Lawrence Emeka Modeme

English Legal System and Obligations

Modern Business Law: Parts 1–4

LAWRENCE EMEKA MODEME

ENGLISH LEGAL SYSTEM AND OBLIGATIONS

MODERN BUSINESS LAW

PARTS 1–4

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DEDICATION

To my late father Godwin and my mother Christiana. Your honesty and integrity have inspired me. Your discipline has helped to make me who I am.

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INTRODUCTION

Business law is a combination of legal topics and principles relevant and applicable to businesses. It situates businesses and business people within the legal environment in which they must operate and equips individuals with the legal knowledge and skills necessary for the operation of businesses. Business law is a wide subject. It covers the foundations and structures of the English legal system, the law relating to contracts, torts, employment, and agency. It also covers laws relating to the formation, structure and operations of business organisations, especially partnerships and companies, as well as aspects of criminal law relating to business organisations and business people. Although the topics in Business Law are varied and taken from different branches of the law, they are all connected in an interesting way. The diligent and committed student will find the study of Business Law interesting and rewarding, even if challenging, but the unserious one is likely to struggle.

This book, which appears in two volumes for convenience, delivers the fundamental principles of law relevant to businesses in a simple, lucid, comprehensive and easily navigable manner and seeks to instil appropriate skills for recognising and tackling legal problems in a business context. Book one deals with the essentials issues in the English legal system, the sources of English law, the administration of justice and the structure and jurisdiction of courts and tribunals. It also covers the fundamental principles of contract, tort and employment law. Book two covers the key issues in partnership, company and agency law. Each chapter ends with a summary of the key points and practice questions for the testing of knowledge, consolidation of understanding, and preparation for assessments.

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HOW TO ANSWER LAW QUESTIONS

Questions in law may be set in the form of scenarios/problems or they may appear as straight knowledge questions. Usually, however, a mixture of both types are used in assessments. Although it is common to have multiple-choice questions as an element of assessment, this discussion will not deal with those. The approach to answering law questions, especially scenario ones, is often different from that in non-law disciplines. In addition, students might be required to write a coursework in the form of an essay. This however is not considered here.

PROBLEM OR SCENARIO QUESTIONS

These are questions that narrate a hypothetical occurrence, event or facts and ask students to advise those concerned on their potential legal claims and/or liabilities. The purposes of this type of questions include:

- To test the student's ability to identify legal principles from a given problem/scenario;
- To test the student's knowledge and understanding of the law;
- To test the student's ability to discuss, analyze and evaluate relevant legal principles; and,
- To test how well the student can relate or apply legal principles to given situations or circumstances.

Solving the problem

The first thing to do before attempting to solve the problem is to carefully read and re-read the scenario and make sure it is clearly understood. Having understood the scenario, follow the following steps in order to successfully answer the question: identify from the stated events or facts the relevant legal issues or principles; explain, discuss and analyze these issues or principles; apply or relate the legal issues to the stated facts or events; and advise the parties concerned on their legal rights or liabilities.

Step 1: Identification of the legal issues

It is the responsibility of the student to identify the relevant legal issues from the scenario. Identifying the issues is the key to solving the problem otherwise the solution could become confused, mixed up or wrong. Be sure to know the major issues from the minor ones and deal with them accordingly. It is helpful to underline the issues or to write them down as part of your answer plan.

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Step 2: Introduction of the answer

Make a brief summary or statement of the legal issues you have identified and which you are going to discuss. An introduction indicates that you understand the question and knows how to solve the problem.

Step 3: Explanation and discussion of the issues

Now the identified legal issues need to be explained, discussed and analyzed. It must never be assumed, unless expressly told to do so, that the examiner knows these issues already. Remember that one of the purposes of the question is to test your knowledge and understanding of the law. Therefore, explain the issues in as much detail as time and the questions allow. Be sure to define or explain every stated legal rule or principle. Identify and explain any possible defences or reasons why the claimant might not succeed. Do not summarize or abridge your answers unnecessarily. If possible, provide some evaluation or assessment of the law; this is likely to fetch you a higher mark, all things being equal.

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In your discussion, use appropriate decided cases and statutory provisions as appropriate. A narration of the facts and judgment of the cases would normally not be unnecessary. A brief statement of the decision or a mention of the case names would be sufficient in most circumstances, although in some, there might be need for a very brief reference to the facts. The citation of the cases would not be necessary in your answer.

Step 5: Application of the law to the facts

The next step would be to apply the legal issues to the facts of the scenario. What laws have been breached, and by whom? What remedies are available, and to whom? Are there any defences available, and to whom? Correct application demonstrates a clear understanding of the legal principles. Lack of application means a grossly incomplete answer.

Step 6: Advice to the parties

This is the last and shortest step and is usually a formality after the foregoing procedure. It is simply to conclude whether the claimant would succeed in his or her claim or whether the defendant has a valid defence against the claim. The advice must however be consistent with the exposition and application of the law.

KNOWLEDGE QUESTIONS

Knowledge questions test knowledge and understanding of specific subject areas without any requirement of application. It is important however, that in answering this type of questions, sufficient details are provided. Avoid the temptation to be too brief in your answer. It important that relevant legal concepts are explained, discussed and analysed as appropriate. Where a question asks for a legal issue to be discussed, remember to explain the issues first before proceeding to discuss and analyse them. Similarly, a request to explain an issue implies a discussion thereof. Always use decided cases where available in your answer.

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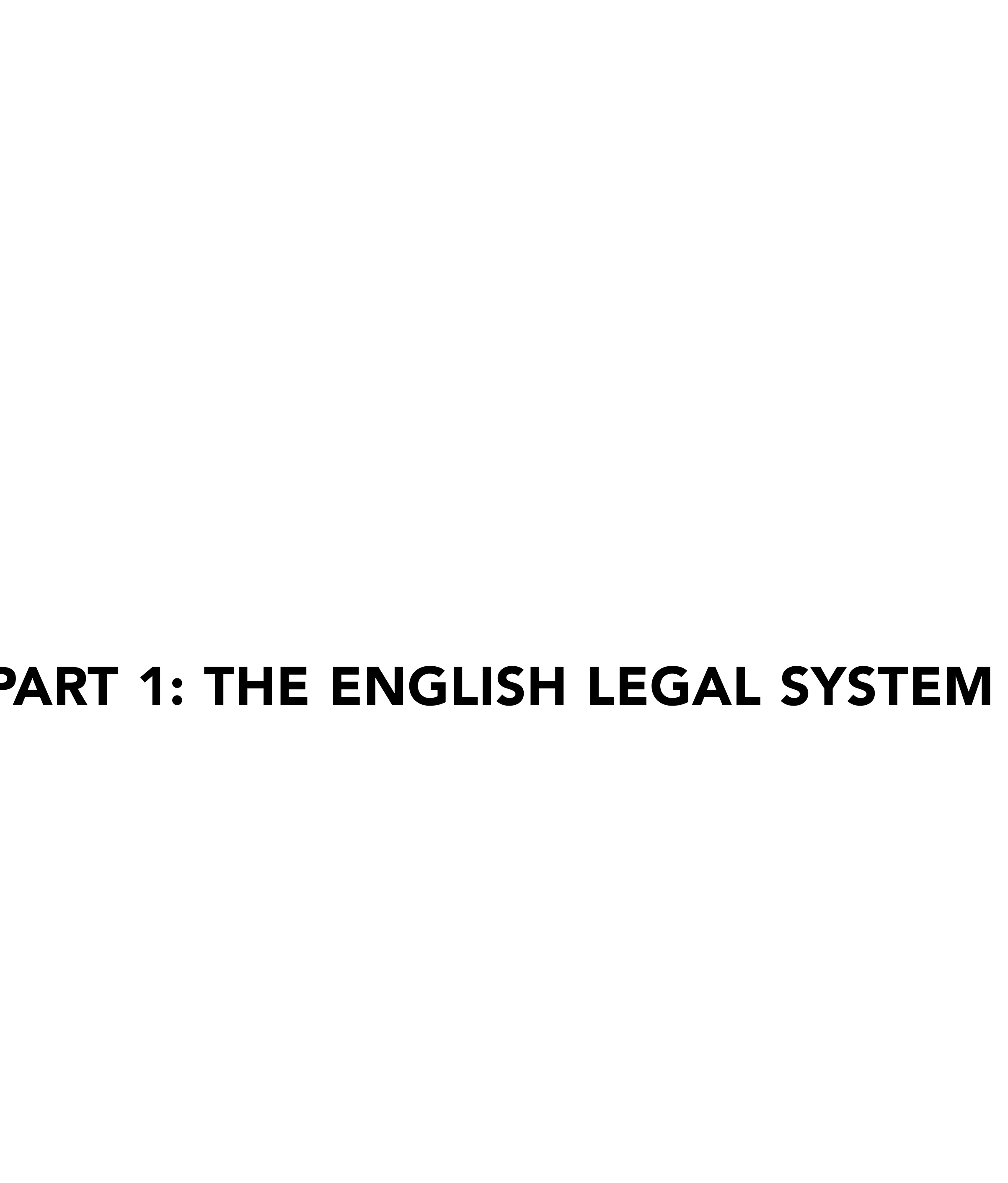

PART 1: THE ENGLISH LEGAL SYSTEM

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1 INTRODUCTION TO THE ENGLISH LEGAL SYSTEM

1.1 INTRODUCTION

This chapter examines the notion of law, introduces some general but useful legal concepts and terminologies and deals with the different classifications of law in the United Kingdom. The aim is to provide students with a proper foundation for their study of Business Law since these concepts and terminologies will recur throughout their study of the subject. The chapter also introduces the types of assessments often used in Business Law and explains how students should deal with these. The objective is to prepare them, from the outset, for the assessments they are likely to face in the subject.

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1.2 LEARNING OBJECTIVES

At the end of this chapter, students should be able clearly to understand:

- The meaning of law
- The different types and classification of law
- The nature of Business law
- Common terminologies and concepts associated with law
- The nature of UK constitution
- How UK law operates
- Who may bring actions, and who may be brought, before the courts of law
- How court cases are recorded and the importance of such recording
- The types of assessments applicable to the principles of English law and how to deal with them

1.3 MEANING OF LAW

Law refers to the body of binding rules and regulations governing the operations and governance of a society and the behavior of its people. At the current stage of human development, law is necessary for the maintenance of order in a society and for the demarcation of the rights and obligations of the people and their governments. The existence of a system of laws is also essential for the operation of the rule of law. A country's laws usually comprise the constitution and other laws.

1.4 THE CONSTITUTION

The constitution is the basic or fundamental law from which other laws derive legitimacy and authority. It is usually written and made by or with the consent of the people of the country concerned. The constitution lays down the broad rules and principles that form the basis of a country's governance and allocates powers amongst the different branches or organs of government. In most cases, it also lays down the fundamental human rights available to the citizens of the country and the circumstances in which they could be derogated from. Where there is a constitution, any subsequent legislation or action of government, government institutions and relevant persons, must be in accordance with the constitution. If this were not to be the case, the legislation or action could be challenged in court which could declare it unconstitutional, null and void. The constitution also maintains the power of the people to choose their governments and is essential for the functioning of the principle of separation of powers.

