lord Cairns in the House of Lords in *Rylands v Fletcher* interpreted non-natural as being something 'not naturally there'. This means that the rule does not apply to things that are naturally found on a particular area of land.

What is regarded as 'non-natural' use has been subject to change. In the past, domestic water supplies, fires, electric wiring in shops and houses, ordinary working of mines and minerals and the keeping of trees and shrubs have been held to be natural use. In contrast, the bulk storage of water, gas or electricity and the collection of sewage have been held to be 'non-natural'.

In the 1919 case of *Musgrove v Pandelis*, keeping a car in a garage with a full tank of petrol was held to be non-natural use. This would probably not be the decision today, as the ownership of cars is much more commonplace.

Lord Moulton set out a definition of 'non-natural use' in *Rickards v Lothian* (1913):

'It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such use as is proper for the general benefit of the community.'

When considering *Rylands v Fletcher* claims during the 1960s and 1970s, the concept of non-natural use was equated with abnormal risk. The courts took account of the quantity of the accumulated material, the way in which it was stored and the character of the neighbourhood, as in *Mason v Levy Auto Parts of England* (1967). This approach was also taken in the case of *LMS International Ltd v Styrene Packaging and Insulation* (2005).

CASE EXAMPLE

LMS International Ltd v Styrene Packaging and Insulation (2005)

The defendant manufactured polystyrene. As the product was being cut, a spark accidentally caused large quantities of flammable polystyrene blocks to catch fire. The fire spread to the claimant's premises.

The defendants were held liable because the use of the land was non-natural. The way in which the product was stored and manufactured involved a 'very real risk' that a fire would spread to neighbouring premises.

However, 'non-natural' use is now taken to be 'non-ordinary' use. This is a narrower definition than the original one. What is 'ordinary' will depend on the time, place and context of the use of the land in question. This definition begins to make the test like negligence, and has allowed the courts to decide that various industrial activities are 'natural' uses of land. This goes against the concept of strict liability, and waters down any impact that the rule could have on environmental protection.

In *British Celanese v Hunt* (1969), the area was an industrial one, so the defendants escaped liability. The use of the land was 'ordinary' in the context of industry as well as being for the benefit of the community. In contrast, in *Cambridge Water v Eastern Counties Leather* (1994), the court said that the storage of substantial quantities of chemicals on industrial premises was an 'almost classic case of non-natural use, even in an industrial estate'. The fact that the chemical in question was commonly used in that industry and that the defendant's factory benefited the local community was not enough to make the use of the land natural.

One of the most recent interpretations of 'non-natural' use can be found in *Stannard (t/a Wyvern Tyres) v Gore* (2012).

CASE EXAMPLES

***Stannard (t/a Wyvern Tyres) v Gore* (2012)**

A fire was caused by the storage of tyres on the defendant's land. The court held that keeping around 3000 tyres on land was natural use of the land, even though the capacity of a typical storage facility was exceeded and the stacking of the tyres was done 'haphazardly and untidily'.

***Transco plc v Stockport Metropolitan Borough Council* (2004)**

The council was the owner of a tower block of flats and an adjacent embankment. A large water pipe serving the flats leaked and water escaped into the embankment, which collapsed as a result. This caused a high-pressure gas main to be exposed, and the claimants made a claim to recover the cost of steps taken to prevent the gas main from fracturing.

The House of Lords stated that the piping of a water supply, a routine function that could not be seen as creating any special hazard, was an ordinary use of the council's land.

So, the courts have interpreted 'non-natural' broadly, and this gives them flexibility when deciding whether to apply the rule to a new situation. This can mean that a claimant is far less likely to succeed in a claim against general industrialised activity. In turn, the number of successful claims can be restricted.



▲ **Figure 44.2** Piping a water supply was deemed an ordinary use of land in *Transco plc v Stockport Metropolitan Borough Council*

44.2.2 Likely to do mischief

The word 'dangerous' is not interpreted literally and there is no requirement that the thing must be dangerous, but it must be likely to do damage if it escapes.

The rule has been applied to a wide variety of things, including gas (*Batchelor v Tunbridge Wells Gas Co.* (1901)), electricity, fire, explosions, vibrations, fumes, flagpoles (*Shiffman v Order of St John* (1936)), swings (*Hale v Jennings Bros* (1938)) and people.

In *Transco plc v Stockport Metropolitan Borough Council* (2004), Lord Bingham explained that the test for deciding if something was dangerous was a strict one. The claimant had to show that the defendant had brought or accumulated on the land something that they recognised or ought to have recognised would lead to an exceptionally high risk of danger or 'mischief' if the thing escaped. If the requirement was fulfilled, it did not matter that the risk of an escape occurring was low.

The court transformed the 'likely to do mischief' test into a foreseeability test in *Transco*. A defendant will not be liable if they could not have foreseen an exceptionally high risk of danger should the thing brought onto their land escape. But the rule in *Rylands v Fletcher* should be strict, so it should not be a case of whether the defendant could or should have recognised (foreseen) that a thing would give rise to an exceptionally high risk of danger if it escaped.

44.2.3 Escape

In the *Rylands* judgment, 'escape' is taken to mean:

'an escape from a place where the defendant is in occupation or control over land to a place which is outside his occupation or control.'

As long as there has been a non-natural use, the thing that escapes need not be the thing that has been accumulated.

This was confirmed in *Stannard (t/a Wyvern Tyres) v Gore* (2012). While agreeing that it would be possible for *Rylands* liability to be based on fire, the court found that this would need fire itself to be brought onto the land and then escape. As the tyres themselves had not escaped, there could be no liability.

Traditionally, the term 'escape' meant that the release of the dangerous thing had to be accidental. There has been some debate as to whether intentionally releasing something from one's land is capable of being an escape and, therefore, falling within *Rylands*.

44.2.4 The escape must have caused damage

The damage is generally to land or other property. Until *Transco* (2004), it was unclear whether a claim for death or personal injury would succeed as such claims had succeeded before then, for example in *Hale v Jennings Bros* (1938). However, in *Read v Lyons* (1947), doubts were raised about whether the rule could be used, but later in *Hunter v Canary Wharf* (1997) it was held that personal injuries are not recoverable.

Lord Hoffman confirmed this approach in *Transco*.

CASE EXAMPLE

Hale v Jennings Bros (1938)

The defendant operated a chair-o-plane roundabout at a fairground. As the roundabout was turning, one of the chairs broke loose and hit the claimant. This was held to be an escape of a 'thing' that was likely to cause harm. The defendant was liable for the claimant's injuries.

CASE EXAMPLES

Miles v Forest Rock Granite Co. Ltd (1918)

The defendant was blasting rocks using explosives that they had brought onto their land. Some of the rocks flew onto the road and injured the claimant, who brought a claim in *Rylands v Fletcher*. It was held that the defendant was liable, despite the fact that the rocks were not brought onto the land nor deliberately collected and kept there. The explosives were accumulated and caused the rocks to escape.

Read v Lyons (1947)

The claimant was an inspector of ammunitions. She was visiting the defendant's factory, which was being used to make mortar shells and ammunition for use in the Second World War. A mortar shell that had been produced there exploded, and she was injured. As there was no evidence of negligence on the defendant's part, the claimant attempted to bring a claim in *Rylands v Fletcher*. Her claim failed because even though explosives are highly dangerous, there had been no escape, as the shell had not left the defendant's

property. The Law Lords held that an escape only occurs when the substance or item causing damage actually moves from the defendant's premises to a place outside the defendant's occupation or control.

Crown River Cruises Ltd v Kimbolton Fireworks Ltd (1996)

It was suggested that *Rylands v Fletcher* could be extended to cover intentional releases of dangerous things, although the defendants in the case were held not liable under the rule. The facts of this case are detailed in the law of nuisance.

Rigby v Chief Constable of Northamptonshire (1985)

In contrast, the court held that where direct harm had been caused by an intentional act, an action in the tort of trespass would be more appropriate. In this case, the police were liable as they caused damage to Rigby's home when they released a canister of gas to subdue a criminal who was hiding there.

▼ Figure 44.3 Key cases: elements to be proved in a *Rylands v Fletcher* action

Key cases		
Element	Case	Facts
Things brought onto the land	<i>Giles v Walker</i> (1890)	Thistles – naturally occurring so not brought onto the land
	<i>Pontardawe Rural District Council v Moore-Gwyn</i> (1929)	Rocks that fall because of weathering – naturally occurring so not brought onto the land
Non-natural	<i>Musgrove v Pandelis</i> (1919)	Petrol was non-natural
Non-natural (abnormal risk)	<i>LMS International Ltd v Styrene Packaging and Insulation</i> (2005)	Polystyrene was an abnormal risk
Non-natural (non-ordinary)	<i>Stannard (t/a Wyvern Tyres) v Gore</i> (2012)	Haphazardly and untidily stored tyres is non-natural use of land
	<i>Transco plc v Stockport Metropolitan Borough Council</i> (2004)	Non-natural use of land occurs where there is a special hazard
	<i>Cambridge Water v Eastern Counties Leather</i> (1994)	Chemicals were not an ordinary use of the land, even on an industrial estate
Likely to do mischief	<i>Hale v Jennings Bros</i> (1938)	A swing
Escape	<i>Miles v Forest Rock Granite Co. Ltd</i> (1918)	A rock escaped when explosives were used

44.3 Defences

44.3.1 Consent

If the claimant gives express or implied consent to the presence of the dangerous thing, this is a defence unless the defendant is negligent.

Consent can be implied where a thing has been brought onto the land for the common benefit of the claimant and the defendant. It can also be implied where a person who enters a property as a tenant takes it as they find it, in so far as they know of the presence of the dangerous thing.

CASE EXAMPLE

Peters v Prince of Wales Theatre (Birmingham) Ltd (1943)

The tenant of a shop in the defendant's theatre found his shop flooded by the theatre's sprinkler system. The claimant was held to have consented to the presence of the system, as it was kept in the theatre in case of fire. The claim failed.

CASE EXAMPLE

Rickards v Lothian (1913)

The defendant rented the upper part of a building. A tap in his part of the building was turned on by an unknown third party. This caused flooding, which damaged stock kept by the claimant on the floor below. Here, there was no liability, as he was using the property for its ordinary purpose and the damage had been caused by a stranger.

The defence cannot be used if the act is one that the defendant ought reasonably to have foreseen and guarded against.

CASE EXAMPLE

Box v Jubb (1879)

The defendant was not liable for the damage caused when their reservoir overflowed, because the flooding was caused by a third party who had emptied his own reservoir into the stream that fed the defendant's reservoir.

44.3.2 Act of a stranger

The defendant will not be liable if the escape is the result of an unforeseeable act of a third party, over whom the defendant has no control or who is not acting under the defendant's instructions.

In relation to this defence, a trespasser is regarded as a stranger but employees acting in the course of their employment are not.

44.3.3 Statutory authority

The defendant may avoid liability if a relevant statute authorises the defendant's actions. However, some Acts that allow the carrying out of dangerous activities do not specify whether the rule should apply, so it is entirely up to the court to interpret the Act. This means that similar cases may have very different outcomes.

CASE EXAMPLES

Green v Chelsea Waterworks (1894)

A water main burst, causing damage to the claimant's land: any escape of water would inevitably cause damage. As there was an obligation to maintain high pressure, there was no liability for the damage, because the defendant had the defence of statutory authority.

Charing Cross Electric Supply Co. v Hydraulic Power Co. (1914)

The defence failed in this case. The facts were similar to *Green* but the relevant statute gave a power to the defendant to keep the water main at high pressure, so there was no obligation to do so. [An obligation in an Act means that the company must do something, but if there is a power, it gives only a discretion to do something.]

44.3.4 Act of God

This defence may be used when the escape is caused by natural forces, only in circumstances that the defendant could not have been expected to foresee or guard against.

The judgment in *Tennant v Earl of Glasgow (1864)* said that this includes any events that:

'no human foresight can provide against, and of which human prudence is not bound to recognise the possibility.'

CASE EXAMPLES

Carstairs v Taylor (1871)

A rat gnawed through a roof, causing rice to be damaged when there was heavy rain. The defendant successfully relied on the defence of Act of God.

Nichols v Marsland (1876)

The defence was also successful in this case. The thunderstorm that caused flooding was an Act of God that the defendant could not reasonably have been expected to predict, and without the storm the lakes would not have flooded.

Internet research

Read the article regarding the potential flooding of a town following extensive rain at www.thejournal.ie/significant-threat-to-life-uk-town-evacuated-over-fears-of-dam-collapse-4750195-Aug2019

Would there be a potential claim in the tort of *Rylands v Fletcher*?

44.3.5 Default of the claimant

If the claimant's own act or omission causes the damage, there will not be a successful claim.

CASE EXAMPLE

Dunn v Birmingham Coal Navigation Co. (1872)

The claimant knowingly built a mine below the defendant's canal. He brought a claim when water from the canal flooded the mine. It was held that since he knew of the danger of building beneath the canal but still went ahead, liability could not be imposed on the defendant. The claim failed.

If the claimant is partly to blame, the defence of contributory negligence will apply.

CASE EXAMPLE

Ponting v Noakes (1894)

The claimant's horse died after it reached over a fence to eat poisonous leaves from a tree on the defendant's land. The defendant was not liable, as the harm suffered was due to the horse's own intrusion onto the defendant's land.

Greenock Corporation v Caledonian Railway Co. (1917)

This case suggests that this defence will have a limited application. The defendants had built a concrete paddling pool for children and had to change the course of a natural stream to do so. After rainfall of extraordinary violence, the stream overflowed and the claimant's property was damaged.

It was not enough for the defendant to show that the occurrence was one that could not be anticipated. The defendant must go further and prove that no human foresight could have recognised the possibility of such an event. The defence rarely works.

▼ Figure 44.4 Key cases: defences to a claim using the rule in *Rylands v Fletcher*

Key cases		
Defence	Case	Principle/outcome
Consent	<i>Peters v Prince of Wales Theatre (Birmingham) Ltd</i> (1943)	The sprinkler system was for the benefit of both the claimant and the defendant.
Act of a stranger	<i>Rickards v Lothian</i> (1913)	The defendant must have no control over the third party.
	<i>Box v Jubb</i> (1879)	The defendant must not be able to guard against the acts of the third party.
Statutory authority	<i>Green v Chelsea Waterworks</i> (1894)	There must be an obligation to do or not to do something for the defence to be successful.
	<i>Charing Cross Electric Supply Co. v Hydraulic Power Co.</i> (1914)	A mere power to do or not to do something is not a defence.
Act of God	<i>Tennant v Earl of Glasgow</i> (1864)	The weather event that causes the harm must not be foreseeable.
	<i>Carstairs v Taylor</i> (1871)	Defence successful where rain was 'heavy'.
	<i>Nichols v Marsland</i> (1876)	Defence successful where rainfall is easy to predict.
	<i>Greenock Corporation v Caledonian Railway Co.</i> (1917)	Defence not successful even though the rainfall was of 'extraordinary violence'.
Default of the claimant	<i>Dunn v Birmingham Coal Navigation Co.</i> (1872)	If the claimant does something to cause the damage, there will be a defence.
	<i>Ponting v Noakes</i> (1894)	If the claimant is partly to blame, the defence of contributory negligence will apply.

▲ Figure 44.5 Applying *Rylands v Fletcher*

TARGET SKILLS

- 1 Describe how *Rylands v Fletcher* became a fault-based tort.
- 2 Name the cases which are relevant to the answer above.
- 3 Assess whether *Rylands v Fletcher* is the most effective way of dealing with environmental damage.
- 4 Discuss whether the tort of *Rylands v Fletcher* is as relevant now as when it was created.