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1.5 SEPARATION OF POWERS

The principle of separation of powers means that different branches of government – the executive, the legislature and the judiciary – must confine themselves to the powers given to them in the constitution. This principle was originally propounded in 1751 by Baron de Montesquieu, a French lawyer and philosopher, in his book, *The Spirit of Laws*. According to him, the concentration of all governmental powers in one person or institution would lead to abuse of power and tyranny, since "power corrupts and absolute power corrupts absolutely." The separation of powers also has the effect of making the different custodians of power protective of their constitutional powers, thereby ensuring a system of checks and balances amongst the branches of government. This prevents one branch from becoming too powerful and promotes the rule of law.

1.6 THE RULE OF LAW

The rule of law means that the law is supreme and that actions and policies of government and its organs, as well as those of the citizens, must be subject to the constitution and the laws of the land. It also implies the equality of all citizens before the law and that nobody is above the law. Under the rule of law, the rights of the people cannot be denied or taken away except in accordance with, and as prescribed in, the law. Moreover, no one should be punished except in accordance with the law and in the regular courts or tribunals that exist for such purposes. The rule of law also ensures that actions of government and citizens could be subjected to judicial process and that the decisions of the courts of the land must be respected. Failure to respect such decisions could amount to contempt of court, which is punishable under the law.

1.7 THE UK CONSTITUTION

In the UK, unlike in most other countries, the constitution is unwritten. This means that no single document could be identified as the constitution, but that, the constitution is derived from many sources, including Acts of Parliament, decisions of courts, and settled conventions and traditions of the land. International treaties and legal principles which have been ratified or adopted as law could also be part of the constitution. Because the constitution is unwritten, its interpretation is more flexible and sometimes uncertain. It also means that the Parliament is not as circumscribed by the constitution as is the case in countries with a written constitution. The parliament in the UK is said to be supreme.

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1.8 SOVEREIGNTY OF PARLIAMENT

Sovereignty or supremacy of parliament means that the powers of the UK parliament to make laws within its jurisdiction is unlimited. Accordingly, any law made by parliament in accordance with its rules and procedures for law making cannot be challenged by anybody or in any court. In other words, what the Parliament duly says is law is law. It also means that no other authority could make binding laws for the UK except the parliament. The sovereignty of parliament has however been affected by the devolution of power over certain domestic matters to Scotland, Northern Ireland and Wales, in 1998.[1] It has also been affected by the membership of the UK of the European Union, and its being signatory to several European Union conventions. What these mean is that in matters of Scottish, Northern Irish, Welsh and European law, the UK Parliament no longer has unfettered powers to make law and could be judicially challenged if it exceeds it powers with respect to them. The effect of EU membership on UK law will be discussed more fully in the next chapter.

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1.9 CLASSIFICATIONS OF LAW

Law is divided into many branches corresponding to different aspects of human endeavor and works of life. Such divisions are also convenient for teaching and understanding of the different ramifications of the law. Thus there are branches of the law dealing with crime, constitutional and administrative matters, torts, land and property. There also branches of the law dealing equity, trusts, succession and probate, Intellectual property, medical practice, sports, companies and businesses, as well as international issues. In fact, there is hardly any work of life that is not affected by the law. There are also classifications of the law based on the philosophies, origins or developments of the law.

Notwithstanding the classifications of law, real life problems may cut across different aspects of the law, while many words and terminologies are common to all areas of law even though they may at times have different implications depending on the context in which they are used. Let us now consider some of the more common classifications.

1.9.1 CRIMINAL AND CIVIL LAW

Criminal law deals with the prohibition of certain conducts within a state, the infringement of which are enforced by the criminal prosecution of the offender by the state authorities (e.g. the police). Prosecutions of crimes are usually undertaken by the state because crimes are deemed to be committed against the whole society, not just against the direct victims. Examples of criminal offences are burglary, fraud, murder and rape. The enforcement of criminal law is particularly essential for the maintenance of order in any given society and the protection of the fundamental rights of the people.

For an act to be regarded as a crime however, it must be proclaimed as such and in advance in a written law. There is no crime unless the conduct in question was prohibited, and the punishment for its infringement stated, before it took place. Nobody should be prosecuted or punished for an act that was not a crime at the time it was done. To do otherwise would be to impose retrospective punishment, which is contrary to the notion of justice. Thus, most countries, including the UK, have criminal or penal codes and other laws where certain actions or activities as proscribed as crimes.

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If found guilty of a crime, the offender will be punished either by fine, or imprisonment, or both. Criminal offences are usually tried at first instance in criminal courts, namely the Magistrate Court and Crown courts. In order to convict somebody of a criminal offence, the allegations must be proved beyond reasonable doubt. This means that no reasonable person would believe from the evidence that the accused person did not commit the crime. In other words, there is no other logical explanation of the evidence except that the accused committed the crime. Prosecutors bring criminal actions while the persons against whom the actions are brought are known as the accused persons or defendants.

Civil law, or private law, regulates relationships and conduct among individuals in their private, social, or business capacities. It deals with personal rights that are enforceable by personal action by one person or persons against another or others. Examples of civil law include Employment Law, Company Law, Commercial Law, Property Law, Contract Law, Tort Law, and Intellectual Property Law. Civil law also refers to legal rules enforceable by individuals rather than the state or its agencies. The person who brings a claim in civil law action is usually referred to as the plaintiff, claimant, or petitioner, while the person against whom the claim is brought is referred to as the defendant.

Remedies in civil cases include monetary compensation or damages, an order to do something as agreed (specific performance), an order to do or to refrain from doing something (injunction), a declaration regarding the legality or otherwise of conduct, or an order of restitution. The standard of proof in civil cases is on a balance of probabilities. This is a lower standard than the criminal one and means that the version of events as proved by the claimant is more likely to be true than that of the defendant. Such cases are mostly dealt with by the County Courts and the High Courts at first instance.

Note that in reality one incident may be both a crime and a civil wrong. For example, a violent attack against another would at the same time amount to the civil wrong of battery and the crime of assault. A criminal act of rape would also amount to the civil wrong of trespass to the person. Although the components of Business Law are mostly civil, there are a significant number of criminal elements.

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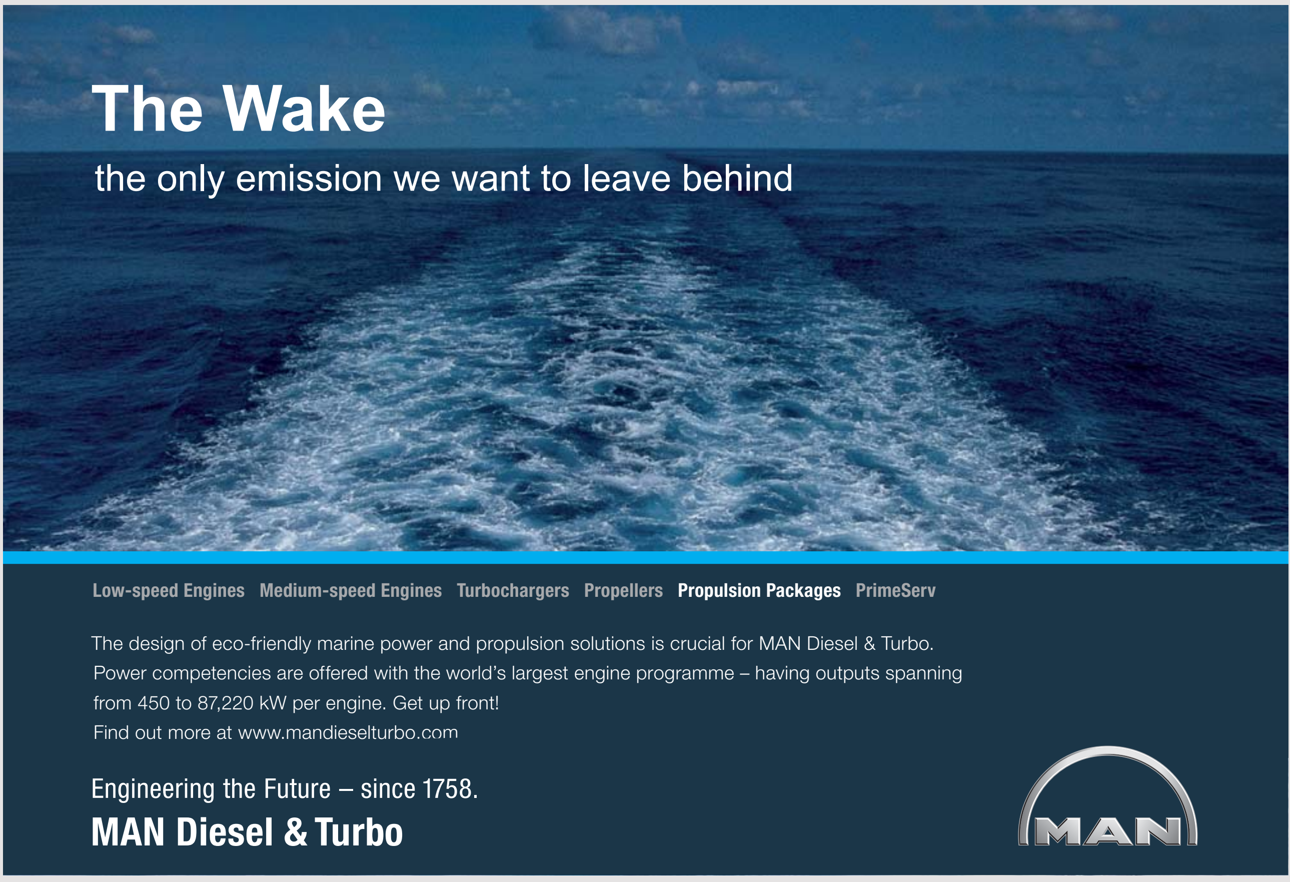
1.9.2 PRIVATE AND PUBLIC LAW

Law may be further divided into public law and private law. Private law is the same as civil law and deals with relationships and interactions between individuals as seen above. Most areas of law are private law; e.g. company, business, commercial, contract, and tort law. Public Law refers to law regulating the functions of the branches and institutions of government as well as the relationship between the state and the people. It also refers to law which can only be enforced by, or with the permission, of the state. Examples of Public Law include, Administrative Law, Constitutional Law, Human Rights Law, and Criminal Law. Business Law contains elements of private and public law.

1.9.3 CIVIL CODE AND COMMON LAW

Civil Code (sometimes also called Civil Law) is a system of law based on the ancient Roman and French legal systems. All the laws in that system are codified or in writing. Most of Continental Europe have the Civil Code system. The common law refers to the system of law developed by English judges on the basis of the people's customs and traditions and established via the doctrine of judicial precedent. This is the principle that previous court decisions bind future lower courts. Common law operates in the UK, the Commonwealth countries (comprising former British colonies and dependencies), the USA and Canada (see chapter 2 for more details).



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1.9.4 STATUTES OR LEGISLATION

Statutes are laws enacted by or with the authority or permission of the Parliament. It includes direct enactments (Acts of Parliament) and subsidiary or delegated legislation made outside, but with the authority of, parliament. Many aspects of Business Law are derived from statutes.

1.10 EVIDENCE

Parties who bring cases to court are obliged to prove their claims or allegations before judgment could be given in their favour. Such proof is usually done by means of evidence, which refers to statements, materials, or documents used to prove the facts relating to the claim or charge. Evidence may be in the form of oral testimonies of witnesses, documents, objects or materials relevant to the establishment of the facts alleged. In a court of law, claims not supported by evidence or admitted by the opposing party are deemed unproven, unless they are some well-known that the court has judicial notice of them. The Law of Evidence governs the admissibility of evidence in a court of law.

1.11 APPEALS

An appeal is a process where the decisions of lower courts are challenged in a higher court. The challenge may relate to the final decision of the court or its decision on a preliminary issue arising in the case. Most decisions can be appealed to a higher court, although most times, appeal over final decisions may only be allowed for the purpose of challenging the interpretation or application of the law, rather than the findings of fact. Appeals may be made as of right or with the leave or permission of the original or higher court.

Where cases go on appeal, the names and order of the parties would change. The person bringing the appeal, who could be the claimant or defendant, becomes known as the appellant, with his name appearing first. The other party to the appeal (who could be the claimant or defendant in the original case) becomes known as the respondent.

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1.12 JUDICIAL REVIEW

Judicial review is an application to the High Court to review or re-visit the actions or policies of certain lower courts, public or private institutions or organizations or persons. An application for judicial review is not an appeal of the decision, but a challenge of the way in which it was made. For example, the challenge may be on the ground that the court hearing the case or the body making the decision or taking the action had no right to do so; that the conduct of the case was unfair; or that the decision was unreasonably or improperly made. Upon a successful judicial review, the challenged decision, action or policy may be quashed or be ordered to be re-done. The High Court could also give an order of injunction or declaration against the institution or organization concerned.

1.13 WHO CAN SUE OR BE SUED

It is important to understand who can take legal action and the persons against whom it could be brought. In order to sue or be sued in a court of law, the parties concerned must have legal capacity. As we have already seen, criminal cases are brought by government agencies empowered to do so. However, only adults or children 10 years and above could be charged with a criminal offence. Companies and other incorporated bodies could also be charged.

Civil cases, on the other hand, are brought by private persons. Generally, the following could sue or be sued:

- Natural persons
- Limited Liability companies and other corporations
- Limited Liability Partnerships
- Some unincorporated associations such as clubs and trade unions
- States and international organizations, such as the United Nations (UN), the African Union (AU), the European Union (EU), and the Federation of International football Associations (FIFA).

In addition, for anyone to be able to sue, they must usually have the legal standing (*locus standi*) to do so. This means the person must be connected with or have interest in the subject-matter of the case.

1.14 PARTIES TO A LEGAL ACTION

The manner in which actions are instituted and the designations of the parties thereto are different in criminal and civil cases.

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1.14.1 CRIMINAL CASES

In criminal cases, actions are normally brought by the prosecutor against a defendant or accused person. The prosecutor would normally be the police, the Crown Prosecuting Service (CPS), the Serious Fraud Office (SFO), the Attorney-General (AG) or even private citizens acting with the permission of the AG. Because crimes are deemed to be offences not only against the direct victims, but also against the wider society, criminal actions are usually brought in the name of the King or queen (depending on who is the monarch at the time) against the defendant. Criminal cases therefore appear as follows:

> *Regina v Wilson* (where a queen is the monarch); or *Rex v Wilson* (where a king is the monarch). Both forms could be shortened as *R v Wilson.* Usually, case names are underlined or italicized.

Where the defendant is a minor, a person of unsound mind, or a person whose anonymity needs to be protected, their initials would be used. Thus, instead of *R v Wilson,* the case becomes *R v W.*

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Some cases are brought in the name of the Attorney-General, who is the chief legal officer of the country. This would be the case where it is necessary protect a right which belongs to the public rather than an individual. Examples would be cases of Public Nuisance and contempt of court. Such a case would be rendered as follows:

Attorney General v PYA Quarries Ltd [1957] 1 All ER 894
Attorney-General v Bastow [1957] QB 514

1.14.2 CIVIL CASES

In civil cases, one private individual (the claimant/plaintiff) brings a legal action against another person (the defendant) who is usually a private person, company or business. The case will appear as follows, with the name of the claimant first:

Thornton v Shoe Lane Parking Ltd [1971] 2 WLR 585
Hartley v Ponsonby [1857] 7 EB 872

A civil case could also be between a private person and a government body, e.g., a government ministry or local council, whose action or policy is being challenged by the claimant. In that situation, the case will be brought in the name of the state at the application of the private individual, e.g.:

R v Ministry of Defence, ex p. Smith [1996] QB 517 (here ex p. stands for *ex parte*, which means "at the application of").

Where civil cases are brought on behalf of others who could not do so themselves, e.g., children, estates of deceased persons, or persons of unsound mind, the cases would be rendered as being "in the matter of" the person in whose interest they are brought. E.g.:

Re F (a child) [2015] EWHC 25
In re F (Mental patient sterilization) [1990] 2 AC 1

Civil cases do not usually involve the police or public prosecutors

Please note that although the "v" between the case names stands for versus, the convention in criminal cases is to express it as "against" and in civil cases as "and".

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1.15 LAW REPORTS

Cases decided in the superior courts (High Court, Court of Appeal, the Supreme Court, as well as equivalent tribunals) are usually recorded in Law Reports. The report of a case would normally include the facts of the case, the testimony of the parties and their witnesses, the arguments of their lawyers, the evidence tendered by the parties, a discussion of the legal issues by the judge, the judgment of the court and the reason behind it. These reports provide a body of legal principles and precedents as well as invaluable reference materials for lawyers and litigants. Some of these reports are very old, corresponding with the development of the law in the country. The citation of a case in a law report would normally include the name of the law report, the year in which it was compiled, sometimes the particular volume in which the case appears, and the page from which the reporting of the case started. Examples:

> *Re F (a child)* [2015] EWHC 25 (Here EWHC stands for England and Wales High court, 2015, the year the case was decided, and 25, the page from which the reporting of this particular case started). In *re F (Mental patient sterilization)* [1990] 2 AC 1 (This case was decided by the Court of Appeal in 1990, with the reporting beginning at p. 1)
>
> *R v Ministry of Defence, ex p. Smith* [1996] QB 517 (This case was decided by the Queen's Bench (a division of the High Court) in 1996 with the reporting starting at p. 157)

1.16 CHAPTER SUMMARY

- Laws are obligations binding on persons and institutions in a state and are essential for societal order and harmony
- There are different classifications of law depending on origins or the area of life or activity regulated.
- Business law comprises a collection of laws relevant to the conduct and regulation of business.
- All laws are subject to the constitution, which is the basic law of the land. In the UK however, the constitution is unwritten and sovereignty resides legal sovereignty resides in the Parliament.
- The UK legal system is governed by the principles of rule of law and the separation of powers between different branches of government.
- All legal persons – natural or artificial – could be sued. However, the courts in which actions may be brought depend on the nature and value of the claims.
- The decisions of courts of first instance are normally open to challenge by way of appeals to higher courts, while the decisions of government bodies could be challenged by way of judicial review.

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1.17 PRACTICE QUESTIONS

1. Consider the laws of the country where you live. Does your country operate the civil code, the common law, or a different system?
2. State three reasons why law is important in a society
3. From your personal experiences, reflect on how the law has affected your life either in a civil or criminal capacity.
4. Does the country in which you live operate a written or unwritten constitution? What are the advantages and disadvantages of a written constitution compared to an unwritten one?
5. Is there a separation of powers amongst the organs of government in your country? What are the advantages of separation of powers?
6. Why is it necessary to have the rule of law? Concerning the operation of the law in your country, do you think that the rule of law properly operates?

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2 SOURCES OF ENGLISH LAW

2.1 INTRODUCTION

By sources of law, we refer to the places from which the law is derived, or the means by which the law came into being. The principal sources of English are common law, judicial precedent, equity, Acts of Parliament, delegated legislation, and European Union law, including its convention on human rights.

2.2 LEARNING OBJECTIVES

At the end of this chapter, readers should be able clearly to:

- understand the various sources from which English law is derived and the relative importance, strengths, weaknesses and limitations of each source
- understand the procedure for the enactment of legislation in Parliament
- understand the concept, significance and operations of Delegated Legislation
- understand the concept and workings of Judicial Precedent
- appreciate the effect of EU membership on UK legal system
- appreciate the concept and importance of human rights in the legal system.

2.3 COMMON LAW

Common law refers to the part of English law harmonised and developed from the customs and traditions of the people of England, and administered by the common law courts. Many areas of English law are founded on common law, including contract law, land law, tort law. Common law remedies are granted as a matter of right, often expressed in the maxim *ubi jus ibi remedium* (where there is a right, there is a remedy). Originally unwritten and diverse, the customs of the English people were harmonised into one system of law (hence "common") after the Norman Conquest of 1066 and then applied in cases before the courts. The courts that originally applied the common law were the courts of Exchequer, Common Pleas, and King's Bench. The common law was subsequently exported by the British Empire to its colonies and dependencies around the world, meaning that the system operates in most of the 53 nations of the Commonwealth and the USA.

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2.4 JUDICIAL PRECEDENT OR CASE LAW

To make the common law truly uniform not only across the land but also across similar cases, the system of Judicial Precedent was established. This is a system where decisions in former cases are followed in the determination of subsequent cases whose facts are similar to the former ones. To work effectively, this required an effective and comprehensive system of law reporting, by which the facts and judgment of cases before the common law courts were carefully recorded in writing. Many law reports now exist in all areas of the law providing an invaluable and rich source of case law for lawyers and litigants. Judicial precedent has been largely responsible for the preservation and consolidation of the common law.

However, not every part of a court judgment would form part of the precedent; and not every part of precedent would be binding on subsequent courts. Usually, a judgment would consist of the material facts of the case; a review of legal authorities, including past cases, by the judge; side remarks or hypothetical observations by the judge; application of the relevant legal principles to the instant case in order to arrive at a decision.

Only the last part – the application of legal principles to arrive at a decision – would amount to a binding or authoritative precedent. This is known as the *ratio decidendi* of the case. Side remarks or hypothetical findings of the court – things not relevant to the determination of the case – would form the orbiter dicta (singular, orbiter dictum). These can only have persuasive effect on subsequent courts. Judicial Precedent works on the basis of court hierarchy – superior courts bind themselves and lower courts; a lower court cannot bind a higher court; and inferior courts do not bind any court.