COMMENT

Evaluation of the law relating to *Rylands v Fletcher*

The tort was intended to be a strict liability tort but it was quickly limited by Lord Cairns in the House of Lords, as the claimant had to prove a non-natural use of land. This can limit the tort's effectiveness, as a thing may be dangerous but not a non-natural use of land. The term 'non-natural' has a shifting nature as time passes, which can mean that the tort is able to adapt to changes in society and technology. This can be seen in the cases of *Cambridge Water* and *Transco*. The courts have seemed to have taken a more restrictive approach and the tort is rarely used on its own. Often a claimant will also bring a claim in both negligence and nuisance, or rely on statutory provisions relating to the environment.

Complexity

The tort itself is complex in nature. There are many requirements and equally a relatively large number of defences that are available. This can be off-putting to some claimants, as it is easier to prove negligence or nuisance. Recent cases such as *Cambridge Water* (1994) and *Transco* (2004) have shown that the tort is moving closer to being negligence- and nuisance-based.

The tort was created as an offshoot of nuisance, as nuisance did not exist in its current form, and this was a one-off event which traditionally the tort of nuisance did not cover. As it is easier to bring a claim in negligence itself, it begs the question of whether *Rylands v Fletcher* is now needed in a modern setting. Initially, despite all the requirements, this was a strict liability tort which made it easy for claimants to succeed, but now that the element of reasonable foreseeability has been added, the tort has become less accessible.

Non-natural use of land

The definition of what is regarded as non-natural has changed over time. Initially, it meant that the thing brought onto the land brought with it an increased danger, but this has now changed to extraordinary and unusual use, with the courts making it clear that chemicals will always be regarded as non-natural regardless of where they are stored. This allows the tort to adapt to different times and places, for example in *Musgrave v Pandelis*, storage of petrol was regarded as non-natural, but as most people now have a car, storage of petrol is now regarded as natural.

Environmental protection

The tort was initially introduced to deal with environmental issues arising from the rapid industrialisation of the UK during the Industrial Revolution. Now, environmental protection is dealt with by European legislation, UK legislation and the torts of nuisance and negligence. This suggests that the tort is less effective, but equally the development of the law allows a claimant to access more than one compensation stream.

Other common law jurisdictions, such as Australia, have either dispensed with the rule in *Rylands v Fletcher* or incorporated it into negligence. The UK Supreme Court is reluctant to go down this path, and as *Transco* indicates, the court regarded the rule as a specific type of nuisance that should be retained to provide compensation for environmental damage.

STRETCH AND CHALLENGE

Assess whether the tort of *Rylands v Fletcher* is so complicated that it deters people from bringing claims.

TEST YOURSELF

- 1 Describe the elements needed to be successful in a claim for *Rylands v Fletcher*, including relevant cases.
- 2 What types of damage can the claimant make a claim for under *Rylands v Fletcher*?
- 3 Describe the meaning of 'non-natural'.
- 4 What is the significance of *Cambridge Water v Eastern Counties Leather* (1994)?
- 5 According to *Transco plc v Stockport Metropolitan Borough Council* (2004), what is the test for deciding if something is 'dangerous'?

EXAM-STYLE QUESTIONS

- 1 Zorzon Gas Corp is a company that imports natural gas and distributes it by pipeline around the United Kingdom. The gas is piped into regional depots where it is stored in large storage tanks until it is piped on into the homes of the general public as it is needed for cooking and heating.

The storage depot in Bassetshire has just been replenished, when a fire breaks out in a pumping station on the site. The fire causes several gas storage tanks to explode and it takes the fire service several days to get the subsequent fire under control. Flying debris as a result of the explosions damages nearby houses so severely that local residents have to leave and pay to stay in hotels in the town until they are allowed to return home.

Discuss Zorzon Gas Corp's potential liability in tort for the unexpected financial costs sustained by local residents if the cause of the fire is a lit cigarette discarded by: (a) a Zorzon Gas Corp employee or (b) a member of a dissident* group that had broken into the depot.

Your answer should consider both situations (a) and (b).

*A dissident is a person who publicly disagrees with and criticises their government.

Cambridge AS and A Level Law 9084 Paper 43 Q6 October/November 2013

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- 2 'In the tort of *Rylands v Fletcher*, judges have created so many separate requirements that there is very little chance of a successful claim.'
- Critically evaluate this statement.

45

Trespass to land

Introduction

Unlike the tort of private nuisance, the tort of trespass to land concerns the protection of someone's interest in their land, rather than their loss of enjoyment. It is a tort that is easy for a claimant to use, as it does not require proof of damage and the definition of land is broad. This means that trespass can occur where someone

trespasses on the land itself, but it can also mean that someone can trespass if they dig into someone's land. A broad range of behaviour is covered, from the use of low-level cranes to drilling into land to look for oil. This chapter links to the key concept of rights, duties and responsibilities, and freedoms.

45.1 Nature of trespass

Trespass to land is defined as the intentional and unlawful direct interference with land that belongs exclusively to another person.

For the purposes of trespass to land, land is described as:

- » the ground itself
- » anything attached to the land
- » anything below the land (subsoil)
- » anything above the ground (airspace).

A person possesses airspace to a reasonable height. Section 76(1) of the Civil Aviation Act 1982 states that a trespass to land is not committed if an aircraft flies above property when flying at a 'reasonable height'. The following two cases are helpful in defining land.

CASE EXAMPLES

Lord Bernstein v Skyviews and General Ltd (1978)

The claimant argued that when an aeroplane flew above his property taking photographs, this was a trespass to land. The court disagreed, stating that the activity (taking photographs) took place above the level of ordinary use of land.

Kelsen v Imperial Tobacco Co. Ltd (1957)

The defendant's advertisement sign protruded by about 20 centimetres into the area of the claimant's shop. This was a trespass, because the trespass into airspace interfered with the ordinary use of land.



▲ **Figure 45.1** An aerial photograph is usually taken above the level of ordinary use of land and is not a trespass

A trespass may be temporary; for example, if the arm of a crane swings into the airspace of a person's property, this will be regarded as a trespass, as shown in *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd (1987)*.



▲ **Figure 45.2** A crane may temporarily trespass on land

A trespass can be committed by a person who digs or drills into someone else's land (subsoil).

CASE EXAMPLE

Star Energy Weald Basin Ltd v Bocardo SA (2010)

The claimant owned land under which there was oil. The defendant, Star Energy, drilled three wells from its land diagonally and entered the claimant's land to a depth of 800 to 2800 feet. Although there was no interference with the claimant's enjoyment of land, the Court of Appeal held that there was a trespass.

A person must be in possession of the land. Possession is having the right to exclude others from the land, so that a claimant will include the owner, tenant or sub-tenant. A lodger or a hotel guest will not have possession of the land, as they are only using it and do not have the ability to control who enters it.

45.1.1 Unlawful entry

This element of trespass to land will be fulfilled if the trespasser does not have permission to be on the land or to do anything with it. Trespass could also be committed if the person has exceeded their permission to be on the land.

Scrutton LJ's comment from *The Calgarth* (1927) is relevant here:

'When you invite a person into your house to use the staircase you do not invite them to slide down the bannisters.'

▼ Figure 45.3 Unlawful interference to land

Key facts	
Type of unlawful interference	Comment
Trespass by wrongful entry	The person actually enters the land possessed by the defendant, for example: - the slightest crossing of a boundary - walking across a garden without permission.
Remaining on the land	A person stays on the land when their permission to be there has ended.
Placing objects on the land	A person deliberately throws items from one property to another, for example: - allowing a dog to run across a private field - branches or signs overhanging someone else's property.
Going beyond what is permitted while on someone's land	This includes: - going beyond a 'Do not enter' sign in a shop - hitting a nail into the wall of another person's property.

45.1.2 Intentional and direct interference

The defendant must intend to enter the land. This can include a mistaken intention, for example walking on land believing that it belongs to someone who has invited them to be there.

CASE EXAMPLE

Basely v Clarkson (1682)

The defendant was mowing his land when he went over the boundary in error and mowed his neighbour's land as he thought it was his own. The defence of mistake failed, because the act of cutting the grass was intentional.

Despite intention being a key element of the definition of trespass to land, the following case suggests that the defendant could act in a negligent way and still be liable for trespass.

CASE EXAMPLE

League against Cruel Sports v Scott (1986)

The court held that if, when for hunting, the riders entered land after permission to enter it had been refused, the master of the hunt would be liable if he intended the dogs to enter, or if the entry was caused by his failure to control them.

Internet research

Read www.mylawyer.co.uk/trespassing-a-A76076D34460 for more information on the relationship between civil trespass and criminal trespass.

45.1.3 Continuing trespass

A continuing trespass will occur when a person fails to remove an object that has been unlawfully placed on the land. There is a new claim for each day that the trespass continues.

CASE EXAMPLE

Holmes v Wilson (1839)

The defendant built supports for a road on the claimant's land. The defendants paid damages for the initial trespass and then damages for every day that the supports remained on the property.

▼ Figure 45.4 Elements of the tort of trespass

Key facts		
Element	Comment	Case/statute
Airspace	Possession to a reasonable height	<i>Lord Bernstein v Skyviews and General Ltd</i> (1978) Section 76(1) of the Civil Aviation Act 1982
Subsoil	Possession to a depth of 2800ft	<i>Star Energy Weald Basin Ltd v Bocardo SA</i> (2010)
Unlawful entry	Trespasser has no permission to enter land or exceed it	<i>The Calgarth</i> (1927)
Intention and/or negligence	There must be an intention to enter the land or there must be a careless action	<i>Basely v Clarkson</i> (1682) <i>League against Cruel Sports v Scott</i> (1986)

ACTIVITY

Consider whether a trespass to land has been committed in the following instances.

- 1 Neethu has a dinner party. She goes upstairs to get a cardigan and finds one of her guests looking through her cupboards.
- 2 Michael has been listening to very loud music during the night. His neighbour has not been able to sleep properly.
- 3 Vivek is clearing his garden of rubbish and throws planks of wood onto his neighbour's lawn.
- 4 Lisa has a large tree in her garden. The branches overhang into her neighbour's garden.

TARGET SKILLS

- 1 Describe how a person may unlawfully interfere with land.
- 2 Name two cases to illustrate how a person may unlawfully interfere with land.
- 3 Assess whether the tort of trespass to land is unfair to a defendant, as it is a tort which is actionable per se.
- 4 Discuss whether the tort of trespass to land is effective in light of recent legislation.

COMMENT

Evaluation of the law relating to trespass to land

As the tort is actionable per se, it appears that a claimant can bring an action without damage occurring, which can be harsh for the defendant. However, it is an attempt to reflect how any trespass to land used to be a criminal offence leading to a charge of breach of the peace, regardless of how trivial the trespass. In reality, most people will not sue in trespass, unless the claimant wants to deter persistent trespassing or where there are boundary disputes.

Compensation

This aim of tort is not always met. Damages will only be substantial if there is significant damage, and this tends to be rare. Aggravated damages can be awarded if there is exceptional or insulting conduct leading to mental distress or injury to feelings.

As injunctions are commonplace in relation to trespass to land, the tort can be effective in vindicating a person's rights and protecting their interests in land. Injunctions can be tailored to the rights of the claim.

Legislation

Two recent Acts of Parliament have limited the effectiveness of the tort. The Infrastructure Act 2015 has made it lawful for energy companies to carry out fracking to a depth of 1200 metres or more below national parks, areas of outstanding natural beauty and world heritage sites. Some compensation is given to the occupier of the land, but this could actually be as little as £100. Fracking is a process of injecting liquid at high pressure into subterranean rock to force open cracks in the rock to extract oil or gas. Any person affected in this way cannot claim in trespass to land.

In the past, the tort has been used to evict people from land, for example where they have been squatting. On 1 September 2012, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 made various forms of trespass a criminal offence, including mass trespass and squatters in a residential property. This means that a claimant has two potential avenues to follow to get rid of trespassers. However, the criminal law will only apply where the property is residential and the defendant entered as a trespasser, or knew or ought to have known that they were a trespasser, and is living in a building. It does not apply to someone who has simply overstayed their welcome, so the tort of trespass to land would remain the only way to evict and/or obtain compensation.

STRETCH AND CHALLENGE

Discuss how the tort of trespass to land fulfils the aims of deterrence and compensation.

TEST YOURSELF

- 1 What is the definition of trespass to land?
- 2 For the purposes of this tort, what is the definition of land?
- 3 State two cases which illustrate what land is.
- 4 Describe how a person can trespass if they mistakenly enter another person's land.
- 5 Describe how a continuing trespass occurs.

EXAM-STYLE QUESTIONS

- 1 The torts of trespass to land and private nuisance protect similar interests.

Compare and contrast the two torts and assess whether they both continue to serve a useful purpose.

Cambridge AS and A Level Law 9084 Paper 41 Q3 May/June 2014

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- 2 Adib and Imran own two houses next to each other. Adib enjoys flying his model aeroplanes in his garden. He frequently flies model aeroplanes over Imran's garden, even though he has been told not to. One day, Imran sees Adib flying a model aeroplane and he becomes very angry and decides to get revenge. While Adib is out of his house, Imran goes into Adib's garden and digs three large holes in the lawn and places large rocks on his flowerbeds.

Advise the parties of their rights, responsibilities and potential remedies.

46

Assault, battery and false imprisonment

Introduction

Trespass to the person is a tort that protects a person's physical interests from direct and intentional harm from another. It is made up of three elements: assault, battery and false imprisonment. It is easy to use, as it does not require proof of damage or harm to the claimant.

The tort seeks to protect a person from a range of unlawful behaviours, such as stalking, receiving a

blow during a fight, unlawful arrest and detention by the police, and having medical treatment without consent. So, it seeks to protect an individual's civil liberties, and in this respect should be considered alongside the Human Rights Act 1998. This chapter links to the key concept of rights, duties and responsibilities, and freedoms.

46.1 Assault

46.1.1 Definition and elements required to establish liability

A definition of assault can be found in *Collins v Wilcock* (1984). The court stated that assault is an:

'... act which causes another person to apprehend the infliction of immediate, unlawful force on his person.'

In *Collins v Wilcock*, a policewoman took hold of Collins' arm to stop her walking off when she was questioning her. Collins scratched the policewoman and was charged with assaulting a police officer in the course of her duty. It was held that the policewoman's actions formed a battery. Collins acted in self-defence and her conviction was quashed.

The tort of assault protects a person who fears or apprehends battery, and so no physical contact is required. It is enough that the claimant is threatened, as it is actionable per se. Where the claimant has no reasonable belief that the defendant has the intention or the ability to carry out the threat immediately, no assault is committed because there is no battery to be afraid of.

It is clear that the defendant must have acted voluntarily for this element to be proved. If a claimant is harmed unintentionally, the most appropriate form of action is in negligence.

46.1.2 Actions that amount to assault: words and silence

Traditionally in tort, words alone could not amount to an assault. The judgment in *R v Meade and Belt* (1823) held: 'No words or singing are equivalent to an assault.'

This meant that, generally, threatening words have to be accompanied by a gesture to amount to battery, as shown in *Read v Coker* (1853).

CASE EXAMPLE

Read v Coker (1853)

The defendant was a rent collector who was owed money by the claimant. One day, the defendant went to the claimant's workshop and told him that he had to leave the premises. When the claimant refused, the defendant told his workmen to make him leave. They surrounded him, rolled up their sleeves and said that if he did not leave, they would break his neck. The defendant refused to leave the workshop until he had been paid his rent. The claimant claimed that the defendant had assaulted him.