At the apex of the English judicial pyramid is the Supreme Court, which binds every other court in the land from the court of Appeal to the County Courts and tribunals. It does not however bind itself. Next in the hierarchy is the Court of Appeal, which binds itself, the High court and other lower courts. However, in *Young v Bristol Aeroplane Co Ltd* [*1944*] KB 718 at 729, it was held that the Court of Appeal would not be bound by its previous decision:

- Where there are conflicting Court of Appeal decisions on the same issue;
- Where a decision of the Court of Appeal is inconsistent with a later House of Lords (or if relevant Privy Council) decision;
- Where a previous decision of the Court of appeal was *per incuriam* a statute or binding precedent;
- In a criminal case where the law has been misapplied or misunderstood.

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The High Courts are bound by the decisions of the Supreme Court and the Court of Appeal and bind the Magistrate Courts, County Courts and tribunals. However, the High Courts do not bind themselves, while Magistrate courts, County Courts, and tribunals do not create binding precedents. Since, UK's membership of the European Union in 1973, the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) – have jurisdiction in matters of European law – and in those areas bind all UK Courts but not itself.

2.4.1 ADVANTAGES OF JUDICIAL PRECEDENT:

The advantages of judicial precedent include the following:

- *Certainty in the law – Judicial Precedent* makes the law fairly settled and predictable. Judges are not free to modify the law as they see fit in different cases. If they were to do so, many mistakes might be made and the law might become uncertain.
- *Consistency of the law – Binding Precedent* ensures that similar cases are decided in a similar way, thus enabling parties to a case to assess their chances of success by reference to previous cases.

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- *Availability of law reports* – The system of elaborate law reporting on which precedent is based has led to the accumulation of case law which has provided invaluable reference tools to judges, lawyers, law students and litigants. This has also let to clarity of the law.
- *Practicality of the law* – since law arises from and is applied to real situations, the law is made more human, practical and adaptive to real life situations instead of being based on abstract principles.

2.4.2 DISADVANTAGES OF JUDICIAL PRECEDENT

The disadvantages of judicial precedent include:

- *Insufficient flexibility* – The requirement to follow previous decisions might prevent judges from using their discretion in individual cases.
- *Perpetuation of wrong decision* – A wrong decision may have to be followed by lower courts until overturned by a higher court – an outcome that might take a long time or not happen at all. This may have the effect of perpetuation a miscarriage of justice and warrant intervention by parliament.
- *Possibility of illogical decisions* – Lower courts might employ the principle of distinguishing wrongly in order to avoid following a precedent. This may lead to illogical decisions.
- *Lack of pro-activity* – Since judges cannot take decisions unless and until a case comes before them they cannot make law pro-actively as parliament can. Moreover, since only the *ratio decidendi* forms part of precedent, any view expressed by the court in anticipation of a legal problem would have no binding effect, being only orbiter dictum.

2.4.3 EXCEPTIONS TO JUDICIAL PRECEDENT

In some circumstances, a judicial precedent may not be followed by subsequent courts. These circumstances include:

- Where the facts of the present case are significantly different or could be distinguished from those of the previous case
- Where the *ratio decidendi* is not clear (i.e., obscure). This may be case where the different judges that decided the case gave different reasons for their decision
- Where the previous decision was reached *per incuriam*, i.e., without care. This will be the case, for example, the Court to Appeal reaches a decision without taking account of a relevant Supreme Court judgment. This will also be the case where a relevant statute was not considered

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- Where the previous judgment is inconsistent with a relevant statute, or a fundamental legal principle
- Where the precedent did not take account of, or is inconsistent with, a relevant decision of the European Court of Human Rights
- Where the *ratio decidendi* in the previous case is considered to be too wide
- Where there are conflicting judgments from courts of concurrent jurisdiction
- Where the precedent has been overruled by a higher court or Act of Parliament.

2.5 EQUITY

Although the common law was the oldest source of law in England, by the 16th century, it had become very rigid, inflexible, and concerned more with form and precedent than the substance and merit of individual cases. Claims not covered by existing precedent or which did not follow the prescribed form would often be rejected by the common law courts. Moreover, the only remedy available in common law was the award of damages, which in many situations, proved unsatisfactory. In time, people who were not satisfied with the common law began to appeal directly to the monarch for justice. The monarch would then delegate the hearing of such petitions to his spiritual adviser, the Lord Chancellor, for determination.

The chancellor would, in deserving cases, ignore the rigid strictures of the common law and mete out justice as the cases deserved. Subsequently, petitions began to be made directly to the chancellor, who had begun to preside over the Court of Chancery dedicated to equity cases. The petitions to the Chancellor and the decisions emanating therefrom, in time, became a separate body of case law called Equity.

2.5.1 PRINCIPLES AND REMEDIES OF EQUITY

Equity brought out about huge changes in the law. First, it recognised new and special legal relationships unknown to common law, such as trustees and beneficiary, partnerships and agency. Second, it introduced brand new, albeit discretionary, remedies in order to do greater justice in deserving cases. These remedies include injunctions, declarations, restitution, rescission, rectification and specific performance.

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Because equity is primarily concerned with doing justice in individual cases, its remedies are discretionary. This means that the court may not grant a remedy unless it considers it just and equitable to do so in a particular case. Certain principles have been developed to help equity achieve its objectives. These principles, which are commonly referred to as the 'maxims of equity', include:

- Equity suffers no right to be without a remedy
- Equity regards the substance rather than the form
- Equity considers as done that which ought to have been done
- Equity aids the vigilant and not the indolent
- Equity does not aid a volunteer
- Where the equities are equal, the first in time prevails
- He who seeks equity must do equity
- He who comes to equity must come with clean hands
- Equity will not permit a party to profit by his own wrong
- Equity delights to do justice and not by halves
- Equity looks upon as done that which ought to have been done.

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2.5.2 MERGER OF COMMON LAW AND EQUITY

For a long time, equity and common law operated side-by-side, but where there was a clash of principles, those of Equity would prevail – *Earl of Oxford's Case* [1615] 1 Ch. Rep. 1. In the course of time, the principles of Equity became firmly established, developed its own precedents and consequently became as rigid as the common law. The *Judicature Act of 1873–1875* eventually unified the administration of Equity and common law although their principles remained separate. The effect of the unification is that every court in the UK is able to apply the principles of both common law and Equity. Both are part of Case Law.

2.6 LEGISLATION OR STATUTE

Also known as Act of Parliament or legislation, this is law made by, or with the authority of parliament. The Parliament in the UK is regarded as sovereign in that it is not answerable or subject to any other authority or superior law. UK courts or the monarch cannot challenge a law passed by the Parliament, unless (since becoming a member of the European Union) the legislation concerns a matter of EU law.

2.6.1 LAW-MAKING PROCEDURE

Law making in Parliament involves a number of stages, which are as follows:

Stage 1: The introduction of a law-proposing Bill

> This could be by government ministers, members of Parliament, or Local Authorities or companies. Bills introduced by government ministers are public Bills affecting the whole country, while those introduced by Members of Parliament (Private Member's Bill) or by Local Authorities or companies (Private Bills) do not affect the whole country. The Bill could be introduced at the House of Commons or the House of Lords, although as a matter of practice, most bills are introduced at the House of Commons. Those involving taxation, budget and controversial political issues are as a matter of law required to be introduced at the House of Commons.

Stage 2: First Reading

> The title, purpose and motivations for the Bill are formally read to the House for the first time. The full Bill is not read at this stage.

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Stage 3: Second Reading

The Bill is presented again and read in full. It is now debated by Members of Parliament. Usually, the bill will proceed from here to a committee usually composed of Members of Parliament with some knowledge or expertise of legal drafting or the issues covered in the Bill.

Stage 4: Committee Stage

After the Second Reading, the Bill goes to a Standing Committee, a Select Committee, or a Committee of the whole House, as appropriate. The latter would be case if the Bill: is of special or major constitutional importance; is uncontroversial and not likely to be opposed; or requires speedy passage into law. The committee considers the Bill in more detail and attempts to eliminate drafting errors.

Stage 5: Report Stage

After deliberations at the committee stage, the relevant committee reports to the whole House and might propose changes to the Bill. Unless the committee was of the whole house, the Bill is now debated by all members of the House and amendments and/or additions suggested as may be appropriate and voted upon.

Stage 6: Third Reading

After the report stage and consequent amendments to the Bill, the final draft is presented to the House in full. Further debate is not normally done at this stage unless expressly requested by a minimum of six members of Parliament. A vote would be taken as to whether the Bill should proceed to the final stage – Royal Assent.

Repeat Procedure at the other House – After the Third Reading, the Bill goes to the second chamber of Parliament where the above procedure is repeated. Further amendments could be made to the Bill by the second chamber; and the two Houses would have to reach a compromise if necessary.

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Stage 7: Royal Assent

Following the above processes and any necessary compromises between both Houses have been concluded, the Bill is sent to the queen (or king) for signature. Although technically, the monarch could refuse assent to the bill, this stage is practically a formality as the Royal Assent has not been refused since 1707.

Where a bill had passed through the House of Commons, but fails or is unduly delayed (for over a year) in the House of Lords, it could still be presented for Royal Assent. The approval of the Bill by the Lords may also be dispensed with where the Bill concerns financial matters. This is because the Commons, by virtue of *Parliament Acts of 1911 and 1949,* plays the main legislative role while the Lords play a complementary one. The Royal Assent makes the Bill into law – an Act of Parliament or statute.

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2.7 DELEGATED OR SECONDARY LEGISLATION

Delegated or secondary legislation refers to laws made by bodies other than Parliament but pursuant to authority granted to them by Parliament via statutory provisions. These include:

Statutory Instrument (SIs) – This is a subordinate legislation by which the Queen in Council, government ministers or the Welsh Minister make rules, regulations or orders pursuant to a statute. It is often used to enforce, amend or update a statute without the Parliament having to make new or detailed legislations). A SI may be *affirmative* in that it would only become law if both House of Parliament approve it; or *negative* in that it would become law unless either house of Parliament votes to annul it. The *Statutory Instruments Act 1946* regulates statutory Instruments.

Order in Council – This is an order of the monarch by and on the advice of the Privy Council. These are often used where ordinary SIs would not be appropriate. In practice, they allow the Prime Minister to take some important administrative and policy decisions without Parliamentary approval.

Royal Proclamations – These are declarations under official seal by which the monarch brings to the attention of his or subjects matters of particular importance. Examples would be declarations of the commencement or cessation of war; declaration of state of emergency; or the summoning or dissolution of Parliament.

Byelaws – These are laws made by local authorities, corporations or charities on the authority of an act of Parliament. Byelaws have local or limited application; and cannot apply beyond the areas for which law-making authority was granted. Before they could come into force, bylaws are required to be displayed to the public in the relevant for them to raise any objections. Only after the expiration of the stipulated time – usually one month – could the law be tabled before the relevant government department for approval of the Secretary of State. The *Local Government Act 1972* regulates the making of byelaws by local authorities

2.7.1 CONTROL OF DELEGATED LEGISLATION

Oversight of the use of Delegated legislated is provided by the Parliament and the courts and sometimes by ministers.

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2.7.1.1 Parliamentary review

There are at least two methods by which Parliament exercises control over delegated legislations. The first is the requirement (often contained in the enabling statute) that secondary legislations be laid before Parliament either for approval (affirmative Resolution procedure) or annulment (Negative Resolution Procedure) and only become law if Members of Parliament affirm or elect not to reject them.

The second is supervision by the *Joint Select Committee of Statutory Instruments* (JCSI) comprising representatives from both Houses. This committee scrutinises subordinate legislations, especially Statutory Instruments, and brings them to the attention of Parliament in accordance with its terms of reference. However, the JCSI does not consider local instruments unless they are subject to parliamentary procedure. It does not consider those made by devolved administrations unless they are required to be laid before Parliament. The committee does not also consider the merits of any Statutory Instruments or the policies behind them.

2.7.1.2 Judicial review

On the judicial side, the courts are empowered to review, on the application of interested parties, the legality or validity of delegated legislation. The challenge may on the ground that the law was made ultra vires (i.e., beyond the powers granted to the relevant body by parliament); that it was made through an improper procedure; that it was unreasonable in that no responsible or reasonable body would make it; or that it contravenes any of the provisions of the *Human Rights Act 1998.* The operation of judicial view is illustrated by the cases below.

> *Strickland v Hayes Borough Council [1896] 1QB 290* – Part of a byelaw was declared ultra vires and severed from the rest of the byelaw before the byelaw could be enforced.
>
> *Customs and Excise Commissioners v Cure & Deeley Ltd [1962] 1 QB 340* – Regulations on tax made by customs and excise commissioners under the *Finance (No. 2) Act 1940* declared ultra vires.
>
> *Agricultural Training Board v Aylesbury Mushrooms [1972] 1 All ER 280* – A proposed law to introduce a new training programme for agricultural workers by the Secretary of State was declared invalid because the minister failed to undertake consultations of the claimant organisation as required by the parent Act.

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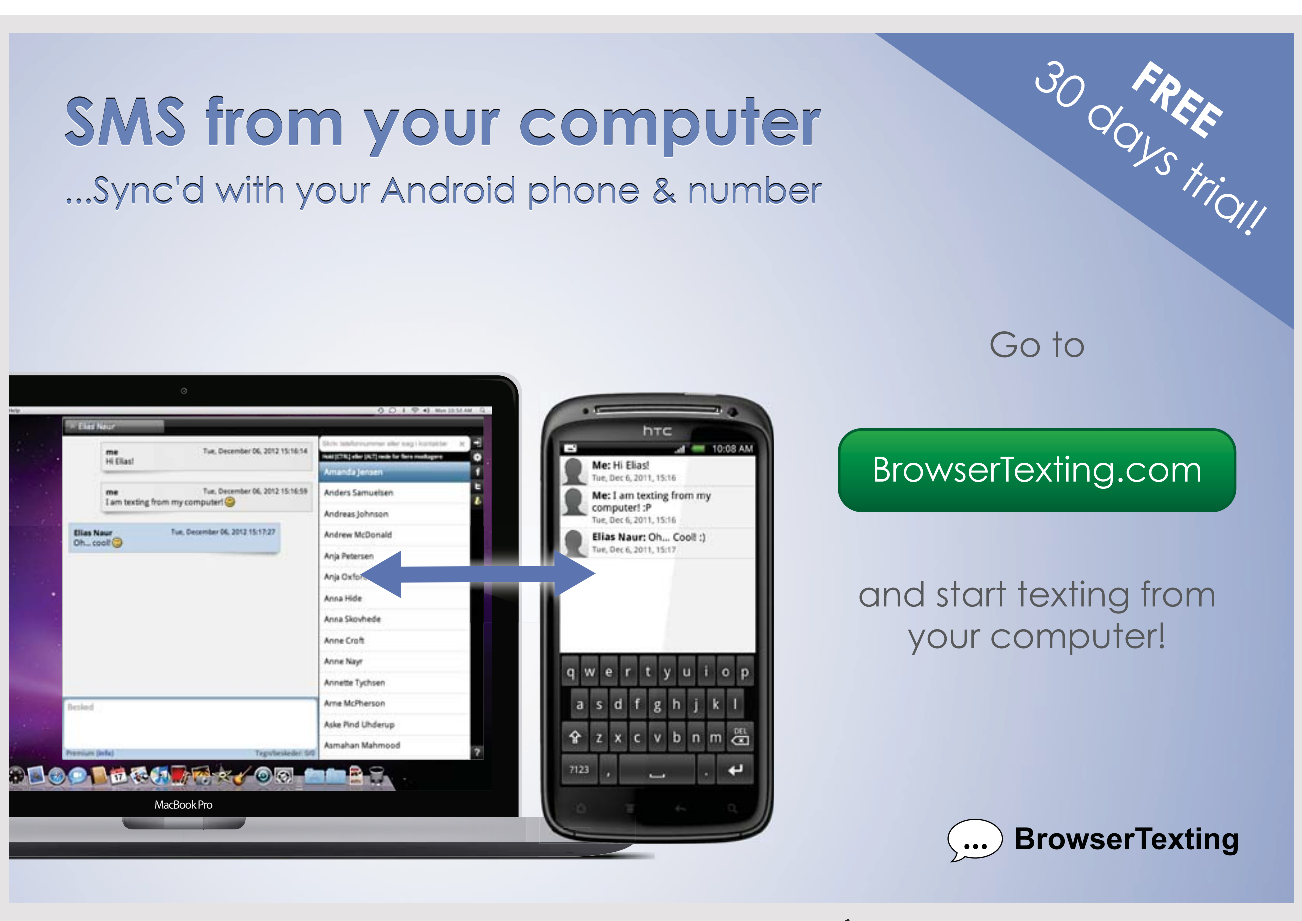
DPP v Hutchinson; DPP v Smith [1990] AC 783 – Held that a part of local authority byelaw that denied access to the public of a common lad was ultra vires and invalid.

R v Secretary of Social Security, ex parte Joint Council for the Welfare of Immigrants [1996] 4 All ER 385 – Regulations restricting the benefits entitlement of asylum seekers made pursuant to *Asylum and Immigration Appeals Act 1993* were held to be ultra vires.

2.7.1.3 Ministerial review

Under s. 236 (and subject to exceptions contained in s.236 (2) and 236A) *Local Government Act 1972*, local authority byelaws usually require the confirmation of relevant central government minister before they could become operational.



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2.7.2 ADVANTAGES AND DISADVANTAGES OF DELEGATED LEGISLATION

Delegated legislation has many advantages and disadvantages. The advantages of delegated legislation include:

- Enabling quick enactment of laws because law making has been spread to many different persons, bodies and institutions, instead of being concentrated in one body – the Parliament.
- Allowing those with technical expertise to make relevant laws, while allowing Parliament to legislate on underlying policy issues.
- Ensuring flexibility of the law in dealing with and responding to local matters when Parliament might not sufficiently informed of them.
- Saving Parliamentary time and allows it to focus on national issues and more serious issues.

The disadvantages of delegated legislation include the following:

- It leaves law making in the hands of unelected officials who might be unaccountable to the electorate.
- Because of the sheer volume of laws involved, the relative privacy under which they are made, and the uncertainty of powers granted by some enabling statutes, it is difficult for members of the public to recognise improperly made laws and challenge them in court. It is also, for the same reasons, difficult for parliamentary and ministerial reviews to be effective and comprehensively exercised.
- It may enable the government to make unpopular rules, regulations or orders, a state of affairs that might be considered undemocratic.

2.8 EUROPEAN UNION LAW

EU law are now a major source of English law since the country joined the EU in 1973. It may come in the form of treaties, regulations, decisions and directives.

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2.8.1 TREATIES

Treaties are agreements signed and ratified by EU member states, which detail the constitutional framework of the union and the rights, duties and obligations of member states. They have direct applicability and effect in member states. A major EU treaty of the EU with particular importance to individuals is the *European Convention on Human Rights 1950*, enacted in the UK as the *Human Rights Act, 1998*. The Act came into force in 2000. Human rights are those rights regarded as natural and inalienable to human beings. The main rights enshrined in the convention and the *Human Rights Act 1998* include:

- Right to life – article 2
- Freedom from torture, inhuman or degrading treatment – article 3
- Freedom from slavery, servitude or forced or compulsory labour – article 4
- Right to personal liberty and security – article 5
- Right to fair hearing – article 6
- Right to freedom from criminal offence without law/retrospective punishment – article 7
- Right to private and family law – article 8
- Right to freedom of thought, conscience and religion – article 9
- Right to freedom of expression – article 10
- Right to peaceful assembly and association – article 11
- Right to marry and found a family – article 12
- Right to remedy for contravention – article 13
- Freedom from discrimination – article 14
- Right to peaceful enjoyment of possession – article 1, protocol 1
- Right to education – article 2, protocol 1
- Freedom from imprisonment for breach of contract – article 4, protocol 1
- Right to freedom from expulsion from one's country; right not to be prevented from entering one's country – article 1, protocol 4.

2.8.2 REGULATIONS

Regulations are laws passed by EU law making institutions, notably the European Commission, Council and Parliament, and which are directly applicable and effective throughout the EU. There is no need for an Act of Parliament to implement them.

2.8.3 DECISIONS

A "decision" is a ruling of the EU Commission on specific matters and are directly applicable and binding on the states or parties affected by it.

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2.8.4 DIRECTIVES

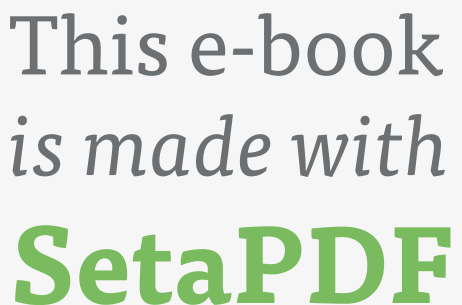
"Directives" give broad policy objectives and goals which member states are required to implement as appropriate within a stipulated time through detailed local legislation. Directives do not have direct applicability, but could also have direct effect in that they give individual rights even though the Parliament or government have not implemented them via local legislation.

2.8.5 EFFECTS OF EU LAW ON THE UK

The effects of EU law on the UK are profound especially in the hierarchy of laws and courts and the regime of human rights.

2.8.5.1 Supremacy of EU Law

UK legislations are now subordinate to EU treaties, regulations, decisions and directives concerning matters of European community law. Under s. 2(4) of the *European Communities Act 1972*, English law should now be interpreted and have effect, subject to the principle of supremacy of EU law.



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In *R v Secretary of State for Transport, ex parte Factortame* [1991] AC 603, Spanish fishing boat owners challenged the UK *Merchant Shipping Act 1988* on the ground that it contravened the freedom of EU citizens to set up business in any state of the EU. The Act had prevented Spanish and other European fishing boats from registering in England and taking advantage of UK fishing quota. The House of Lords held that the Act was incompatible with the European communities Act 1972.

In *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1994] 1 All ER 910, the House of Lords held that parts of the UK's *Employment Protection (Consolidation) Act* 1978 were incompatible with EU law on non- discrimination between male and female employees. The Act had given fewer rights to part-time workers than their full time counterparts in respect of redundancy and unfair dismissal. This was considered discriminatory because most part-time employees were women and were therefore more widely affected by the Act than men were.