The court agreed. Although the established principle was that words without a threatening gesture could be an assault, here there was something more than a threat of violence.

In judgment, Byles Serjt said:

'To constitute an assault, there must be something more than a threat of violence ... there must be some act done denoting a present ability and an intention to assault.'

The criminal case of *R v Ireland* (1998) suggests that silence could make the claimant fear immediate harm.

CASE EXAMPLE

R v Ireland (1998)

Three women suffered psychiatric harm after being harassed by the defendant over a long period of time. The harassment included many silent phone calls. The defendant was found guilty because it was decided that, in the circumstances, the victim reasonably believed that the silent calls would cause fear of immediate harm.

Although this is a criminal case, it is also followed in tort law as a persuasive precedent. So, the defendant's conduct can comprise silence, words or gestures, or a mixture of these.

However, it is clear that words can negate an assault.

CASE EXAMPLE

Tuberville v Savage (1669)

There was held to be no assault when the defendant placed his hand on his sword and said: 'If it were not assize time I would not take such language from you.' (Assize time was the time when the magistrates went to specific towns to deal with criminal cases.) As it was assize time, he was stating that he did not intend to hit the claimant.

A modern example of words that can negate an assault would be raising your fist at someone and saying: 'I'd like to punch you but you are not worth going to prison for.'

What is important to establish an assault is to consider how the threat is conveyed, and whether it is enough to place the claimant in reasonable fear of an immediate battery. If the claimant knows that the defendant is not in a position to carry out an immediate battery, there is no assault.

The claimant only has to prove that it was reasonable for the claimant to expect that harm was going to occur. The claimant does not have to prove that they were actually afraid of immediate harm. The test for reasonable fear of an immediate battery is an objective one, so it is irrelevant that the particular claimant was actually in fear or could have defended themselves successfully.

The threat of violence must be capable of being carried out at the time that it was made.

CASE EXAMPLE

Stephens v Myers (1830)

The claimant was the chairman of a meeting where the defendant was to be expelled. They were sitting about six or seven places from each other. The defendant became angry and made a move towards the claimant, saying that he would rather pull him out of the chair than be ejected from the meeting. His attempt to do this was prevented by another person. As the claimant and the defendant were close enough to each other, the threat was said to be enough to put the claimant in reasonable fear of an immediate battery. The judgment held:

'It is not every threat, when there is no actual violence, that constitutes assault; there must, in all cases, be the means of carrying that threat into effect.'

In contrast, in *Thomas v National Union of Mineworkers (1986)* the threat of harm was not immediate.

CASE EXAMPLE

Thomas v National Union of Mineworkers (1986)

Striking miners made violent gestures at working miners who were being taken into the colliery in buses. Police barricades that were near the mine also protected them.

Scott J held the actions of the miners did not meet the requirements of immediacy or directness because:

'... the working miners are in vehicles and the pickets are held back from the vehicles, I do not understand how even the most violent of threats or gestures could be said to constitute an assault.'

Consequently, the action failed.

ACTIVITY

- 1 Can a defendant be liable for an assault where they are pointing an unloaded gun at the claimant, and the claimant thought it was loaded?
- 2 Would it make a difference to your answer if the defendant did not know that the gun was unloaded?
- 3 Describe the key elements of assault.
- 4 Name the cases which illustrate each of the key elements of the tort of assault.
- 5 Discuss the problems which may arise in relation to the tort of assault.

▼ Figure 46.1 Key cases: elements of assault

Key cases		
Element	Case	Comment
Direct and intentional	<i>Letang v Cooper</i> (1965)	The action must be intentional, not negligent (careless).
Conduct	<i>R v Meade and Belt</i> (1823)	No words or singing can amount to an assault.
	<i>Read v Coker</i> (1853)	Assault can be verbal with gestures.
	<i>R v Ireland</i> (1998)	Silence can amount to an assault.
	<i>Tuberville v Savage</i> (1669)	Words can cancel out an assault.
Reasonable fear of immediate harm	<i>Stephens v Myers</i> (1830)	The threat must be capable of being carried out.
	<i>R v Ireland</i> (1998)	This can be a matter of minutes.

46.2 Battery

46.2.1 Definition and elements required to establish liability

A battery involves intentionally bringing about a harmful or offensive interference with another person without consent.

There is a definition in *Collins v Wilcock* (1984) that states that a battery is the actual infliction of unlawful force on another person.

CASE EXAMPLE

Letang v Cooper (1965)

The claimant was sunbathing on a piece of grass that was used as a car park. The defendant was moving his car, and ran over her legs. He did not mean to do this, but the claimant argued that he did not take reasonable care to avoid her. The court held that the claimant needed to sue in negligence rather than trespass to the person, as the defendant had not acted intentionally.

Lord Denning held:

'Where the act causing the damage was intentional, the correct cause of action was trespass to the person. Where the act was negligent, the cause of action was in negligence. There was no overlap between trespass to the person and negligence.'

As with assault, battery is a tort that is actionable per se.

A defendant must have acted intentionally, and the act of force must be voluntary. If it can be proved that the defendant's intention was to commit a trespass to the person, then there will be liability. If there is any non-intentional contact, the claim for harm must be in negligence.

This was confirmed in *Iqbal v Prison Officers Association* (2009). Smith LJ held:

'It is well established that all forms of trespass require an intentional act. An act of negligence will not suffice.'

In this case, the claimant – Iqbal – was restrained in his cell during a strike by the defendant association. A prison officer had failed to unlock Iqbal's cell. This omission was classed as a false imprisonment, and he was awarded damages for two hours' lack of freedom.

Despite this, the tort of battery may be committed even if the original action was unintentional, if the defendant at some point intended to apply force to the claimant.

CASE EXAMPLE

Fagan v Metropolitan Police Commissioner (1968)

The defendant unintentionally stopped his car on a police officer's foot. At this point, no tort had been committed. However, by intentionally failing to move the car until the officer had shouted, 'Get off my foot!' several times, he committed a battery.

▼ Figure 46.2 The difference between battery and negligence

Key facts		
	Negligence	Battery
Type of action	Can be indirect, e.g. leaving a branch on the ground for someone to fall over	Must be direct, e.g. throwing a branch at someone to cause harm
State of mind	Failing to take reasonable care to prevent foreseeable harm	Acting intentionally
Damage required	Must cause actual harm	Actionable per se; mere touching is sufficient to prove a battery

Intention can mean one of two things:

- » the defendant has committed a voluntary action, or
- » the defendant intended a consequence, for example where there is no intention to hit anyone but behaving in a way knowing that someone may be hit.

CASE EXAMPLES

Livingstone v Ministry of Defence (1984)

The defendant was successfully sued by the claimant for battery, after the claimant was hit by a bullet that was aimed at someone else.

Williams v Humphrey (1975)

The defendant pushed the claimant into a swimming pool, causing him to fall awkwardly and break his ankle. The defendant argued that he did not intend to hurt the claimant, but this did not matter as he had intended to touch the claimant.

The courts have interpreted the element of 'directness' flexibly. This means that this requirement is not a difficult requirement for the claimant to prove.

CASE EXAMPLE

Scott v Shepherd (1773)

The defendant threw a lit firework into a market place, and was liable in battery. This decision was reached despite the fact that two stallholders had caught the firework and had thrown it away to protect themselves before it exploded in the claimant's face.

46.2.2 Force

A battery can be any type of unwanted physical touching, including even the slightest touch. In *Cole v Turner* (1704), it was suggested that 'the least touching of another in anger' was sufficient force. This statement appeared to introduce the element of hostility into the tort of battery, which will be discussed in the following subsection.

If this definition were to be applied strictly, it would cover all forms of contact between individuals. It is generally accepted that for conduct to become unlawful, the touching has to exceed what is regarded as 'physical contact which is generally acceptable in the ordinary conduct of daily life' (Lord Goff in *Collins v Wilcock* (1984)).

The courts have had some difficulty in finding where to draw a line between an actionable battery and ordinary social contact.

46.2.3 Relevance of hostility

As stated in the previous subsection, the case of *Cole v Turner* (1704) refers to 'anger'. This was interpreted to mean 'hostility'.

CASE EXAMPLE

Wilson v Pringle (1987)

The claimant, a 13-year-old boy, suffered a severe hip injury when the defendant pulled his schoolbag off his shoulder while they were playing. In order to make the defendant liable, the court had to consider whether his actions were 'hostile' rather than rough play. The Court of Appeal suggested that for the defendant's actions to be unlawful, there had to be a 'hostile intent'.

Croom-Johnson LJ held:

'In battery there must be an intentional touching or contact in one form or another of the plaintiff by the defendant. That touching must be proved to be a hostile touching.'

This judgment has been criticised, because the word 'hostility' has not been defined. However, it is taken to mean that the defendant has wilfully interfered with the claimant in a way in which the claimant objected to. The case narrowed the scope of battery, as it made it impossible to bring a battery action against doctors who may act without consent but who do not act with hostility.

The interpretation in *Wilson v Pringle* proved difficult to apply. However, Lord Goff had already suggested an alternative approach in *Collins v Wilcock* (1984). He suggested that hostility was not necessary to prove a battery. He referred instead to contact that was not 'generally acceptable in the ordinary conduct of daily life'. In turn, this approach has been criticised by Croom-Johnson LJ in *Wilson v Pringle* as not being practical.

Lord Goff continued to adopt his approach in *Re F (Mental Patient: Sterilisation)* (1990). He suggested situations where there may be a battery although there was no hostility, such as:

- » a prank that gets out of hand, or
- » surgical treatment by a surgeon who mistakenly thinks that the patient has consented.

He said:

'It is more common nowadays to treat ... everyday jostling ... as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life.'

However, the current position seems to be as stated in the criminal case of *R v Brown* (1994), where Lord Jauncey said that if the defendant's actions were unlawful, they were also hostile. So, 'hostile' is taken to mean 'unlawful'. Most academics agree with this thinking, as they believe that if there is a hostile action, this is evidence of a lack of consent by the claimant.

ACTIVITY

Read the facts of *Collins v Wilcock* (1984) at www.e-lawresources.co.uk/Collins-v-Wilcock.php and answer the questions below.

- 1 What is the definition of assault?
- 2 What is the definition of battery?
- 3 If the police had complied with the Police and Criminal Evidence Act 1984 (PACE 1984), what defence would have been available?
- 4 What did Lord Goff suggest should be used instead of 'hostility' to decide if a battery had taken place?
- 5 Describe the potential problems with Lord Goff's suggestion.

▼ Figure 46.3 Elements of battery

Key facts		
Element	Case	Comment
Intentional/direct	<i>Letang v Cooper</i> (1965)	Action must be intentional, not negligent
Direct	<i>Scott v Shepherd</i> (1773)	'Direct' will be interpreted flexibly
Unlawful	<i>Collins v Wilcock</i> (1984)	Touching has exceeded 'physical contact which is generally acceptable in the ordinary conduct of daily life'
Force	<i>Cole v Turner</i> (1704)	Least touching of another in anger is needed

46.2.4 Defences

There are a number of full defences available to the defendant:

- » consent
- » self-defence
- » necessity.

Defence of consent

A battery can be made lawful with two types of consent:

- 1 Express consent, for example where the claimant has signed a consent form for medical treatment.

- 2 Implied consent, where consent can be implied from the circumstances. For example in *O'Brien v Cunard* (1891), holding out an arm so that the medical practitioner could carry out an injection was interpreted as the claimant impliedly consenting to being vaccinated.

Consent will only be successful as a defence if the claimant consents to the specific act that occurred.

CASE EXAMPLE

Nash v Sheen (1953)

The claimant asked her hairdresser for a treatment that would curl her hair. However, the hairdresser dyed the claimant's hair instead. The dye caused a skin complaint. This was held to be a battery because the claimant had not consented to her hair being dyed. The defence of consent failed.

Further, consent must be genuinely given to the defendant. Consent that has been obtained under duress cannot amount to a valid defence. Also, consent cannot be induced by fraud or misrepresentation.

Consent in sport

The general rule here is that participants in sport are taken to have consented to any activity or touching that is within the accepted rules of the game. However, there is no consent to touching that occurs because of behaviour outside the rules, such as excessive violence or deliberate unfair play.

CASE EXAMPLES

R v Billingshurst (1978)

A punch thrown at an opponent will not be within the rules of the game of rugby, so a battery will be committed.

Condon v Basi (1985)

The claimant was playing for Whittle Wanderers and the defendant was playing for Kelso FC in a Sunday league match (they were amateur players). During the game, the defendant tackled the claimant, which led to the claimant breaking his leg. The tackle was late – the defendant lunged at the claimant with his studs up and was about 30 centimetres off the ground.

In his defence, the defendant argued that as the claimant was participating in a sport, he had consented to some risk of harm. The claim failed, but the court said that the players should act in accordance with the spirit of the game.

[Note that this case was brought in the tort of negligence, but the same principles apply to consent in both negligence and trespass to the person.]

However, the current position seems to be as stated in the criminal case of *R v Brown* (1994), where Lord Jauncey said that if the defendant's actions were unlawful, they were also hostile. So, 'hostile' is taken to mean 'unlawful'. Most academics agree with this thinking, as they believe that if there is a hostile action, this is evidence of a lack of consent by the claimant.

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[Note that this case was brought in the tort of negligence, but the same principles apply to consent in both negligence and trespass to the person.]

Internet research

Visit www.e-lawresources.co.uk/cases/R-v-Billinghurst.php, which provides the very brief facts of *R v Billingshurst* (1978).

What type of contact would the claimant have consented to when playing sport? Discuss the problems that can arise in such a claim.

Consent for medical treatment

In medical cases, a battery can be committed in four main ways, when the patient:

- 1 is treated against their will, or
- 2 consents to one type of treatment but receives different or extra treatment, or
- 3 is given treatment without being told that this will happen, or
- 4 agrees to treatment after being given incorrect information.

However, if a doctor or nurse is acting in an emergency situation, any contact will not generally be considered a battery. Even so, this does not prevent a person from bringing an action. A comment made in *Schloendorff v Society of New York Hospitals* (1914) is useful here, even though it is an American case, as it directly reflects the position in UK law also:

'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; a surgeon who performs an operation without the patient's consent commits an assault.'

When a person of sound mind gives consent, that consent must be real. A patient must be told about the nature of any examination or treatment in broad terms. If the patient asks a specific question, the medical practitioner is expected to answer truthfully and as fully as necessary. If the claimant believes that the information that has been given is deficient in some way, the action against the defendant will be in negligence rather than battery.

CASE EXAMPLES

Chatterton v Gerson (1981)

The claimant suffered from a trapped nerve after an operation. She consulted the defendant, a doctor, to free the nerve. After the operation, she lost all feeling in her leg. She sued the defendant for the harm done in battery, because she alleged that he had not explained the risks of the operation. As a result, she had not given full (real) consent. The claim failed, as the defendant had explained the nature of the operation in broad terms.

Birch v University College London Hospital NHS Foundation Trust (2008)

This is a case where the claimant had an invasive procedure. The risks associated with the procedure were explained to her and she signed a consent form. However, there were complications during the operation and she suffered a stroke. She then brought a claim for the injuries suffered.

It was held that, at the very least, the duty to inform a patient of significant risks extended to making the patient aware that fewer or no risks were associated with an alternative treatment. The claimant succeeded because there were alternative procedures available and she should have been made aware of these.

If a person of sound mind is able to consent to what would otherwise be a battery, it follows that such a person can refuse consent, even if the treatment is in their best interests.

A medical professional can only treat a person without consent if the person lacks capacity. The lack of capacity may be permanent or temporary, and may be the result of mental illness, brain injury or drug and alcohol abuse. In *Ms B v An NHS Hospital Trust* (2002), the court considered what full capacity means.

CASE EXAMPLE

Ms B v An NHS Hospital Trust (2002)

Ms B was completely paralysed from the neck down but could move her head slightly and could talk. She was kept alive by a ventilation machine, but there was no hope of her recovering from her paralysis. She had written a living will, and had told those who were caring for her that she wanted the ventilator to be switched off. Effectively, she was saying that she was withdrawing her consent to treatment.

The doctors who had been treating her for over a year argued that she lacked full capacity to make this decision. So, Ms B asked the High Court for a declaration that she had full mental capacity and that if the doctors continued with her treatment, this would be a battery.

Ms B was awarded the declaration that she wanted. Lady Butler Sloss stated that when a person is making a decision to refuse consent to treatment, their mental competence had to be commensurate with the gravity of the decision.

This does not mean that a person with a mental disorder lacks full capacity in every instance. The Mental Health Act 1983 only allows for treatment without consent for the mental disorder itself.

If a patient is unconscious and cannot give consent, the medical practitioner will be able to give treatment on the basis of necessity.

CASE EXAMPLE

F v West Berkshire Health Authority (1989)

There was an application to the court for a 36-year-old woman, with a mental age of four, to be sterilised so that she could not become pregnant. This was the only option available, as the use of contraception was not practical. The court held that the test for whether treatment is necessary is whether it is in the best interests of the patient. What is in the best interests of the patient is judged by the standard of a responsible body of medical opinion. Lord Brandon argued that an operation or treatment would be in a person's best interests if it was performed to save the patient's life, ensure improvement in health or prevent physical or mental deterioration. The sterilisation operation took place.

If a patient is in a persistent vegetative state (PVS), it will not be in the patient's best interests that they continue to receive medication or nourishment that is not beneficial in any way. It is lawful to discontinue medical treatment or nourishment for such a patient, even though death is the inevitable outcome. *Airedale NHS Trust v Bland (1993)* is an example of this.

CASE EXAMPLE

Airedale NHS Trust v Bland (1993)

Bland had been permanently unconscious for three years and had been kept alive by feeding tubes. There was no chance of recovery. The medical staff wanted a declaration from the court stating that it would be lawful for the feeding tubes to be removed. The court held that an adult had an absolute right to refuse treatment, even if the consequence was that they would die. In this case, the doctor had a duty of care to Bland, but as he had no hope of recovery, it would not have been in his best interests to continue feeding him. It was declared to be lawful to withdraw the tubes.

Sometimes a patient will refuse consent for religious reasons, for example refusing a blood transfusion. If the patient is conscious and capable, the medical practitioner must follow their wishes or else be liable in battery. If the patient is unconscious and the doctor is unaware of the lack of consent, then as long as the transfusion is in the best interests of the patient, no battery will be committed.



▲ **Figure 46.4** If a patient is conscious and capable, a medical practitioner must follow their wishes or else be liable in battery

A patient's next of kin has no legal right to consent or refuse consent in the case of an adult patient, as illustrated in *Re T (An adult) (1992)*.

The decision in that case does not mean that an adult suffering from some mental disability cannot refuse consent. The question in *Ms B v An NHS Hospital Trust* will be considered – does the patient have the capacity to understand and retain the information given, believe it and make a choice?

This question was used in *Re MB (Medical Treatment) (1997)*.

CASE EXAMPLE

Re MB (Medical Treatment) (1997)

The patient refused to consent to a Caesarean section because of her needle phobia. The risk to the foetus would have been increased if the Caesarean section had not been carried out. The Court of Appeal held that the doctors could not intervene unless the patient lacked capacity and the treatment was in the patient's best interests. The court itself did not have the capacity to take into account the interests of the unborn child. Despite this, the court found that at the critical point, the patient's needle phobia put the patient in such a state of panic that she was incapable of making a decision.

There are limits to the consent given by the claimant. The criminal law has refused to accept defence where the defendant has inflicted actual physical harm on the claimant. Lord Lane CJ said in *Attorney-General's Reference (No. 6 of 1980)* (1981):

'It is not in the public interest that people should try to cause, or should cause, each other bodily harm for no good reason.'

This approach has been adopted in relation to terminally ill patients, as in *Pretty v UK* (2002).

CASE EXAMPLE

Pretty v UK (2002)

The Director of Public Prosecution's refusal to declare that Diane Pretty's husband would not be prosecuted under the Suicide Act 1961 did not infringe her human right to self-determination, as there was a duty to safeguard life and protect the weak and vulnerable in society who might be exploited by allowing assisted suicide.

Self-defence

Self-defence is where the claimant can use reasonable force to defend themselves, property or another person. Reasonable force can include lethal force, because what is reasonable is a question of fact. The basic principle is that force must be reasonable and in proportion to the unwanted contact.

In *Cockroft v Smith* (1705), the claimant was a clerk of the court. During a scuffle in court, he pushed his fingers towards the defendant's eyes. The defendant bit off the claimant's finger. He pleaded self-defence at trial. Holt CJ said:

'Hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword and cut and hew each other.'

CASE EXAMPLE

Revill v Newbury (1996)

In order to guard his allotment, the defendant slept in it, armed with a loaded gun. The claimant, a 21 year old, who had already committed a number of damage-related offences and thefts that night, tried to break into the shed. The claimant was shot at through a hole in the shed door. The defendant was sued for personal injury from the assault and battery caused by the shotgun wound. He claimed that he acted in self-defence.

The defendant was found liable, as he had used greater force than was necessary. However, the damages were reduced by two-thirds for contributory negligence.

Defence of necessity

The defence of necessity can be used where the defendant's actions are justified to prevent greater damage to the defendant or to someone else. The courts take the view that where personal injury is threatened, any damage to property is justified. A common example here is where goods are thrown from a ship to save the lives of the people on board.

This defence overlaps with that of consent and acting in the best interests of a patient. This has already been discussed in this section, in the cases of *F v West Berkshire Health Authority* (1989) and *Airedale Trust v Bland* (1993).

▼ Figure 46.5 Defences

Key facts		
Defence	Case	Comment
Consent	<i>Nash v Sheen</i> (1953)	Consent must be to a specific act
Consent in sport	<i>R v Billingshurst</i> (1978)	Consent to contact within the rules of the game
Consent in medical treatment	<i>Chatterton v Gerson</i> (1981)	Patient must be given information about treatment in broad terms
	<i>Ms B v An NHS Hospital Trust</i> (2002)	A person of full capacity can refuse treatment
Self-defence	<i>Revill v Newbury</i> (1996)	A defendant must not use greater force than was necessary

TARGET SKILLS

- 1 State when consent can be used in the tort of battery.
- 2 Name three cases where consent was used as a defence in battery.
- 3 Assess the effectiveness of consent as a defence in medical cases.
- 4 Discuss the extent to which the tort of trespass to the person deters wrongdoing.

46.3 False imprisonment

46.3.1 Definition and elements required to establish liability

False imprisonment is the third element of the tort of trespass to the person. The definition of false imprisonment is an act that directly and intentionally places a total restraint on a person's freedom of movement without lawful justification.

Intention

The law relating to the 'intention' element is inconsistent, but current case law seems to suggest that it is not required. Initially, cases such as *Sayers v Harlow Urban District Council* (1958) were clear that intention was an essential element. In this case, the claimant used a toilet maintained by the defendant. She was unable to get out of the cubicle, so she tried to get out by climbing on the toilet-roll holder. However, it spun when she put her foot on it and she fell, injuring her leg. The claimant sued in both negligence and trespass to the person. However, the claim for false imprisonment failed, as the council had not intentionally restricted her movement but had been merely negligent.

However, the case of *R v Governor of Her Majesty's Prison Brockhill* (2000) seems to suggest that intention is not needed.

CASE EXAMPLE

R v Governor of Her Majesty's Prison Brockhill (2000)

The claimant had been convicted of a number of offences and was sentenced to different lengths of time in prison for them. The sentences were to run concurrently, which meant that she should have been in prison for no longer than the longest sentence. However, the claimant had spent some time on remand, so this needed to be deducted from her sentence.

When the prison governor was calculating the length of the sentence, he used the rules set out in case law. Unfortunately at around the time that he was doing this, the High Court declared the rules to be incorrect. The claimant made a claim for false imprisonment, as she was imprisoned longer than she should have been. The House of Lords held that although the governor had used the correct method of calculation, there was liability because the tort of false imprisonment was a strict liability tort.

Restraint

Total restraint

The claimant must be totally restrained or imprisoned. If there is a reasonable means of escape, there can be no false imprisonment. The restriction on movement can be for any period of time and in any place, including the open air.

For there to be false imprisonment, the person must be confined within a boundary that can be either a physical boundary or a verbal threat.

CASE EXAMPLE

Bird v Jones (1845)

Part of a public footpath over Hammersmith Bridge had been closed off for paying spectators to watch a boat race. The claimant wanted to walk through the enclosure, so he jumped over it and was stopped by two police officers (the defendant was one of them). They told the claimant that he could not pass through the enclosure but they did tell him that he was free to move in the opposite direction. It was held that there was no false imprisonment as there was an alternative route, and partial closure is not the same as total obstruction.

Knowledge of the restraint

It is possible for a person to be falsely imprisoned if they are asleep or drunk at the time of the detention or restraint. This was not always the position.

In *Herring v Boyle* (1834), a headmaster refused to allow a mother to take her son home for the Christmas holidays because she had not paid his school fees. As the boy was unaware of being detained, there was no false imprisonment and the claim failed.

In contrast, in *Meering v Grahame White Aviation* (1919) there was false imprisonment because the court held that the knowledge of being detained was not an essential element of the tort.

CASE EXAMPLE

Meering v Grahame White Aviation (1919)

The claimant was asked to go to a room with two work policemen from the defendant's company. He asked why and said that he would leave if he were not told. When the defendant told him that there was a suspicion of theft, he agreed to stay. The works police stayed outside the room until the Metropolitan Police arrived. Unbeknown to him, they had been told to prevent him from leaving.

Meering v Grahame White Aviation (1919) was approved in *Murray v Ministry of Defence* (1988).

CASE EXAMPLE

***Murray v Ministry of Defence* (1988)**

The claimant was suspected of the collection of money for the IRA, a prohibited organisation. Acting on orders, the defendant and five other soldiers went to her house at 7 a.m. to arrest her. When she opened the door, the soldiers, following the usual procedure, entered the house and asked the claimant her name. All the other occupants at the house were assembled in one room and the rest of the house was searched. Thirty minutes later, the claimant was formally arrested. In this instance, it was reasonable for the defendant to delay the formal words of arrest, and so the arrest was not unlawful. There was no false imprisonment.

As part of the *ratio decidendi* (reason for the decision), the court said that in a claim for false imprisonment it was not necessary for a person unlawfully detained to prove that they knew that they were being detained or were harmed by the detention. The court pointed out that where someone was unaware of being detained and suffered no or little harm, only nominal damages would be awarded.

Lawful restraint

Some Acts of Parliament and common law principles allow for the lawful detention of people. If the procedures set out in the law are followed, there is no false imprisonment.

PACE 1984 gives both the police and an ordinary citizen the right to arrest a person. However, in order for this defence to be successful, the arrest and detention must comply with the Act and any relevant Codes of Practice. The arrest must be carried out with reasonable force only, unlike in *Treadaway v Chief Constable of West Midlands* (1994) where the claimant suffered serious injuries on arrest and during detention.

The claimant must be told of the arrest in clear terms. However, this requirement may be flexibly applied, as in *Murray v Ministry of Defence* (1988). Another example is the case of *Christie v Leachinsky* (1947).

CASE EXAMPLE

***Christie v Leachinsky* (1947)**

The claimant was arrested by the defendants without a warrant. At the time, they suspected and had reasonable grounds for suspecting that he had stolen a bale of cloth. They did not tell him that but arrested him on a charge of 'unlawful possession'. He was taken to the police station and was detained overnight until he appeared at the Magistrates' Court. He was refused bail and was placed in custody for two weeks. He brought a claim for false imprisonment for the day's detention at the police station. It was held that there was no false imprisonment, as the claimant knew why he was being detained.

Both the police and a citizen must take the suspect to the police station or court as soon as reasonably possible. What is reasonable depends on the circumstances of the case. There are two contrasting cases of *John Lewis v Tims* (1952) and *White v WP Brown* (1983).

CASE EXAMPLES

***John Lewis v Tims* (1952)**

The claimant was caught shoplifting by a John Lewis store's security guard, who then arrested the claimant as a citizen. The store's manager took an hour to decide what to do with Tims, before calling the police. There was no false imprisonment. When there is a citizen's arrest, the citizen is allowed a reasonable period of time in which to decide how to proceed. In the circumstances, one hour was reasonable.

***White v WP Brown* (1983)**

Here, 15 minutes' detention following a citizen's arrest was regarded as unreasonable.

TARGET SKILLS

- 1 Define false imprisonment.
- 2 Name two cases illustrating false imprisonment.
- 3 Analyse the impact of the cases relating to total restraint on the law of false imprisonment.
- 4 Discuss the extent to which the tort of trespass to the person fulfils the aim of compensation.

COMMENT

Evaluation of the law relating to trespass to the person

Actionable per se: This is an issue which arises in relation to both assault and false imprisonment.

This tort is effective to the extent that it is actionable per se, as it is easier for the claimant to bring a claim. The fear of being sued may mean that potential defendants are careful not to commit the torts of assault and battery particularly. In reality, very few claims are brought where there is no or minimal damage because the costs of bringing the claim will outweigh the amount of compensation paid. However, for some claimants the purpose of bringing a claim is not compensation but to vindicate their rights, and that the tort is actionable per se allows this to happen.

Assessment of damages

This can be difficult in terms of assault, because the tort is based on fear rather than actual harm. Harm is subjective: how is it possible to measure that? As words alone are not an assault in tort, this limits the ability to compensate the victim and means that future threats cannot be dealt with. This means that bad behaviour goes unpunished.

Hostility

Initially, in battery the defendant had to act in anger. This limited the effectiveness of the tort, because there are actions that amount to unlawful touching but could not be batteries because of the lack of hostility, for example medical situations. This meant that only hostile actions would be deterred. The difficulties in interpreting hostility created some confusion, and this deterred people from bringing a claim.

False imprisonment

The tort can now be committed negligently, which increases its effectiveness, as does the claimant not needing knowledge of the false imprisonment. This element also acts as a deterrent and ensures that the police and other bodies with the ability to detain people follow the law correctly. However, the range of defences available limits the effectiveness of the tort generally.

STRETCH AND CHALLENGE

Discuss how the tort of trespass to the person offers a person protection from harm.

TEST YOURSELF

- 1 Define assault and battery and name the case that provides the definitions.
- 2 Define hostility and name the case which provides the current definition.
- 3 Define false imprisonment.
- 4 Define the concept of lawful restraint.
- 5 What is the effect of *Meering v Grahame White Aviation* [1919]?

EXAM-STYLE QUESTION

Marco and Gianni are playing hockey for their university team in the final of the national championship. A former team member, Luigi, is now playing for the opposition. Marco and Gianni are still angry with him for leaving.

As they are playing, Gianni verbally threatens Luigi that he will injure him before the end of the game. Luigi replies that if the referee was not on the pitch he would ensure that Marco and Gianni 'would never play again'.

Later in the game Marco tackles Luigi aggressively on a number of occasions but the referee does not intervene. At half-time, when the players are returning to the dressing room, Luigi trips Gianni with his hockey stick. Gianni falls and suffers a serious head injury. He is unable to take any further part in the game and as a result of the injury he misses his final exams and has to repeat the entire year of university.