2.8.5.2 Human rights

Decisions of the European Court of Human Rights, opinions and decisions of the EU Human Rights Commission, and decisions of committee of Ministers, must now be taken into account by UK courts in determining human rights cases before them (s.2, *Human Rights Act 1998*). In addition, UK courts are required to interpret statutes and secondary legislation as far as possible in line with the Human Rights Convention (*s.3, Human Rights Act 1998*). They may overrule statutory instruments for incompatibility. Although they are not permitted to overrule statutes, they may make with respect thereto, a 'Declaration of Incompatibility' (s. 4) and refuse to apply them. Upon such a declaration, ministers have power to take action in order to remedy the legislation (s.10). Moreover, ministers introducing new legislation must state whether they believe it to be compatible with Convention Rights or not (s. 19).

In *Bellinger v Bellinger* [2003] UKHL 21, the House of Lords declared as incompatible with the Human Rights convention s.11 of the *Matrimonial Causes Act 1973*. The Act had restricted marriage to a man and a woman, meaning that the claimant, who had done a sex change from man to woman, could not be married to a man. (Following *Bellinger*, the UK passed the *Gender Recognition Act 2004* to give legal recognition to transsexual people in their acquired gender).

Furthermore, it is now unlawful for the government and public authorities to act in a manner inconsistent with convention rights (s.6). Individuals may sue them for breach of convention rights (sections 7 and 8).

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2.8.5.3 Hierarchy of courts

Before it joined the EU, the House of Lords (now the Supreme Court) was the highest court in England. Now, however, the European Court of Justice based in Luxembourg is the highest court on matters of general EU law, while the European Court of Human Rights based in Strasbourg, France has superseded the Supreme Court on matters of EU law and human rights.

Some of the effects of EU law on English law has been strongly criticised. The supremacy of EU law over English law may be seen as undemocratic because EU law are often made by political officials and members of EU Parliament who are far removed from and not directly answerable to, the British electorate. The direct applicability and effect of EU law may detract from the sovereignty of British Parliament, while the supremacy of the ECJ and ECHR over the Supreme Court might undercut some of the lofty traditions of the English law and judicial system built up over several hundred years.

2.9 CHAPTER SUMMARY

- The sources from which English laws are derived are common law, judicial precedent, equity, statutes or Acts of Parliament, European Union Law, including the European Convention on Human Rights.
- Common law is the oldest source and is founded on the ancient customs and traditions of the people of England.
- Equity refers to laws developed and originally applied by the Lord Chancellor and the Court of Chancery to mitigate the hardship and rigidity of the common law.
- The rules of equity are designed to achieve maximum justice and the remedies are granted at the discretion of the court. However, the administration of common law and equity was since the enactment of the Judicature Act 1873–75 unified in the same courts, although in the event of conflict, the rules of equity would prevail.
- Judicial precedent refers to laws made by the courts in the application of customary and equitable rules.
- Statutes or Acts of Parliament are laws made by elected members of parliament in the Houses of Commons and Lords, and includes delegated legislation.
- A lot of English Law also derives from the European Union, comprising treaties, regulations and directives. It also includes the European Convention on Human Rights.
- The implementation of European Union law in the UK has affected the primacy of local laws in relation to European law, the hierarchy of courts and the protection of human rights.

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2.10 PRACTICE QUESTIONS

1. Mention and explain the key differences between Equity and the Common Law
2. Explain the term "legislation" and the procedure for its creation.
3. Explain the term "delegated legislation" and its advantages, disadvantages, and limitations.
4. Explain the doctrine of *Judicial Precedent* and any exceptions to its application.
5. What would you consider to be the greatest effects of EU law on the English legal system?
6. Reflect on some of the human rights enshrined in the EU Convention on Human Rights 1950 and the Human Rights Act 1998. Which would you consider to be the most important? Imagine what life would be like were these rights to be removed.

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3 INTERPRETATION OF STATUTES

3.1 INTRODUCTION

In deciding cases that come before them, courts often need to apply laws made by Parliament or other authorities though delegated powers. This application of the law calls for the interpretation of the relevant provisions. Sometimes, this procedure may be straightforward; at other times less so. Difficulties of interpretation may arise from poor drafting, typing errors, omissions, the use of ambiguous words/expressions, or from new developments that were not envisaged when the law was enacted.

3.2 LEARNING OBJECTIVES

At the end of this chapter, the reader should be able clearly to:

- understand the role of the courts in the application of laws made by Parliament or other law-making authorities;
- identify the rules which assist the courts in the construction of statutory provisions;
- understand the merits and demerits of the different rules of statutory interpretation;
- identify and explain the various internal and external aids which the courts use in interpreting statutory provisions.

3.3 GENERAL APPROACH TO STATUTORY INTERPRETATION

The general approach in England to statutory interpretation was well summarised by Lawson J in *Franklin v Attorney-General* [1974] QB 185 at p. 199:

> I approach the answer to the question in two stages. Stage one is this; whether the meaning of the… Act in this respect is clear and unambiguous, and if so, what does it mean? At this stage I look at the words of the enactment as a whole, including the Schedule, and I use no further aids, no further extrinsic aids in order to reach a conclusion as to the clear and unambiguous meaning of the words… If I find that the answer on the first stage in my inquiry is that the meaning of the Act in this respect is ambiguous, then I have to go on to the second stage and consider two possible different meanings… Now if I get to this second stage, then in my judgment, and then only, am I entitled to look at extrinsic aids, such as the long title, the heading, the side notes, other legislation; then only am I entitled to resort to maxims of construction…

The main rules of statutory interpretation are the literal, golden, mischief, and purposive rules. Apart from these, the courts use various internal and external aids to assist their interpretation.

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3.4 THE LITERAL RULE

The literal rule is traditionally the starting rule of statutory interpretation. Under this rule, the provisions of a statute is to be interpreted according to the plain and ordinary meaning of the words used provided these are clear and unambiguous, even if the result would appear harsh or absurd:

R v City of London Court Judge [1892] 1 QB 273:

> If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question of whether the legislature has committed an absurdity.

R v Sussex Peerage [1844] 11 Cl. & Fin. 84:

> Acts should be construed according to the intent of Parliament. If the words are clear no more can be done than to use their natural meaning. The words alone do declare the intention of the lawgiver.

Abley v. Dale [1851] 11 CB 378, at 391:

> If the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice.

The literal approach was adopted in the following cases:

> *Whitely v Chapell* [1868] LR 4 QB 147 – A statute intending to prevent electoral malpractices provided that it was an offence to impersonate "any person entitled to vote" at an election. The defendant was charged with impersonating a dead man in order to vote in an election. The defendant was held not guilty of breaking the law since a dead person was not entitled to vote in an election.

> *London & North Eastern Railway Co v Berriman [1946]* AC 278 – A statute provided for the payment of compensation to employees killed while "relaying or repairing" railway tracks. The claimant's husband was killed while undertaking routine maintenance and oiling of the tracks. It was held that the claimant was not entitled to compensation upon the clear meaning of the provision since he was not engaged in relaying or replacing of tracks.

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> *Fisher v Bell* [1961] 1QB 394 – The defendant was charged with the breach of a statutory provision that prohibited the "offer" for sale of flick knives. He had displayed the knives with price tags on his store shelves. Applying the literal rule, the court held that the defendant was not guilty since the display of items in a shop was not an offer for sale but a mere invitation to treat.

If the literalist interpretation of the clear words of a statute produces an absurd result, it is up to the legislature to rectify it. As Lord Diplock observed in *Duport Steels Ltd v Sirs* [1980] ICR 161 at 17:

> It is at least possible that Parliament […] did not anticipate [disruption]…but if this be the case, it is for Parliament, not the judiciary, to decide whether any changes to the law should be made.

3.4.1 ADVANTAGES AND DISADVANTAGE OF THE LITERAL RULE

The advantages of the literal rule include the maintenance of the sovereignty of Parliament, and the separation of judicial and legislative functions of government.

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A disadvantage of the rule is that it may lead to absurd, unjust or harsh outcomes. In addition, the rule may fail to bring out the real intentions of Parliament since it does not allow for judicial activism even in the face of absurdity. It might also be the case that due to imperfections in grammar and legal drafting, drafters did not convey the whole meanings intended.

However, despite its shortcomings, the literal rule is a sensible one. It might be counter-productive to allow judges to become lawmakers, deciding that statutory provisions are absurd and then proceeding to amend them (as the Court of Appeal appeared to do in *R (on the application of Haw) v Secretary of State for the Home Department* [2006] ECWA Civ. 532. Since the Parliament is responsible for law making and is elected for that purpose, it should also be responsible for rectifying any errors it might make in so doing, even if such rectification might come too late for some litigants.

3.5 THE GOLDEN RULE

Where a literal interpretation would lead to an absurdity clearly not intended by Parliament, this rule allows for the interpretation of a statutory provision in such a way as to realise the intention of Parliament as could be deduced from the rest of the statute. As the court observed in *Grey v Pearson* [1857] 6 HL Cas. 61

> The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency *with the rest of the instrument,* in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistence, but no further.

The rule therefore is not a license for the courts to substitute their own law for the one made by Parliament, but a means of implementing the clear intentions of Parliament.

> In *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 954, Lord Simon suggested the test for the application of the golden rule. According to him, the rule should only be used where:
>
> 1) There is clear and gross balance of anomaly;
> 2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective;
> 3) The anomaly can be obviated without detriment to such legislative objective; and
> 4) The language of the statute is susceptible of the modification required to obviate the anomaly'.

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In *Inco Europe Ltd v First Choice Distribution* [2000] 1 All ER (Comm) 674, the House of Lords held that a judge may add words to a statutory provision in order to give effect to the intentions of Parliament where it is clear that the latter had made an error in its drafting.

The Golden Rule was applied in the following cases:

R v Allen [1872] LR 1 CCR 367 – A statute which prohibited bigamy provided as follows: "whosoever being married shall marry any other person during the life of the former husband or wife…shall be guilty of bigamy". The court held that the phrase "shall marry" should be interpreted to mean "shall go through a marriage ceremony" since it was impossible for a person who was already married to validly marry another person.

Adler v George [1964] 2 QB 7 – Under the *Official Secrets Act 1920*, it was unlawful to obstruct a member of the armed forces "in the vicinity of any prohibited place". The defendant was charged with the offence but argued that he was not guilty since the prohibition occurred in an Air Force base which was the prohibited place instead of the vicinity thereof. It was held that "in the vicinity of" included the prohibited place itself.

3.5.1 ADVANTAGES AND DISADVANTAGES OF THE GOLDEN RULE

Because the rule allows a constructive interpretation, it helps to prevent absurd and unjust outcomes. It also helps to realise the intentions of Parliament.

On the negative side, the rule might lead to undue judicial activism and interference in law making since the word "absurd" might be interpreted subjectively. This might encourage some judges to misapply statutory provisions of which they do not approve.