Consider the potential liability of Marco, Gianni and Luigi for trespass to the person in this situation.

Cambridge AS and A Level Law 9084 Paper 42 Q6 May/June 2015

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47

Defences

Introduction

This chapter will deal with some of the defences available to a claimant. Consent (*volenti non fit injuria*) and contributory negligence are the most commonly used defences in tort and, if successfully used, will allow the defendant to be either completely or partially blameless for their actions:

- ★ *Volenti non fit injuria* (*volenti*) means that the claimant voluntarily agreed to accept the legal risk of harm at their own expense.
- ★ Contributory negligence can be used as a defence when the claimant has contributed in some way to their harm.

This chapter links to the key concept of rights, duties and responsibilities, and freedoms.

Internet research

You can read more about general defences in tort at <https://www.legalbites.in/general-defences-defence-against-tortious-liability/>

47.1 Volenti non fit injuria

This phrase means 'to one who volunteers, no harm is done'. This is a full defence, which means that if *volenti* is proved, the defendant will avoid liability completely and no compensation will be payable to the claimant.

The defence requires that there is a freely entered and voluntary agreement by the claimant, in full knowledge of the circumstances including the nature and extent of the risk. The defence can be used for both intentional torts such as assault and battery and non-intentional torts such as negligence. Since 1945, the courts have been less willing to use this defence, instead preferring to apportion blame using the Law Reform (Contributory Negligence) Act 1945.

47.1.1 Elements of volenti non fit injuria

The defence has three elements:

- 1 voluntary
- 2 agreement
- 3 made in full knowledge and understanding of the nature and extent of the risk.

Voluntary

This means that the claimant has had complete free choice. If this has not been the case, the defence will not succeed.

Agreement

This may be express or implied.

CASE EXAMPLE***Nettleship v Weston* (1971)**

(See page 282 for full case details.)

The court held that a learner driver has to meet the same standard of care as a reasonable qualified competent driver. Also, the defence of *volenti* did not apply; as the friend had checked the defendant's insurance cover, that meant that he did not abandon his rights to compensation. His damages were reduced by 50 per cent to reflect the degree of his own fault.

Lord Denning held:

'Knowledge of the risk of injury is not enough. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree expressly or impliedly to waive any claim for any injury that may befall him due to lack of reasonable care by the defendant: or more accurately due to the failure by the defendant to measure up to the duty of care which the law requires of him.'

If the claimant and the defendant have expressly agreed that the claimant will voluntarily accept the risk of harm, and the agreement is made before the negligent act, the defence will be successful, and the defendant will not be liable for the harm caused. If there is an express agreement, it may be subject to provisions in an Act of Parliament, such as the Unfair Contract Terms Act 1977 which does not allow someone to exclude liability for death or personal injury.

It is rare for the courts to imply agreement to accept a risk. The case of *White v Blackmore* (1972) illustrates this.

CASE EXAMPLE

White v Blackmore (1972)

The claimant was a car driver in a race. He had signed a contract with an exclusion clause and there was a warning sign at the entrance to the grounds stating that car racing was dangerous and that the defendant accepted no liability for injury or death. The claimant was killed when he was watching the race. The defence of *volenti* did not succeed as he had agreed to the risk of racing but not the negligent construction of the spectator area.

Knowledge and understanding

The claimant must have knowledge of the existence of the risk and its full nature and extent.

The test for deciding if the claimant has full knowledge of the risk is subjective. An example of this is contained in *Wooldridge v Sumner* (1963).

CASE EXAMPLE

Wooldridge v Sumner (1963)

The claimant was a photographer at an equestrian competition. He was sat inside the ring where the competition was taking place. One of the horses came galloping towards him. As he was afraid, he either fell or stepped back into the path of the horse and was knocked down. The claim failed as there was no breach of duty. However, the court said that consent to risk of injury is not enough as there must be consent in full knowledge of the nature and risk of property.

The Road Traffic Act 1988

Section 149 of the Road Traffic Act 1988 states that *volenti* is not available where a passenger in a car sues the driver and the driver should have compulsory insurance. This is illustrated by *Pitts v Hunt* (1990).

CASE EXAMPLE

Pitts v Hunt (1990)

The claimant was a passenger on a motorbike driven by the defendant. The defendant had never passed a driving test, was not insured and drove dangerously. The claimant encouraged him in this behaviour. *Volenti* was not available due to the provisions of the Road Traffic Act 1988, and the claim failed.

47.1.2 Application in employment

The concept of free choice has been discussed mainly in cases regarding employers and employees who have been harmed while at work. In the early nineteenth century, employees were assumed to consent to the risks attached to their jobs. The reasoning for this was at the time, the courts did not believe that the relationship of employer/employee was an equal one and an employee may have been afraid not to go to work for fear of losing their job.

However, as a response to societal and political changes at the end of the nineteenth century, judicial thinking changed, as in the case of *Smith v Baker* (1891). The approach taken in this case has been followed since, and it is unusual for a *volenti* defence to succeed in an employer/employee situation. However, it did succeed in *Imperial Chemical Industries Ltd v Shatwell* (1965), because the employee was not under pressure to take a risk but deliberately chose a dangerous way in which to work.

CASE EXAMPLES

Smith v Baker (1891)

The claimant sued his employers for the injuries received while he was working. He was employed to hold a drill in position while two other workers took it in turns to hit the drill with a hammer. Nearby, another set of workers were taking out stones and putting them into a crane that swung over his head.

The claimant was injured when a stone fell out of the crane and struck him on the head. The defendant raised the defence of *volenti*, alleging that the claimant knew that it was a dangerous practice and had complained that it was dangerous but continued anyway. This court rejected this argument because, although the claimant knew of the risk and continued to work, there was no evidence that he had voluntarily undertaken the risk of injury. Merely continuing to work does not indicate voluntary consent.

Imperial Chemical Industries Ltd v Shatwell (1965)

The claimant and his brother had not taken the recognised precautions when testing detonators.

The claimant sued ICI on the basis of their vicarious liability for his brother's negligence and their breach of duty under health and safety legislation. The defence succeeded, because the claimant was fully aware of the risk he was taking by not taking precautions and had consented to the risk and potential damage.

47.1.3 Application in a medical context

See Chapter 46, section 46.2.4.

47.1.4 Application in sports

A participant in a sporting event is taken to give implied consent to the risk of injury that occurs in the course of the ordinary performance of the sport. The defence will not be available to the defendant where the injury was inflicted outside the rules of the game. For example, if a boxer hits an opponent below the belt in a boxing match and the opponent is injured, there will have been no consent to that harm and there would be a successful claim in battery.

CASE EXAMPLE

Condon v Basi (1985)

The claimant suffered a broken leg during a tackle from the defendant during a football match. Both parties played for clubs who were in a local football league. The question for the court was: what was the standard of care expected of a football player? As part of this, the court considered what risks were acceptable.

The court decided that the standard of care varies, according to the level of expertise the player has. The defendant was in breach of duty as the tackle was reckless, even with regards to the standard expected of a local league player. While a participant can be taken to accept the risks of injury inherent to such sporting activities, they do not accept the risk of injury that occurs outside the rules of the game.

47.2 Contributory negligence

The defence of contributory negligence can be used in relation to the following torts:

- » negligence
- » Occupiers' Liability Acts 1957 and 1984
- » Animals Act 1971
- » nuisance
- » *Rylands v Fletcher*.

However, it cannot be used as a defence to any of the intentional torts, such as trespass to the person and trespass to land.

47.2.1 Nature of a partial defence and reduction of damages

Before 1945, contributory negligence was a complete defence. If it could be shown that the claimant contributed to their injuries or damage caused in part by the carelessness of another person, then there would not be a successful claim. It had exactly the same effect as the defence of *volenti*.

Since the Law Reform (Contributory Negligence) Act 1945 was passed, contributory negligence has become a partial defence. If the claimant has contributed to their harm (possibly through carelessness or negligence in not taking precautions), they will have a reduction in damages to reflect this contribution. The trial judge will decide the amount that will be deducted from the damages that could have been awarded.

Section 1 of the Law Reform (Contributory Negligence) Act 1945 states that the damages recoverable:

'... shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.'

Damages will be reduced in two situations:

- 1 where, without the claimant's contributory negligence, the accident would never have happened, or
- 2 the claimant's contributory negligence increased the severity of the injury/damage that would have happened anyway.

Usually, the reduction in damages will correspond to the degree of blame attached to the claimant, but this is not always the case.

CASE EXAMPLE

Sayers v Harlow Urban District Council (1958)

The claimant was trapped in a toilet cubicle by a defective lock. She injured herself when she tried to escape by climbing over the door. The claim in false imprisonment failed but she succeeded in negligence. However, her damages were reduced, as she had been contributorily negligent when she tried to escape.

According to *Jayes v IMI (Kynoch) Ltd* (1985), a claimant can be 100 per cent contributorily negligent. This would have the same effect as the defence of *volenti*. In contrast, in *Anderson v Newham College* (2003), it was suggested that *Jayes* had been decided *per incuriam* (the decision was not unanimous) and that it should not be followed. If the fault (blame) lies entirely with the

claimant, the defendant cannot be at fault as the chain of causation has been broken. A claimant's contributory negligence should reduce the defendant's liability, not get rid of it completely.

CASE EXAMPLES

Jayes v IMI (Kynoch) Ltd (1985)

The claimant was an experienced workman who was cleaning a machine when his hand was pulled into it and he lost the tip of his finger. The machine had had its safety guard removed. The claimant was held to be 100 per cent contributorily negligent, after he admitted that he knew that what he had done was foolish.

Anderson v Newham College (2003)

The claimant was a mobile site supervisor who visited the college in 1997. When he was in a classroom, he tripped over a frame of a whiteboard that was free standing and resting against a wall. If the board had been put around the other way, and the claimant had still walked into it, he would have hurt himself at shin height rather than tripping. The college was found to have failed to keep the floor free of articles likely to cause a trip. However, the claimant was greatly to blame, as he was not looking where he was going.

At trial, the claimant's damages were reduced by 90 per cent for his contributory negligence.

Both the claimant and the defendant appealed.

The court held there was a breach of duty. Liability was apportioned at 50/50, because it would have been reasonably practicable to turn the board around and the claimant should have been looking where he was going. The court said that *Jayes* should not be followed by trial judges and it should continue to be 'a decision which probably is confined to its own facts'.

47.2.2 Apportioning blame and reduction of damages

When the claimant is a child

The test for contributory negligence is an objective one (just like negligence itself), but subjective factors are taken into account when there is a child claimant.

The standard of care if the claimant is a child is that which could reasonably be expected, taking into account the child's age and experience.

Lord Denning's statement in *Gough v Thorne* is taken to mean that there is no age under which a child cannot be held to be contributorily negligent. However, the expected knowledge and awareness of a child at a particular age will be considered.

CASE EXAMPLE

Yachuk v Oliver Blais Co. Ltd (1949)

A nine-year-old boy bought petrol, telling the seller that it was for his parents when in fact he was going to play with it. He was badly burned and the seller was sued for negligently selling the petrol to him. The court held the seller liable. The child was not found to be contributorily negligent at all, as he could not be expected to know the dangers of playing with petrol.

The following cases illustrate how children of a similar age may be held to have different levels of contributory negligence.

CASE EXAMPLES

Evans v Souls Garage (2001)

Two 13-year-old boys bought petrol from the defendant so that they could sniff the fumes. Some of the petrol spilled onto the claimant's clothes and when the other boy (who was smoking) threw down a lit match, the claimant's clothes caught fire and he was badly burned. The defendant was found to be negligent when he illegally sold petrol to underage boys, but damages were reduced by one-third for contributory negligence, as the claimant knew that playing with petrol was dangerous.

Gough v Thorne (1966)

A 13-year-old girl crossed the road in front of a stationary lorry at the driver's signal, without looking for herself, and was hit by an overtaking car. At trial, her contributory negligence was assessed at 30 per cent, but on appeal the Court of Appeal disallowed the deduction.

Lord Denning took the opportunity in this case to make a statement about child claimants and contributory negligence. He said:

'A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child contributorily negligent if she was old enough that she could reasonably be expected to take precautions for her own safety: a child, even at 13, has not the same road sense as an adult.'

Probert v Moore (2012)

This case involved a 13-year-old girl pedestrian who was struck by a car travelling at 45 miles per

hour (about 70 kilometres per hour). She was not contributorily negligent in any way. Pittaway QC J stated:

'An ordinary 13 year old should not be expected to consider taking the same level of precautions as an adult. It would be asking too much of her to say that she should not have started to walk home at all, waited for her mother or accepted a lift, or should not have started to walk home without borrowing a high visibility jacket, reflective markings or torch from the stables.'

The Law Reform (Contributory Negligence) Act 1945 was considered in *Jackson v Murray and Another* (2015), where a 13-year-old schoolboy alighted from a clearly marked school bus and was struck by a car from behind it when it crossed a two-way road. The driver was travelling at 50 miles per hour (about 80 kilometres per hour), had not slowed down at any time and had failed to see the claimant. Lord Reed confirmed that s 1(1) gives very little direction to the courts when apportioning blame. However, in his judgment he stated that the court should take into account the blameworthiness of the parties and the relative importance of the claimant's actions.

When the claimant is a passenger

It is unlawful not to wear a seatbelt in a car or other vehicle. This applies to both adults and children.

CASE EXAMPLE

Froom v Butcher (1976)

A car accident was caused by the defendant's negligence, but the claimant was not wearing a seatbelt. He suffered head and chest injuries. His claim succeeded but damages were reduced by 20 per cent. Lord Denning stated:

'Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence that caused the accident. It also was a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seatbelt, the injured person must bear some share.'

The share of blame would depend on the level of injury. Lord Denning suggested that the reduction in damages should range between 15 and 25 per cent.

The court will use an objective standard to decide if the claimant had worsened the injuries or harm. A prudent person would have worn a seatbelt. It should be borne in mind that this case was heard when a reduction in damages was being used to persuade people to wear seatbelts. It was an attempt to change people's behaviour. The introduction of criminal prosecutions probably had a greater deterrent effect than the imposition of the payment of compensation.

When the claimant is a cyclist

Sometimes the court needs to decide if a claimant cyclist has been contributorily negligent, particularly when the cyclist has not worn a helmet. The position relating to cyclists seems to be set out in Griffith J's *obiter dicta* statements in *Smith v Finch* (2009). He said that cyclists who are not wearing helmets when they suffer an injury should be held liable for those injuries, if it can be shown on the balance of probabilities that a helmet would have prevented them.

CASE EXAMPLES

Smith v Finch (2009)

The claimant was injured when a motorcyclist hit him. The claimant was not wearing a helmet and he suffered head injuries. While the claimant made a good physical recovery, there were still problems with his cognition, behaviour and speech function, and he had developed epilepsy. The defendant argued that the claimant was contributorily negligent because he had not been wearing a helmet at the time.

The court applied the logic in *Froom v Butcher*; that is, if motorists had to wear seatbelts then cyclists had to wear helmets. It also looked to the Highway Code, which says that cyclists should wear helmets, but a cyclist is not legally obliged to wear a helmet.

The defendant had to show that the particular injuries suffered would not have occurred if the claimant had been wearing a helmet. In this instance, the injuries responsible for the claimant's disabilities were caused by an injury from which a helmet would not have protected the claimant. So there was no reduction for contributory negligence.

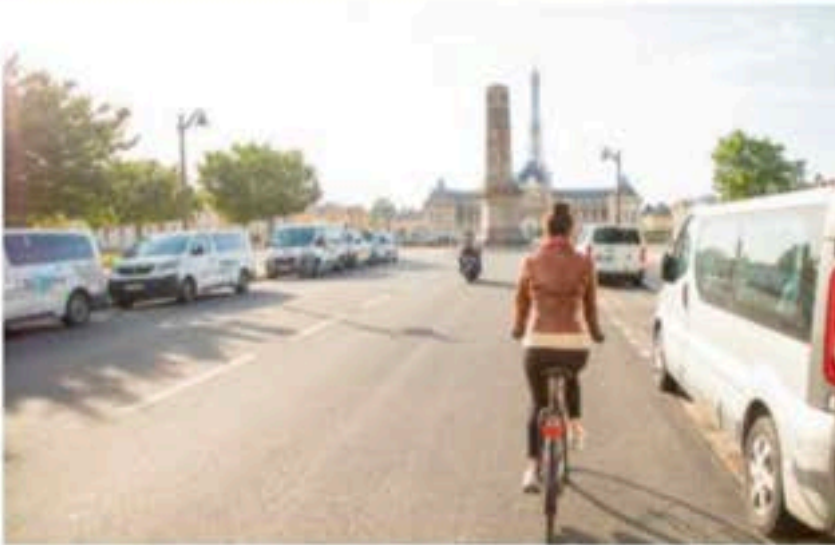
HC Sinclair v Joyner (2015)

The claimant was not wearing a helmet at the time of the accident and the defendant claimed that this was contributory negligence. The court agreed with the defendant and held that the claimant was

25 per cent contributorily negligent as she had failed to assess and act upon what would have been a clear hazard to her. As the defendant had hit the claimant, it would have been clear that there was insufficient room to pass.

However, in relation to the claimant's contributory negligence, the court said:

'No court has yet decided that failing to wear a helmet actually amounts to contributory negligence, although they have come close.'



▲ **Figure 47.1** Wearing a helmet will avoid a claim of contributory negligence

47.3 Other defences

47.3.1 Inevitable accident

An inevitable accident is one where the defendant could not possibly have avoided the incident and it is not intended. The accident will occur regardless of how much care the defendant has taken. In a fault-based tort such as negligence, this means that the defendant will not be liable.

47.3.2 Act of God

This defence may be used when the damage is caused by natural forces, only in circumstances that the defendant could not have been expected to foresee or guard against. However, the defence rarely works.

See Chapter 44 for more information and case law on this defence.

47.3.3 Statutory authority

Statutory authority is a full defence when it can be proved that the defendant's actions are authorised by an Act of Parliament. This defence can be used in the tort of nuisance (see Chapter 43).

47.3.4 Illegality

This is also called *ex turpi causa*. It means that a claim cannot be based on illegal or immoral conduct. In *Kirkham v Chief Constable of Greater Manchester* (1990), the deceased's wife failed to tell the police of her husband's suicide attempts. After he died while on remand, she brought a negligence claim against the police. The claim succeeded but the court said that the defence covered both illegal and immoral acts.

47.3.5 Necessity

This defence is used in relation to intentional torts such as trespass to the person or trespass to land. Often, necessity is used as a defence in assault and battery cases involving medical treatment where the patient is not capable of giving valid consent. The test used here is whether the treatment is in the best interests of the patient, as in *F v West Berkshire Health Authority* (1989). Here, a mother was concerned that her adult child who had a mental age of a small child would become pregnant because of the serious negative consequences of it. The mother was asking the court for the sterilisation of the daughter to prevent this happening.

If the patient is able to give consent but refuses treatment, the doctor may face a battery claim if this refusal is ignored.

Case law shows that the courts are reluctant to allow a defence of necessity to succeed, as it means that a loss may be inflicted on the claimant, particularly in relation to trespass to land. For example, in *Southwark London Borough Council v Williams* (1971), the Court of Appeal refused to accept necessity as a defence when it was raised by the squatter defendants.

Lord Denning said:

'If homelessness were once admitted as a defence to trespass, no one's house would be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need or would invent a need, so as to gain entry.'

Internet research

Read about a case that may open the floodgates for the defendant: www.bbc.co.uk/news/uk-england-devon-22360093

Is the outcome of the case fair to both parties?

TARGET SKILLS

- 1 Describe the rule concerning children and contributory negligence.
- 2 State two cases which support the rule concerning children and contributory negligence.
- 3 Assess whether the availability of several defences makes it difficult for a claimant to have a successful claim for trespass to the person.
- 4 Discuss whether Lord Denning's opinion in *Gough v Thorne* (1966) is both fair and just.

COMMENT**Evaluation of the law relating to defences**

A number of issues have arisen in relation to the law relating to defences. It has been suggested that there is some confusion between *volenti* and contributory negligence, because before 1945 both defences had the same effect. This could be argued as unfair to a claimant who was only contributorily negligent. However, since then the defences have a different outcome if successfully pleaded. Even so, despite this distinction, sometimes the defences are referred to as 'consent to harm', which can be confusing.

Children

Although the defences have a different focus, the courts take a common approach where the claimant is a child. This is evident in the case of *Gough v Thorne* (1966), where policy reasons protect this type of claimant, as children generally cannot judge speed or recognise that they may be in danger. This flexibility can be confusing for practitioners, who may find it difficult to advise clients. The approach, however, ensures that children are not unduly penalised for their lack of experience.

Apportioning blame

There can be difficulties in this respect in relation to contributory negligence. It can be difficult to accurately apportion blame. This is because contributory negligence is dealt with by using a

subjective approach, with the court free to decide what is 'just and equitable'. In contrast, if the defence of *volenti* is successful, the claimant will not receive anything so the defence is much simpler to use.

Insurance

Where the claim falls under the Road Traffic Acts, *volenti* cannot be used as a defence because the defendant must have insurance, as it is compulsory. However, contributory negligence is commonly used. This means that the claimant benefits from this defence as the defendant can never be completely blameless. The defence appears to shift the loss (payment of compensation) from the insurance company to the wider public who take out insurance.

For this reason, among others, the Pearson Commission wanted to abolish the defence, as in Scandinavia. Since the abolition of the defence in Scandinavia, there has been an increase in insurance premiums by at least 7.5 per cent to ensure that there are sufficient funds to provide compensation.

As it can sometimes be difficult to distinguish between *volenti* and contributory negligence, judges who are unwilling to deny a claim altogether will choose to find contributory negligence as a compromise. This makes it a defence that is both effective and fair to both parties.

ACTIVITY

Explain which defence can be used in the following scenarios and support your answers with a relevant case.

- 1 Rafi was involved in a road traffic accident. His injuries were made worse because he was not wearing a seatbelt.
- 2 When Charlotte entered a marathon, she signed a disclaimer form stating that the organisers would not be liable for any personal injury or death that occurred during the race. She was badly injured when she fell down a pothole in the road.
- 3 Deepak made a large concrete swimming pool in his garden. After a night of extremely heavy rainfall, the pool overflowed with water and his neighbours' properties were flooded.
- 4 While Samantha is playing football, she is tackled by an opponent who also grabs her around the neck. This causes her to suffer a neck and shoulder injury.
- 5 A factory was flooded and a layer of oil was left behind on the floor. The factory owner covered nearly the entire floor with sawdust to deal with this. Billie, an employee, fell on a very small area that was not covered and broke her leg.

▼ Figure 47.2 Key facts on defences

Key facts	
Defence	Definition/requirements
<i>Volenti non fit injuria</i> (consent)	• This means 'to one who volunteers, no harm is done'. • This is a full defence. • The defendant must show that there is a voluntary, freely entered into agreement regarding the risk of harm. • The claimant must have full knowledge of the extent of the risk of harm. • Any attempts to exclude liability must comply with the Unfair Contract Terms Act 1977. • A participant in sport only agrees to contact within the rules of the game.
Contributory negligence	• This is a partial defence. • Damages will be reduced to the extent the claimant has contributed to their own harm. • The judge will reduce damages by the amount that is considered just and equitable. • A child of any age can be found to be contributorily negligent and the court will take into account their age and experience. • In relation to drunk defendants, the claimant is judged by what a sober, reasonable person would have done. • 100% contributory negligence is technically possible but unlikely.
Inevitable accident	The defendant is unable to have avoided the accident, regardless of the extent of the defendant's care.
Act of God	This defence is used where the damage is caused by natural forces that the defendant cannot expect to foresee or guard against.
Statutory authority	This is a full defence which can be used when an Act of Parliament specifically authorises the defendant's activities.
Illegality	A claim cannot be based on an illegal or immoral act.
Necessity	This is a defence used particularly in battery, where it is in the best interests of the patient for medical treatment to be carried out.

▼ Figure 47.3 Key cases: defences

Key cases		
	Case	Comment
Volenti non fit injuria (consent)		
Must be voluntary	<i>Nettleship v Weston</i> (1971)	The claimant must expressly or impliedly waive any claim for any injury caused by the defendant's lack of reasonable care.
	<i>Smith v Baker</i> (1891)	Merely continuing to work does not indicate voluntary consent.
Knowledge	<i>Wooldridge v Sumner</i> (1963)	Is the claimant capable of appreciating the nature of the risk?
Road Traffic Act 1988	<i>Pitts v Hunt</i> (1990)	Volenti cannot be used if the driver should have compulsory insurance.
Employees	<i>Imperial Chemical Industries v Shatwell</i> (1965) <i>Smith v Baker</i> (1891)	The defence will succeed where the employee deliberately chooses a dangerous way to work. Continuing to work in a dangerous environment is not an indication of voluntary consent.
Sporting context	<i>Condon v Basi</i> (1985)	A participant in sport will only consent to contact allowed within the rules of the game.
Contributory negligence		
	Section 1 of the Law Reform (Contributory Negligence) Act 1945	Damages will be reduced to the extent to which the claimant is to blame, so far as it is just and equitable.
Children	<i>Yachuk v Oliver Blais Co. Ltd</i> (1949) <i>Gough v Thorne</i> (1966) <i>Probert v Moore</i> (2012)	The standard of care to be taken by the child claimant takes into account the child's age and experience. An ordinary 13-year-old is not expected to take the same level of precautions as an adult.
Apportioning blame	<i>Jackson v Murray and Another</i> (2015) <i>Sayers v Harlow UDC</i> (1958)	The court should take into account the blameworthiness of the parties and the importance of the claimant's actions. Reduction in damages is proportionate to the claimant's own negligence.
Seatbelts	<i>Froom v Butcher</i> (1976)	The claimant will be contributorily negligent if no seatbelt is worn.
Cyclists	<i>HC Sinclair v Joyner</i> (2015) <i>Smith v Finch</i> (2009)	No court has decided that failure to wear a helmet amounts to contributory negligence. The court will consider the rule in <i>Froom v Butcher</i> and the Highway Code.
'100% contributory negligence'	<i>Jayes v IMI (Kynoch) Ltd</i> (1985) <i>Anderson v Newham College</i> (2003)	It is possible for a claimant to be 100% contributorily negligent. 100% contributory negligence would break the chain of causation.

STRETCH AND CHALLENGE

Discuss whether the defence of contributory negligence is both fair and effective.

TEST YOURSELF

- 1 What does *volenti non fit injuria* mean and what is the effect of this defence?
- 2 State the case that confirms that the claimant must have knowledge of the full extent and nature of the harm.
- 3 Describe the test that is used when the claimant is drunk.
- 4 State the Act that applies in relation to contributory negligence.
- 5 Describe the effect of contributory negligence on a claim.

EXAM-STYLE QUESTIONS

- 1 The Airspeed Pageant is an annual air display that takes place in the skies over Casterbridge and is organised by the local aero club to raise sponsorship for the National Museum of Aviation nearby.

Biggles was mistakenly given permission to land by the aero club's air traffic control tower and as his 1930s aircraft approached the grass airstrip Biggles noticed that another aircraft had only just landed in front of him. He had to take avoiding action and on landing one of the tyres punctured and the aircraft spun out of control into crowds that had gathered to watch. Several spectators were killed and many more seriously injured. Biggles survived the incident, but had to be cut from the wreckage and lost both legs as a consequence of his injuries.

Discuss whether or not the club might successfully defend any action taken against them by Biggles, by those injured or by representatives of those killed in the incident.

Cambridge AS and A Level Law 9084 Paper 43 Q5 October/November 2013

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- 2 Awards of damages in tort do not provide just remedies to all claimants in all circumstances.

Critically examine the truth of this view and the extent to which you agree.

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48

Remedies

Introduction

Usually, when a claimant brings a claim in most torts, they will be asking the court to award compensation in the form of monetary damages as this may be all that is required to achieve justice. There are two main types of damages available: compensatory and non-compensatory. The claimant has to provide evidence of harm and loss to the court so that they can be adequately compensated.

It is also possible for a claimant to request an equitable remedy. Unlike common law remedies such as compensation, equitable remedies are not given as of right. These are entirely at the discretion

of the court. The court is able to take into account the behaviour of both parties and can refuse to grant such a remedy if either party has acted improperly. The equitable remedies that are most commonly claimed in tort are restitution and injunctions, which allow the court to either return property or regulate the behaviour of the defendant. Injunctions enable the court to create a balance between the needs of both parties, which allows for a compromise. This chapter links to the key concept of justice, fairness and morality.

48.1 Common law remedies

48.1.1 Purpose of damages in tort

When awarding damages the court's primary aim is to compensate the claimant that is, to put the claimant in the position they would have been in had the tort not occurred. However, there are some forms of damages which aim to punish the defendant as well as compensate the claimant. When awarding damages, the court has to ensure that the claimant is neither over-compensated nor under-compensated.

Damages can be placed in two broad categories:

- 1 compensatory
- 2 non-compensatory.

48.1.2 Calculation of damages

The aim of this type of damages is to put the claimant in the position they would have been in had the tort not occurred. Compensatory damages do not take into account the degree of fault involved in the defendant's actions or inactions so the court does not distinguish between a momentary slip of attention and gross negligence. This means that the courts cannot provide justice to the claimant without some injustice to the defendant.

Mitigation

The claimant will be expected to mitigate any loss. This means that the defendant will not be liable for compensatory damages regarding any loss that could have been prevented by the claimant. Balanced against this, the claimant is not expected to make vast efforts to avoid a loss that is the defendant's fault. An example of this can be found in *Ronan v J Sainsbury plc* (2006).

CASE EXAMPLE

Ronan v J Sainsbury plc (2006)

The claimant was 19 and a student when he was working for the defendant. After an accident at work, he had to have a number of operations. He began a career in banking but still needed surgery. His injury began to cause more problems that led to depression. To pursue a change of career, he went to university. A year later, his health had improved so much that he could have gone back to banking, but he completed his degree.

The court held that the decision to change careers had been a direct result of the injuries caused by his accident. Once the claimant had started his university course, it was unreasonable of the defendant to expect him to leave it, and the claimant successfully sued the defendant for loss of future earnings.

There are two types of compensatory damages:

- » non-pecuniary (for example for pain and suffering)
- » pecuniary, also known as general damages (for example for pre-trial expenses).

Non-pecuniary damages

The aim of this type of damages is to provide fair compensation. However, it may not be possible to accurately estimate the amount of compensation that a claimant should be awarded.

Non-pecuniary losses can include losses from the trial date or settlement date, such as:

- » An amount for pain and suffering. Pain and suffering may arise from the injury itself or from medical treatment that has been received because of the injury. The claimant will not be able to claim for any period of unconsciousness, as it is presumed that if a person is unconscious, they are not aware of any pain.
- » An amount for loss of amenity. This type of loss can be claimed where the claimant is unable to enjoy life to the same extent as before, for example because they cannot enjoy sport any longer.
- » Future losses, such as loss of earnings and the cost of care for the claimant.