3.6 THE MISCHIEF RULE

This rule allows the court to look for the problem or mischief a statute was enacted to solve and interpret its provisions in order to solve it.

Heydon's Case (1584) 3 Co Rep. 7 provides the guide. Four things are to be discussed and considered:

1) what was the common law before the making of the Act;
2) what was the mischief and defect for which the common law did not provide;
3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and
4) the true reason of the remedy.

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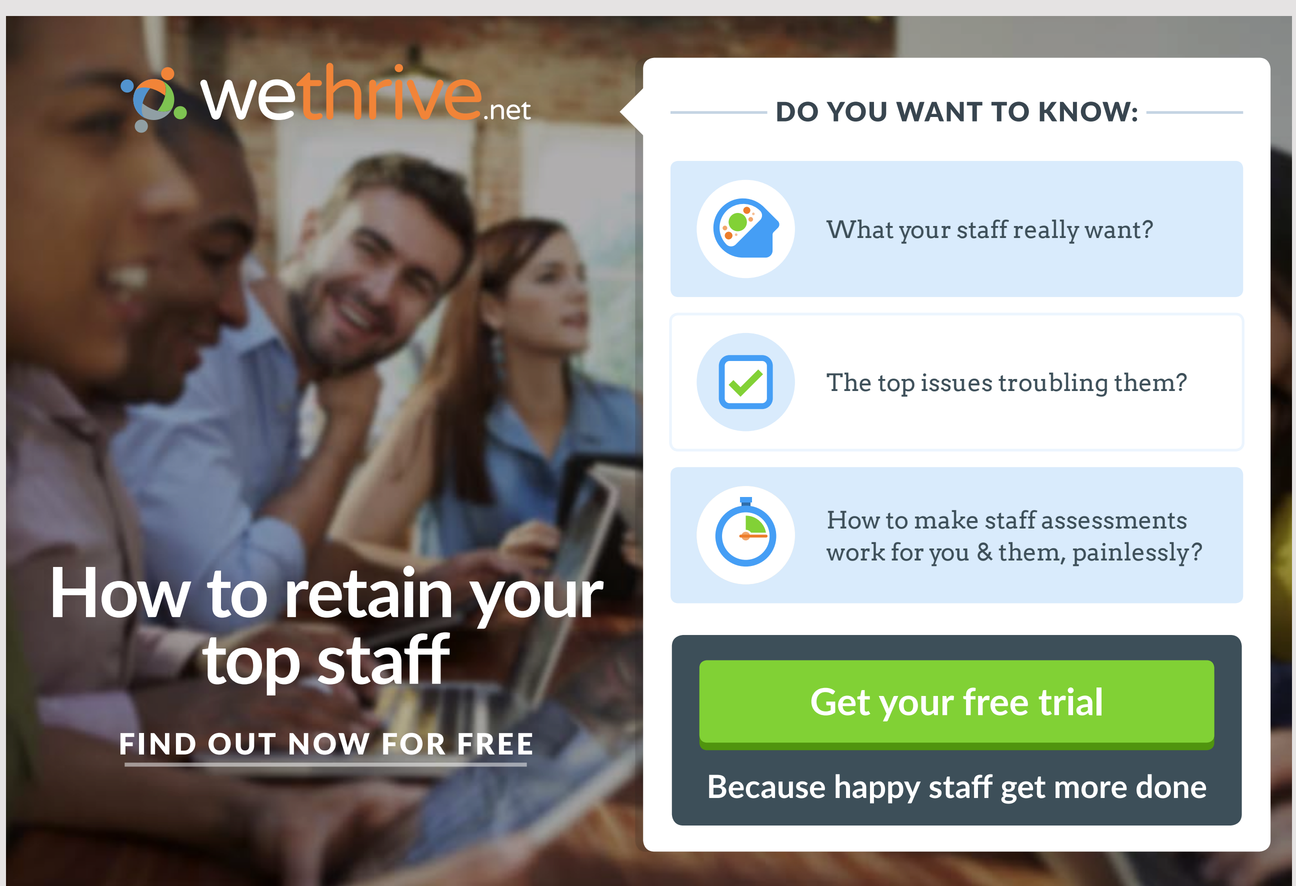
The mischief rule should only be used where the meaning of particular provisions is unclear or ambiguous – *R v Sussex Peerage* [1844] 11 Cl. & Fin. 84; or where the particular facts before the court were not explicitly covered by the statutory provision even though they were intended to be. The Mischief Rule was applied in the following cases:

> *Smith v Hughes* [*1960*] 1 WLR 130 – The *Street Offences Act 1959* prohibited prostitutes from soliciting customers in a street or public place. The defendant solicited customers by sitting in a first floor room and tapping on the window in order to attract the attention of men walking along the street. It was held that she was guilty of the offence since the mischief targeted by the Act was solicitation, for sexual purposes, of men walking past along the street.

> *Gorris v Scott* [*1874*] LR 9 Ex 125 – Under the *Contagious Diseases Act 1869*, ships were required to carry animals, and to contain them, in pens in order to prevent the spread of contagious diseases. The defendant failed to do this with the result that the claimant's sheep were thrown overboard. It was held that the defendant was not liable under the Act since the relevant mischief was the spread of diseases rather than the protection of customers' goods from being lost at sea.



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In *Elliott v Grey* [1960] 1 QB 367, the court interpreted "used on the road" of an uninsured car to include parking and jacking up an uninsured battery-less car on the road since the mischief targeted was hazard created by uninsured vehicles on public highways.

In *Corkery v Carpenter* [1951] 1 KB 102, it was held that riding a bicycle while drunk was a contravention of a law that prohibited being in a charge of a "carriage" on the highway why drunk. The mischief which the law aimed at was danger posed by the defendant to himself and the public.

The rule was also applied in *Royal College of Nursing v DHSS* [1981] 2 WLR 279; and *DPP v Bull* [1995] QB 88.

3.6.1 ADVANTAGES AND DISADVANTAGES OF THE MISCHIEF RULE

Because the rule allows judges to identify the ill a statutory provision was designed to remove and interpret the provision so as to remove it, it helps to avoid absurd outcomes, ensure greater justice, an better realisation of parliament's intent. The rule allows for some flexibility in statutory interpretation and makes the law more realistic rather than merely technical.

A possible disadvantage could be that the "mischief" may sometimes be varied or imprecise meaning that interpretation might become somewhat subjective. Another objection might be that the rule allows judges to get involved in law making, an objection that could be answered by the fact that judges in this situation merely help the Parliament to realise its objectives.

3.7 THE PURPOSIVE RULE

This is the most modern approach to statutory interpretation. European in origin, the approach is usually applied in the interpretation of EU and allied legislation. The idea is that domestic statutes should be interpreted to give effect to the relevant EU laws or directives. In *Pickstone v Freemans* [1989] AC 66, the House of Lords felt constrained to disregard a literal interpretation of a domestic employment legislation and adopt a purposive approach in order to bring it into conformity with EU legislation on equal pay for men and women. However, the rule is now used also in the interpretation of domestic legislations.

In effect, the purposive approach is a more liberal application of the mischief rule. It allows a judge to look at the purpose of the legislation and the intentions of Parliament and try to bring them out without being unduly constrained by the words actually used in the enactment. Accordingly, the literal rule might not be applied even if the words are clear and unambiguous if this will enable the court to bring out the intention of Parliament. According to the House of Lords in *Pepper v Hart* [1992] 3 WLR 1032:

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> The days have long passed when the court adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted (per Lord Griffiths).

In *R v Secretary for Health, ex parte Quintavalle*, [2003] 2 WLR 692, the House of Lords further rationalised the rule as follows:

> The basic task of the court is to ascertain and give effect to the true meaning of what Parliament had said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty…. So the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment (per Lord Bingham).

3.7.1 ADVANTAGES AND DISADVANTAGES OF THE PURPOSIVE RULE

A major advantage of this approach to interpretation is that it is flexible enough to enable courts identify and implement the desires of Parliament without undue technical constraints. Consequently, the courts are able to evolve the law to encompass practical situations and circumstances, which though not specifically covered in the statute, are apparently within the scope of parliamentary intention.

An objection that may be cited against this approach is that it might allow the courts too much legislative power. This may blur the principle of separation of powers and undermine parliamentary sovereignty, especially since UK statutes are drafted in such a way as to cover all foreseeable situations.

3.8 OTHER RULES OF AND AIDS TO INTERPRETATION

Ejusdem generis rule – This means that general words following specific words should be read to include only things of the same kind as those specifically mentioned. The rule may be used in the expansion of items in a list.

Expressio unius est exclusio alterius rule – This means that the express mention of something implies the exclusion of another. This rule may be used to prevent additions to a list in a statutory provision.

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Intrinsic aids, including the preamble, long title, and the interpretation/definition sections of a statute.

Extrinsic aids, including dictionaries, the *Interpretation Act 1978*, other statutes with similar wording, treaties, and Parliamentary debates.

3.9 PRESUMPTIONS RELATING TO STATUTES

There is a general presumption that a statute:

- *has a narrow effect* (that is to say that statutory provisions should not be drafted too widely or generally);
- *has no extra-territorial effect* (in that it is inapplicable outside the country);
- *has no retrospective effect* (in that it does not apply to events that took place before it was enacted)
- *has no effect on the Crown* (since the monarch is the sovereign)
- *cannot oust the jurisdiction of the courts* (since this will defeat the rule of law);
- *does not abrogate the common law by implication* (common law rules can only be abolished by express statutory provisions)

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These presumptions are borne in mind by the courts while interpreting statutory provisions, although they may be rebutted by contrary and clear intention of Parliament. However, any attempt to oust the jurisdiction of the court, or to give a statute a retrospective or extraterritorial effect is likely to encounter serious obstacles in constitutional, human rights and international law.

3.10 CHAPTER SUMMARY

- Laws made by Parliament are interpreted and applied by the courts.
- In doing these, the courts adopt different rules of interpretation, namely literal, golden, mischief and purposive rules. In addition, it may adopt other minor rules and intrinsic and extrinsic aids.
- The literal rule interprets the words of a statute in their simple and ordinary meaning
- The golden rule applies a more constructive approach with a view to realising the intentions of Parliament.
- The mischief rule seeks to identify the ill a particular legislation was made to deal with and attempts to interpret its provisions with that in mind within the context of the words used and the overall context of the statute.
- The purpose approach seeks to realise the intentions of the Parliament even if it warrants an adjustment of the words used if these did not sufficiently bring out the intentions of Parliament.

3.11 PRACTICE QUESTIONS

1. Briefly explain the Literal, Mischief and Golden Rules of statutory interpretation.
2. Explain the Purposive Rule of interpretation; how does this differ from the Mischief Rule?
3. Do you agree that the Golden, Mischief and Purposive rules could give judges too much legislative powers or undermine the principle of separation of powers between different branches of government? Give reason for your answer.
4. Which of the main rules of statutory interpretation do you consider the best? Give reasons.