When calculating the claimant's annual wage, the court will take into account any promotion prospects and the number of years the effects of the accident are likely to continue (the multiplier), minus the 'contingencies of life'. According to the Damages Act 1996, the Lord Chancellor can recommend a rate of interest in order to calculate the multipliers. This is currently set at 2.5 per cent.

As this head of compensation is difficult to calculate, there can be allegations of over- and under-compensation. There are two contrasting cases: *Cooke and Doyle*.

CASE EXAMPLES

Cooke v United Bristol Healthcare NHS Trust; Sheppard v Stibbe and Another; Page v Lee (2003)

All the claimants had been severely injured and were likely to need care for the rest of their lives. They argued that using the usual method of assessing damages with the discount rate would leave them under-compensated, because the costs of care were increasing at a greater rate than inflation.

The Court of Appeal held that it was not possible to produce evidence proving this. The court said that Parliament had authorised the Lord Chancellor to set the rate that was to be used, and he had done so taking inflation into account. As Parliament is supreme, the Court of Appeal said that the courts had to abide by his decision.

Doyle v Wallace (1998)

The claimant was badly injured in a road traffic accident. She had been intending to train as a drama teacher if she could get the qualifications

to do so. If she did not achieve this, she planned to get a clerical job. If she succeeded in becoming a teacher, her salary would be significantly higher than if she had a clerical job. At the time of the accident, it was too early to know if she would have acquired the necessary qualifications.

At trial, there was a 50 per cent chance of her being a teacher. The court calculated the damages for loss of earnings on the basis of an income that was mid-way between that of a drama teacher and that of a clerical worker. The Court of Appeal upheld this approach.

Loss of amenity can still be claimed even if the claimant is unconscious and not aware of the loss of amenity.

CASE EXAMPLE

H. West and Son Ltd v Shepherd (1963)

The claimant was a married woman who was 41 when she was injured. She was partially unconscious because of head injuries and paralysed in all four limbs. There was no hope of a full recovery, and she had a life expectancy of five years. She was not able to speak, but there was evidence that she had some awareness. She was granted a sum of £17 000.

However, this case has been criticised, as a person who is unaware of their loss of amenity can still be compensated. In this situation, the claimant cannot actually use the damages paid, the compensation goes straight into their estate, and this seems unfair because relatives of unconscious claimants may end up with more money than the relatives of a claimant who has been killed immediately. However, if the court decided not to award compensation for this type of damages, the claimant would be treated as if there were dead, and they are not.

CASE EXAMPLE

Martin and Browne v Grey (1998)

A 12-year-old girl was awarded damages for the loss of services provided by her mother, who had been killed. She was able to claim for the cost of employing a housekeeper and her father's loss of earnings.

ACTIVITY

Collett v Smith and Middlesbrough Football and Athletic Co. (2008)

Manchester United youth footballer awarded £4.5m after career-ending tackle

Benjamin Collett, 23, could have enjoyed a top-class career and earned millions of pounds had his right leg not been broken in two places by the "over the ball" tackle he suffered during a reserve team game aged 18, the High Court in London heard.

The tackle, from Middlesbrough's Gary Smith, who now plays for Brentford, came as a "devastating blow" to Mr Collett, who had won an award for his outstanding contribution to Manchester United's victory in the 2003 FA Youth Cup, the judge, Mrs Justice Swift, said.

Describing Mr Collett as "a most impressive young man" at school and on the pitch, Mrs Justice Swift said that he had shown the ability and strength of character to play at the highest level throughout his career.

She found that Mr Collett was about to be offered a three-year professional contract with Manchester United when he sustained the double leg break in May 2003.

Speaking at a previous hearing, Sir Alex Ferguson, the Manchester United manager, said Mr Collett, who joined the club's Youth Academy which also produced David Beckham, Paul Scholes and the Neville brothers, at the age of nine had an "outstanding chance" of becoming a top professional before he was injured.

Mrs Justice Swift said that Middlesbrough FC's parent company and Mr Smith had admitted negligence.

She awarded Mr Collett about £4.3m, including more than £4m for loss of earnings due to the premature end of his footballing career. At a hearing in October to determine Mr Collett's loss of pension and interest payments, the total is likely to rise to no less than £4.5m, she said.

Earlier, the court heard Collett could have earned more than £13,000 a week, making a total in excess of £16 million, if he had played until the age of 35.

Mark Gay, a leading sports lawyer from DLA Piper, said: "In terms of precedent, this sees the common law principles of personal injury applied to the football pitch. Say I was a banker earning £10m a year, and you ran me over. Your negligence would be the same as if you'd run over anyone else, but if my ability to keep earning £10m is ended, you could be left with an enormous payout.

"The equivalent in football has always been possible, but very often the players most susceptible to such injury were getting on a bit, or their lawyers have had difficulty showing that it was one tackle in particular that caused an injury, as happened in the *Alf-Inge Haaland vs Roy Keane* case in 2002. So often players will take a modest insurance payout rather than sue through the courts.

"What makes this exceptional is that it's one of the first in which these usual defences – the problem of causation or a player being late in his career – just didn't apply."

The Telegraph, 11 August 2008

Questions

- 1 What are the two main heads of compensation for personal injury?
- 2 When calculating the amount of damages payable to Collett, what did Mrs Justice Swift take into account?
- 3 Collett was awarded £4.3 million in compensation. How was this sum calculated?
- 4 If Collett could have earned over £16 million during his career, why was he only awarded £4.3 million?
- 5 How could Collett have mitigated his loss?
- 6 Why did Mark Gay of DLA Piper say that this case was different from other similar claims from footballers?
- 7 Discuss how the rules relating to damages may be reformed.

If the claimant is expected to die earlier than they otherwise might have, it is considered unfair to reduce the amount of damages because the income would not have been needed for so long. The approach taken by the courts is to use the claimant's predicted life expectancy if the accident had not happened, but reduce it by the amount that the claimant would have spent supporting themselves during that time.

Pecuniary damages

These can include the following:

- » Pre-trial expenses – the claimant is able to claim for all expenses actually and reasonably incurred, such as damage to clothing and medical expenses.
- » Expenses incurred by third parties, such as a partner or relative who has given up work to care for the claimant. In *Donnelly v Joyce* (1973), the claimant,

a child, was able to claim for this type of loss when his mother had to give up work to look after him following the defendant's negligence. Any damages recovered under this category are essentially compensation for the carer, not the claimant. When the claimant receives the damages, they should give the money to the carer. The cost of future care is recoverable, as long as it is necessary or reasonably incurred.

- » Pre-trial loss of earnings, less any taxes.

Internet research

Read the case of a boy who was awarded £30m in a claim against a hospital for the brain damage he suffered. This is one of the largest settlements in the UK: www.dailymail.co.uk/news/article-7632445/Boy-receives-30million-court-payout-hospital-blunders-left-brain-damaged.html

48.1.3 Non-compensatory damages

These types of damages are connected with the other aims of tort, specifically deterrence and retribution.

- » The award of large amounts of compensation attempts to ensure that accidents are avoided by potential defendants.
- » Retribution is more appropriate to criminal law. This aim allows the claimant to feel vindicated as the law has been on their side and justice has been achieved. The payment of damages can be seen as an acknowledgment of the wrong that was committed – or even as an apology.

There are four types of non-compensatory damages:

- » contemptuous
- » nominal
- » aggravated
- » exemplary.

Contemptuous damages

Contemptuous damages are awarded to the claimant where their legal rights have been infringed but the court disapproves of the claimant's conduct and wants to make it clear that the action should never have been brought. These damages are said not amount to more than the value of the least valuable coin in the country where the claim is being brought but they can be higher than this. The claimant is unlikely to recover the costs of bringing the case. Contemptuous damages are not awarded very often but are usually given in defamation cases. Defamation is a tort that occurs when a person makes an untrue statement that damages the reputation of another.

CASE EXAMPLE

Grobelaar v News Group Newspapers Ltd (2002)

The claimant was a professional footballer who was accused of taking bribes to let in goals. The claimant won and was awarded £85000. The Court of Appeal found that the decision was perverse and quashed it. On appeal, the House of Lords held that the Court of Appeal was wrong to quash the decision, as the verdict was on the basis that he had not let any goals in. However, he was a person who had no reputation that was worth protecting, so he was awarded £1.

Nominal damages

Nominal damages are given to the claimant where there has been an infringement of the claimant's legal rights but there has been no actual damage caused. The court will award a small amount of compensation to acknowledge that there has been an infringement of rights.

CASE EXAMPLE

Watkins v Secretary of State for the Home Department (2006)

The House of Lords held that nominal damages should only be awarded in cases that involve torts that are actionable per se, such as assault and battery.

Aggravated damages

Aggravated damages are awarded where the claimant has suffered more than would normally be expected in a case. The higher level of damages reflects the court's disapproval of the defendant's behaviour.

CASE EXAMPLE

Rowlands v Chief Constable of Merseyside (2006)

The claimant had complained to the police about a noisy party. Then she got into an argument with an officer who came to sort the problem. She was arrested and handcuffed in front of her children. She asked the officer to loosen the handcuffs as they were causing her pain, but the officer deliberately tugged them, increasing her pain.

She was detained for 90 minutes and charged with assaulting a constable in the course of his duty. At her trial for this offence, the judge did not believe the police evidence and she was found not guilty. She then sued the police for assault, false imprisonment and malicious prosecution.

The Court of Appeal awarded the claimant aggravated damages because of the amount of humiliation and distress she suffered on arrest and the willingness of the police to give false evidence against her.

Exemplary damages

Here, the court will award more damages than would normally be appropriate because it is seen as a form of punishment for the defendant. This means that the award of exemplary damages is strictly controlled; for example, if the claimant has not suffered any damage, then exemplary damages cannot be awarded.

The House of Lords in *Rookes v Barnard* (1964) set down when such damages could be granted. The case must fall into one of three categories:

- 1 Statutory authorisation
- 2 Conduct calculated to make a profit
- 3 Oppressive conduct by government servants (employees).

Statutory authorisation

Damages can be awarded when a statute gives authorisation.

Conduct calculated to make a profit

In some instances, the defendant may consider it worth committing the tort, because the cost of paying damages to the claimant is outweighed by any profits made. This can happen in relation to the tort of defamation, where the claimant is suing the defendant for libel or slander because their good reputation has been damaged.

CASE EXAMPLES

Broome v Cassell and Co. Ltd (1971)

The claimant was a retired naval officer. The defendants published a book about a wartime convoy of ships with which the claimant was involved. The claimant successfully sued for libel and was awarded £25 000 as exemplary damages.

This award was confirmed by the House of Lords, as the court took into account the profit that the defendants would have made. The House of Lords said that it was not necessary that the defendant

had actually calculated that the profit would outweigh the damages. The major factor was that the defendant was prepared to hurt someone in order to make a profit.

John v Mirror Group Newspapers (1995)

The High Court indicated that in defamation cases, the jury should be told that an award of exemplary damages could only be made if the publisher had no genuine belief that the information was true.

Oppressive conduct by government servants (employees)

An award of damages can be made under this head if there has been oppressive or unconstitutional action by government servants (employees) while carrying out their jobs; for example, police officers are supposed to serve society and use their powers according to the law.

The old case of *Huckle v Money* (1763) is useful here.

CASE EXAMPLES

Huckle v Money (1763)

The claimant was detained under a search warrant for six hours. There was no ill-treatment as he had been given food and drink. However, he was awarded £300 damages, because entering a person's home with a search warrant without a name on it was a serious breach of civil liberties.

Thompson v Commissioner of Police of the Metropolis (1997)

The court stated that in cases of unlawful conduct by the police, juries should be told that they may grant compensation at a level that is aimed to punish the defendant. The High Court indicated that these damages were unlikely to be less than £5000, and might be up to £50 000 where high-ranking officers such as superintendents were directly involved.

Muuse v Secretary of State for the Department (2010)

The claimant had been unlawfully detained while the Home Office considered whether to deport him to Somalia. The Home Office had no right to detain him, as he was actually a Dutch national, even though he had been born in Somalia. During the detention, it was alleged that the behaviour of the Home Office was 'high-handed, insulting,

malicious and oppressive'. The Home Office employees ignored all the evidence that he was Dutch, failed to answer letters and kept him in detention for a month longer than necessary after they realised that he should not be detained. The claimant was terrified that he was going to be deported.

The Court of Appeal awarded exemplary damages because it wanted to express its strong disapproval of the Home Office's conduct.

48.1.4 Damages for personal injury

As stated above the aim of the paying compensation (damages) to the claimant is to put the claimant in the position they would have been in if the tort had not been committed. This is not always possible where personal injury has occurred, especially where the claimant has suffered a permanent disability. However, claims for pecuniary and non-pecuniary damages attempt to ensure that the claimant is not left under-compensated. Damages are usually awarded on a one-time-only basis, in the form of a lump-sum payment. However, if the settlement is large because of the severity of the injuries involved, then the claimant may receive payments over a period of time to reflect their individual needs.

48.1.5 Issues relating to future losses and death

According to s 1 of the Law Reform (Miscellaneous Provisions) Act 1934, if the claimant dies then the claim passes to their estate. Whoever inherits the claimant's estate can make a claim for the losses that the claimant would have claimed for themselves between the injury and the death.

Also, the Fatal Accidents Act 1976 allows for a claim by the deceased's descendants for financial losses and a claim for the bereavement suffered. This action can be brought by a spouse, dependent children and any close relatives who can prove that they are financially dependent on the deceased. This can include unmarried partners who have been together for more than two years.

A person making a claim under the Fatal Accidents Act 1976 can also make a claim for their own financial losses caused by the death, for example earnings spent on dependants, or savings that have been used.

The amount of compensation that can be claimed is the annual loss multiplied by the number of years

the loss would have been suffered. The survivors can also claim funeral expenses and a spouse can also claim bereavement damages (currently £12 980).

The usual rules of contributory negligence will apply here, and damages will be reduced if the claimant has contributed in some way to their death.

As stated above, it can be difficult to assess future losses, as these differ from claimant to claimant.

48.1.6 Policy issues and reform

As the main aim of awarding damages is to ensure that the claimant is properly compensated, a number of policy issues are considered by the courts, for example the availability of insurance. This is especially important where the injuries sustained by the claimant are significant. If there is no insurance policy the claimant is not likely to be compensated unless the defendant has assets that can be used to pay the compensation. In cases where aggravated or exemplary damages are awarded the courts have shown that damages will be awarded according to what is just and fair, taking into account the circumstances of how the claim arose.

There have been a number of criticisms and suggestions for the reform of how compensation is assessed and paid.

The Law Commission, in its report *Damages for Personal Injury Non-Pecuniary Loss* in 1998, recommended that this position remain the same. In contrast, however, the Royal Commission on Civil Liability and Compensation for Personal Injury in 1978 (commonly known as the Pearson Commission) has recommended that compensation for loss of amenity should not be given to unconscious patients. The government has not implemented this recommendation.

The Association of Personal Injury Lawyers has criticised the standard amount of compensation for bereavement as being unfair and inadequate and has suggested a complete review. The association considers it unfair because it is cheaper for the defendant to kill the claimant than injure them. Also, parents are not able to claim damages for children over the age of 18.

It has been suggested that there should be a state-run compensation scheme paid for by insurance companies (similar to schemes already run in New Zealand).

▼ Figure 48.1 Key cases: damages

Key cases		
Term	Case	Comment
Mitigation	<i>Ronan v J Sainsbury plc</i> (2006)	The claimant is not expected to make vast efforts to avoid a loss that is the defendant's fault.
Under/over compensation	<i>Cooke v United Bristol Healthcare NHS Trust; Sheppard v Stibbe and Another; Page v Lee</i> (2003)	The court must use set inflation rates when assessing the cost of future care for the claimant even if means that the claimant is undercompensated.
	<i>Doyle v Wallace</i> (1998)	The court will sometimes take a more flexible approach to ensure that the claimant is properly compensated.
Loss of amenity	<i>H. West and Son Ltd v Shepherd</i> (1963)	Damages under this head are awarded even to unconscious patients, if necessary.
Death of the claimant	<i>Martin and Browne v Grey</i> (1998)	A claimant can also claim for losses caused by a death, e.g. savings used; a 12-year-old was awarded damages for the cost of employing a housekeeper.
Third party expenses	<i>Donnelly v Joyce</i> (1973)	A child claimant could claim for damages for their future care, but the care must be necessary or reasonably incurred.
Contemptuous damages	<i>Grobbelaar v News Group Newspapers Ltd</i> (2002)	£1 was awarded, as the claimant did not have a reputation worth protecting.
Aggravated damages	<i>Rowlands v Chief Constable of Merseyside</i> (2006)	A higher level of damages was awarded where the police intentionally gave false evidence against the claimant.
Nominal damages	<i>Watkins v Secretary of State for the Home Department</i> (2006)	These are only paid where the tort committed is actionable per se.
Exemplary damages	<i>Rookes v Barnard</i> (1964)	These are given as a punishment, so they are strictly controlled; they can only be given in three circumstances.
	<i>Broome v Cassell and Co. Ltd</i> (1971)	A factor that the court considers is whether the defendant was prepared to hurt someone for a profit.
	<i>John v Mirror Group Newspapers</i> (1995)	Exemplary damages should only be made in defamation cases if the publisher had no genuine belief that the information was true.
	<i>Huckle v Money</i> (1763)	Searching a home without a warrant is a serious breach of civil rights and an award of exemplary damages is appropriate.
	<i>Thompson v Commissioner of Police of the Metropolis</i> (1997)	In cases of unlawful conduct by police, damages can be awarded to punish the defendant.
	<i>Muuse v Secretary of State for the Home Department</i> (2010)	Exemplary damages are awarded to punish oppressive conduct.

COMMENT

Evaluation of the law relating to common law remedies

Common law remedies are essentially damages in all their different forms. As we have seen, it can be difficult to advise a client which type of damages is appropriate and in relation to what loss. Compensatory damages are the main form of compensation and normally comprise a lump sum to put the claimant in the position they would have been in if they had not suffered the harm or injury. This lump sum is given to the claimant on a once-and-for-all basis which means that the award of damages cannot generally be reconsidered if the claimant's injuries or harm change in some way.

This system of full compensation can lead to high costs being incurred where there are small claims, for example. These potentially high costs, however, can lead to insurance companies being willing to offer an out-of-court settlement to prevent this. Academics have argued that the payment of a lump sum does not provide the claimant with an incentive to recover and return to work but, equally, a lump sum enables the claimant to concentrate on recovering without reducing their entitlement to compensation. The claimant is able to plan their life, taking into account any disability they may have suffered.

There is a possibility that the claimant will use the lump sum payment unwisely, and it does not take into account any changes to the claimant's medical

condition. Finally, inflation may diminish the value of the lump sum over time. However, to combat this, the courts have the power to award provisional damages if they feel that it is right to do so.

Damages for personal injury raise their own problems:

- The court has to fix a value for the tangible damage to the body and then assess damages for intangible losses such as pain and suffering and shock. This can be difficult to do, but judges tend to rely on previous precedent for direction. Each type of loss must be itemised by the claimant's legal representative, as each type attracts a different level of interest that is payable. As legal representatives are aware of the going rate for each type of loss, this can encourage out-of-court settlements, which, in turn, saves time and money.
- Non-pecuniary damages include a payment for loss of amenity, such as the inability of the claimant to enjoy life. Non-pecuniary damages are awarded on an objective basis so the court does not take into account the claimant's inability to understand the level of their disability. This means that unconscious claimants may recover for loss of amenity. This can be considered unfair to claimants who are fully aware of their circumstances.
- However, in contrast, an unconscious claimant cannot recover damages for pain and suffering,

though conscious claimants may recover for any mental suffering caused by the knowledge that their life has been cut short in some way. This tips the balance of fairness towards the conscious claimant.

- A final issue relating to the payment of damages is the deductions that a court can make from the claimant's compensation. As the law stands, the court is able to offset some income that the claimant receives from another source, such as state benefits and payments from their employer. The courts will not effectively punish any claimant who has been thrifty and obtained private insurance to cover any ill health. This is not deductible. It could be argued that this benefits wealthier claimants because, more controversially, to prevent the payment of double compensation, the government passed the Social Security (Recovery of Benefits) Act 1997. This Act allows the state to recover some state benefits. This means that an insurance company must repay any relevant benefits received by the claimant before the compensation payment is made.

The current system of recovering compensation can lead to high costs being incurred where the amount claimed is small. This can be advantageous to the claimant because an insurance company may offer an out of court settlement to avoid such costs.

48.2 Equitable remedies

48.2.1 The use of injunctions

A court may grant an injunction to deal with continuing or repeatable torts, such as nuisance and trespass to land. The purpose of such an order is to prohibit the defendant from committing, continuing or repeating a tort. According to s 37 of the Supreme Court Act 1981, the granting of an injunction is discretionary and can be granted where it is 'just and convenient'. It is clear from case law that an injunction will not be granted where it would be more appropriate to award damages.

Most injunctions are prohibitory in nature (they prevent certain behaviours from occurring) but they can also be mandatory (they order the defendant to do something).

Also, an injunction in tort can be:

- » interlocutory (temporary order until the case gets to trial), or
- » final.

48.2.2 Mandatory injunctions

If this type of injunction is granted, the court will order the defendant to do something. The guidelines that the courts follow when considering whether to grant such an injunction are set out in *Redland Bricks Ltd v Morris* (1970).

The court has to consider the following:

- 1 An injunction should only be granted if damages are not adequate in the circumstances.
- 2 Where the defendant has acted reasonably but wrongly, the fact that the cost of carrying out the injunction is expensive can be used to not grant the injunction.
- 3 If the defendant has acted reasonably, the cost should not be taken into account.
- 4 Finally, the injunction must be very specific, and with accurate instructions given to the defendant.

CASE EXAMPLE

Redland Bricks Ltd v Morris (1970)

The defendant was digging on his own land but this caused the claimant's land to subside, causing damage. The subsidence was likely to continue so the claimant brought a claim against the defendant. The claimant was granted compensation for the damage already caused and a mandatory injunction to provide support for the land and to prevent future digging. The work that the defendant needed to do to provide the necessary support cost more than the value of the claimant's land, so he appealed against the injunction. The appeal was allowed.

48.2.3 Prohibitory injunctions

These are granted to prevent continuing tortious behaviour. They are usually used in relation to trespass to land and nuisance actions to protect the claimant's interests but can be used in trespass to the person cases. The aim of such injunctions is to prevent further harm to the claimant. They are obtained more easily than mandatory injunctions, as hardship being suffered by the defendant is not a ground for refusing an injunction.



▲ **Figure 48.2** Injunctions can be used to halt building works

48.2.4 Interlocutory injunctions

Interlocutory injunctions are awarded to the claimant before the case actually gets to trial, and are designed to prevent potential harm or continued harm. An interlocutory injunction may be either prohibitory or mandatory. The guidelines for this type of injunction are set out in *American Cyanamid Co. v Ethicon Ltd* (1975):

- 1 The claimant does not have to establish a *prima facie* case, but there must be a serious question that has to be answered.
- 2 If compensation is adequate, no interlocutory injunction should be granted.
- 3 If the adequacy of compensation is questionable, the court has to decide on the issue on the balance of convenience. The court will consider: what does the claimant gain, and what does the defendant lose?

Interlocutory injunctions are often used in defamation cases, to protect the reputation of the claimant. However, once a defamatory statement is made, it cannot be undone. There are also arguments that such injunctions put a limit on the freedom of speech.

48.2.5 Damages in lieu of an injunction

If granting an injunction would be oppressive to the defendant, the court should exercise its discretion to award damages instead of an injunction. For example, if the harm to the claimant is minor, damages may be more appropriate.

CASE EXAMPLE

Shelfer v City of London Electric Lighting (1895)

The electricity company caused structural damage to a house and nuisance to its occupier. The trial judge awarded damages but refused an injunction. The Court of Appeal reversed this, allowing an injunction. AL Smith LJ said:

'Whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

In my opinion, it may be stated as a good working rule that:

- (1) If the injury to the plaintiff's legal rights is small,
- (2) And is one which is capable of being estimated in money,
- (3) And is one which can be adequately compensated by a small money payment,
- (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:

then damages in substitution for an injunction may be given.

Regan v Paul Properties (2006) is an example of where the court did not consider the injunction to have an oppressive effect.

CASE EXAMPLE

Regan v Paul Properties (2006)

The defendant was constructing a building near the claimant's flat. Part of the planned building would have reduced the light in the claimant's living room. This would have reduced the value of the claimant's property by £5000.

The claimant asked the court for an injunction, forcing changes to the plans that would have reduced the value of the defendant's building by £175 000. Despite the claimant's complaints and his argument that he did not want damages but wanted the light, the defendant continued with the original plans. By the time the case came to court, a large part of the building had been completed.

The defendant argued that an injunction would be oppressive, as it would cost a substantial amount of money to alter the building after so much work had been done already. However, the Court of Appeal held that the losses (the cost of alterations) were only substantial because the defendant had continued to complete the building. Therefore, the effect of the injunction was not oppressive.

However, the principles held in *Shelfer* were challenged in *Coventry v Lawrence* (2014).

CASE EXAMPLE

Coventry v Lawrence (2014)

[See Chapter 43 for the facts of this case.]

The Supreme Court strongly criticised the tendency of the courts to mechanically apply the existing principles in *Shelfer* and grant an injunction rather than damages. The main reason for this is that the court felt that *Shelfer* had been decided when England had been less crowded. Instead, the Supreme Court proposed a more flexible approach that should lead to fewer injunctions and damages becoming a more common alternative remedy. This view is a departure from the judicial trend to award an injunction even when the loss to the claimant was slight and the impact on the defendant severe.

Their Lordships proposed a new test. They held that the default position was to be that an injunction should be granted if the claimant's rights had been infringed but it is open to the defendant to prove that damages are an appropriate alternative. The test is:

- 1 The *Shelfer* test should not be applied so rigidly.
- 2 An injunction would not automatically be granted, even if all four of the elements in the *Shelfer* test are not satisfied.

So, it appears for the time being that the instructions in *Coventry v Lawrence* will apply but with the proviso that, as Lord Sumption stated, 'damages are ordinarily an adequate remedy for nuisance'.

COMMENT

Evaluation of the law relating to equitable remedies

Unlike common law remedies, equitable remedies have limited application in the law of tort. These remedies are predominantly used in relation to torts such as nuisance, trespass to land, trespass to the person and *Rylands v Fletcher*. The most common equitable remedy is an injunction that is used to prevent or stop the defendant's behaviour.

These remedies are not available to the claimant as of right but are issued at the discretion of the court. According to s 37 of the Supreme Court Act 1981, the remedies will only be given when it is 'just and convenient', unlike damages that are granted as of right when sufficient evidence is provided by the claimant of their loss.

The remedies are discretionary in nature and most claimants will be requesting an injunction rather than restitution or self-help. Even though injunctions are granted at the discretion of the court, there are fixed principles that the courts use to decide if the injunction should be granted.

The current case law can be found in *Coventry v Lawrence* (2014), which seems to suggest the guidelines in *Shelfer* should be more flexibly applied. Despite these principles, the court can easily refuse to grant an injunction for reasons such as delay, impropriety on the claimant's part and where it is impractical to grant an injunction because it is difficult to supervise.

As there are different types of injunction, they can be used to effectively balance the interests of both the claimant and defendant, as in nuisance where the court may have to balance the interests of the claimant against the business interests of a defendant. A good example of the application of the law relating to injunctions can be found in the case of *Miller v Jackson* (1977), relating to nuisance.

TARGET SKILLS

- 1 Describe the guidelines for granting a mandatory injunction.
- 2 Name relevant cases where the court considered whether to grant a mandatory injunction.
- 3 Assess the impact of *Coventry v Lawrence* (2014) in relation to the granting of injunctions.
- 4 Discuss the effectiveness of the various types of injunction.

▼ Figure 48.3 Equitable remedies

Key facts	
Element	Comment
Restitution	Granted where damages are not appropriate, e.g. where the defendant's profit from the wrongful act is greater than the claimant's loss
Injunction	Granted to deal with continuing or repeatable torts; discretionary, and granted where it is 'just and convenient' to do so
Prohibitory injunction	An injunction ordered to prevent certain behaviours from occurring, e.g. nuisances or trespass to land
Mandatory injunction	An order to do something; the guidelines regarding this type of injunction are set out in <i>Redland Bricks Ltd v Morris</i> (1970)
Interlocutory injunction	Awarded to the claimant before the case actually gets to trial – either to prevent harm or continued harm; the guidelines are set out in <i>American Cyanamid Co. v Ethicon Ltd</i> (1975)
Damages in lieu of injunction	Awarded where the granting of an injunction would be oppressive to the defendant; the guidelines are set out in <i>Shelfer v City of London Electric Lighting</i> (1895)

▼ Figure 48.4 Key cases: equitable remedies

Key cases	
Case	Comment
<i>Redland Bricks v Morris</i> (1970)	This case sets out the guidelines for granting a mandatory injunction.
<i>American Cyanamid Co. v Ethicon Ltd</i> (1975)	This case sets out the guidelines for granting an interlocutory injunction.
<i>Shelfer v City of London Electric Lighting</i> (1895)	This case sets out the guidelines for when damages in lieu of an injunction should be given.
<i>Regan v Paul Properties</i> (2006)	Damages in lieu of an injunction were not appropriate because the defendant had continued to complete the building and had caused the substantial losses himself.
<i>Coventry v Lawrence</i> (2014)	The court suggested that a less mechanical approach to <i>Shelfer</i> should be taken, and so an injunction should not be automatically granted even if all the requirements are met.

STRETCH AND CHALLENGE

Read the article about Maisha Najeeb, who suffered brain injuries after a hospital procedure: www.fieldfisher.com/en/injury-claims/case-studies/great-ormond-street-hospital-settles-24-million-claim-for-girl-whose-brain-was-injected-with-glue

When you have done so, consider the following questions.

- 1 How was her compensation calculated?
- 2 Does the compensation put her in the position that she was in before the incident occurred?
- 3 What types of damages have been paid?
- 4 In what way has the compensation been paid to her?

TEST YOURSELF

- 1 Describe the main aim of damages in tort.
- 2 Explain the difference between pecuniary and non-pecuniary damages.
- 3 State when restitution might be ordered.
- 4 Describe the purpose of mandatory and prohibitory injunctions.
- 5 Describe the guidelines regarding damages in lieu of an injunction.

EXAM-STYLE QUESTIONS

- 1 A judge may only award an injunction as a remedy in the law of tort when it is considered just and convenient to do so.

Using appropriate case law, critically analyse the circumstances under which injunctions have been awarded as remedies.

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- 2 The aim of damages is to compensate the claimant and not to punish the defendant. Evaluate the accuracy of this statement.



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