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4 THE COURT SYSTEM

4.1 INTRODUCTION

Courts and tribunals are the places where legal disputes are usually resolved. Their availability ensures that people or businesses will not have recourse to self-help or "Jungle Justice" in resolving disputes or legal issues. The availability of courts and tribunals also ensures that the rich and strong do not have the freedom to trample on the rights of the poor and the weak. In short, courts and tribunals are critical to the maintenance of the rule of law and order in the society. Different courts and tribunals deal with different cases depending on the nature of the issues involved and the stage of proceedings.

4.2 LEARNING OBJECTIVES

The objectives of the chapter are:

- To enable the reader appreciate the necessity for the existence of legal means of dispute resolution
- To enable the reader understand the different legal mechanisms for dispute resolution
- To understand the types and hierarchy of the tribunal system
- To understand the hierarchy and workings of the court system in its civil and criminal jurisdictions
- To understand the relative advantages and disadvantages of tribunals and courts
- To understand the circumstances in which cases might be brought in different courts and tribunals
- To understand the impact of European law on the workings and hierarchy of UK courts

4.3 TRIBUNALS

In the past, tribunals were informal and specialized court-like bodies employed in the resolution of disputes and were outside the regular court system. Now, following the enactment of the *Tribunals, Courts and Enforcement Act 2007*, the tribunal system has been reformed and modernised in a manner similar to the court system. All tribunals (as well as courts) are administered by Her Majesty's Courts and Tribunals Service. Tribunals are now largely divided into a two-tier system – the First Tier Tribunal and the Upper Tribunal. Both types of tribunals are composed of people with expert knowledge in the relevant areas and usually headed by lawyers. Aside from this, there are also some independent tribunals and tribunals set up by professional associations to deal with cases involving their members.

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4.3.1 THE FIRST TIER TRIBUNAL

The First tier Tribunal hears cases at first instance. It is divided into chambers with each chamber specializing in and dealing with particular issues. Thus, there are chambers for asylum support, criminal injuries compensation, immigration and asylum, mental health, social security and child support, care standards, property, special education needs and disability, tax, war pensions and armed forces compensation, among others.

4.3.2 THE UPPER TRIBUNAL

The Upper Tribunal is a Superior Court of Record and functions like the Court of Appeal with respect to tribunal matters. It hears appeals from the first tier tribunals and undertakes the enforcement of decisions and orders of those tribunals. In addition, it has the power of judicial review and may grant injunctions as well as quashing and declaratory orders. Appeals may lie from the Upper Tribunal to the Court of Appeal. The Upper Tribunal comprises different chambers, namely, the administrative chamber, the immigration and asylum chamber, the land chamber, and the tax and chancery chamber.

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4.3.2.1 The administrative chamber

This chamber hears appeals from the decisions of most first – tier tribunals. It hears appeals from the Social Security and Child Support, War Pensions and Armed Forces Compensation, Mental Health, Special Education Needs or Disabilities, and the General Regulatory chambers. In addition, it hears appeals from the decisions of the Disclosure and Barring Service and applications for judicial review of the decisions of the Criminal Injuries Compensation, and those of other first-tier tribunals where there is no right of appeal.

4.3.2.2 The immigration and asylum chamber

This chamber hears appeals from the decisions of the Immigration and Asylum Tribunal, as well as applications for judicial review of decisions of the Home Office on immigration, asylum and human rights.

4.3.2.3 The lands chamber

The Lands Chamber hears appeal from the First-Tier Property Tribunal (except those involving land registration), as well as those of the Residential Property Tribunal, and the Leasehold Valuation Tribunal in Wales. Among other things, this chamber also hears applications for compensation for the compulsory purchase of land, damage to land by subsidence from mining, and land affected by public works. It also hears applications for tree preservation orders.

4.3.2.4 The tax and chancery chamber

Appeals come to this chamber from the decisions of the First-Tier (Tax) Tribunal, the Land Registration division of the First-Tier (Property) Tribunal (for cases involving land registration), and the General Regulatory Chamber (in respect of cases involving charities). It also hears appeals from the decisions of the Financial Conduct Authority, Prudential Regulation Authority, the Pensions Regulator, the Bank of England, Her Majesty's Treasury, and the Office of Gas and electricity Markets (Ofgem).

4.3.3 INDEPENDENT TRIBUNALS

In addition to the above, there are a number of independent tribunals outside the two-tier system. These include the Employment Tribunal and the Employment Appeal Tribunal which hear employment disputes and appeals arising from them. There are also the Reserve Forces Appeal Tribunal, Special Immigration Appeals Commission, Proscribed Organisations Appeal Commission, Pathogens Access Appeals Commission, Gang Masters Licensing Appeals, and Gender Recognition Panel. These are independent of the government and usually deal with appeals arising from decisions of government agencies.

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4.3.4 PROFESSIONAL TRIBUNALS

These are private tribunals dealing with matters involving particular professional organisations, their code of conduct, and discipline. Associations of doctors, solicitors, accountants, etc. have such tribunals. Normally, these tribunals are not part of the judicial system and their decisions are subject to judicial review at the High Court, rather than appeal to the Upper Tribunal.

4.3.5 ADVANTAGES OF TRIBUNALS

Tribunals have some advantages over most regular courts, including the following:

- Tribunals are generally more accessible and cheaper than conventional courts.
- Tribunal procedures are more informal, more private and less intimidating to ordinary people than regular courts. This means that ordinary people can more easily participate in them.
- Tribunal decisions are reached more quickly than in conventional courts due to their informal procedure and the usual absence of legal representatives.
- Tribunals are usually composed of experts in the relevant fields; this makes them likely to reach correct and fair decisions.
- Tribunals are not bound by precedent and are therefore more flexible in their determination of disputes.
- Tribunals take up a lot of cases that would otherwise go to the conventional courts and cause congestion.

4.3.6 DISADVANTAGES OF TRIBUNALS

The use of tribunals instead of regular courts have some disadvantages, including the following.

- Legal aid is not usually available for tribunal cases so litigants have to bear the costs of their cases. This might be a serious obstacle to ordinary people whose disputes would usually be against government agencies or employers with access to good legal advice.
- Some tribunal hearings involve complex legal issues, meaning that ordinary people might not be able to cope without legal representation.
- The absence of a system of binding precedent might lead to inconsistencies in decisions on similar matters.

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4.4 MAGISTRATES' COURTS

All criminal cases commence at the Magistrates' Court. Cases are dealt with by two or three magistrates or by a District Judge, who would be a qualified lawyer. Most magistrates (also called Justices of the Peace (JP)) are lay people and work part time without salary. There are presently about 28,000 of them and only 129 district judges. Justices Clerks, who are qualified lawyers, provide advice to the magistrates on law and legal procedure.

4.4.1 CRIMINAL JURISDICTION

The Magistrates' Court is primarily a criminal court and the vast majority (over 90%) of criminal offences are heard in this court. Under the *Criminal Justice Act 1977,* offences are categorized into three – summary, "either-way, and indictable. Offences triable summarily are those that must be heard at the Magistrate Court. These are normally minor, such as driving or motoring offences, small property damage, and being drunk and disorderly.

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Offences triable "either way" are those which could be heard in the Magistrate court, but if the accused person insists, or if the magistrate considers it appropriate, would be transferred to the Crown Court for trial by indictment. These include more serious offences like burglary, drug offences, serious property damage, and theft. "Indictable offences are the most serious offences, such as murder, manslaughter, rape, robbery, and fraud. These are triable only upon indictment before a jury in a Crown Court. Such cases are passed over to the Crown Court after the accused person has been arraigned before the Magistrate Court.

Magistrates' courts are only empowered to sentence convicted persons to a maximum of 6 months imprisonment; or a maximum of 12 months if there are more than one offences. If they desire to impose a longer sentence, the case must be referred to the Crown court. They may also impose fines of up to £5,000; a combination of imprisonment and fine; or community service. Magistrates' court also decide whether an accused person should be kept in police or court cell, or whether they should be released on bail pending or during trial – s. 4 *Bail Act 1978*. Bail would normally be granted except for very serious cases, such as murder, manslaughter and rape.

4.4.2 CIVIL JURISDICTION

Magistrates' Courts also have some civil jurisdiction. This includes the collection of crown debts (taxes etc.), granting of restaurant, casino and betting licenses, and dealing with domestic proceedings, such as adoption and child maintenance payments.

4.5 COUNTY COURTS

County courts are civil courts of first instance and deal with most (over 90%) of the civil cases in the country. Now, there are at least 200 county courts sitting in different parts of the country. The courts comprise legally qualified District and Circuit Judges. Civil claims with monetary value of £25,000 or less must be commenced at the County Court. The monetary value of cases heard in the Count court would not exceed £50,000 (*County Court Jurisdiction Order 1981; High court and County Court Jurisdiction Order 1991*), except for its equity jurisdiction (relating to properties) where the upper limit is £350,000 (s. 3, *County Court Jurisdiction Order 2014*).

Generally, cases of £10,000 and below follow the relatively informal small claims track; those above £10,000 and up to £25,000 and which can be heard within 30 days and decided in one day follow the fast claims track; while those of above £25,000 or involving complex issues are multi-track claims.

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The District Judges, who comprise the majority, deal with most of the cases where the value of the claim is not more than £25,000. Circuit judges deal with cases whose value exceed £25,000. The county court hears cases involving, among other things:

- Contractual disputes
- Consumer complaints
- Landlord and tenant cases
- Civil wrongs (torts)
- Personal injury
- Employment
- Consumer credit
- Bankruptcy
- Mortgages and re-possession
- Equity
- Equality and discrimination
- Other actions where parties agree (e.g. defamation cases)

4.6 CROWN COURT

The Crown Court is a criminal court with first instance jurisdiction for either-way and indictable offences. It is also an appellate court in respect of appeals coming from the decisions of magistrates' courts in their criminal jurisdiction. In addition, it has sentencing jurisdiction in respect of cases referred to it by magistrates. There are presently about 77 Crown Court centres in different cities in the country.

During hearings at first instance, one Crown Court judge sits with a jury of 12 lay men and women. The judge deals with issues of law while the jury determines issues of fact and whether the accused person is guilty or not guilty. If the judge determines that, there is no cause of action, in that the facts disclosed do not establish the commission of the offence alleged, he would discharge the accused person, and the jury will not have to decide guilt or innocence. During appeal hearings, a judge sits with at least two magistrates, but without a jury.

4.7 HIGH COURT

The court has original civil jurisdiction for higher value or more complex civil cases. The court comprises the Lord Chief Justice and over 100 puisne (pronounced 'puny') judges who are generally ex-barristers. A single judge normally hears the cases in a particular court. The court has three divisions: the Queen's Bench, the Chancery and the Family divisions.

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The *Queen's Bench* deals with cases of contract and tort of the value of £50,000 or above or those involving complex disputes. The court also has jurisdiction in technology and construction cases, commercial disputes, mercantile, and admiralty cases. In addition, it has the power of judicial review over the actions and decisions of governments and public bodies. Accordingly, the Queen's Bench has six branches: the Queen' Bench Civil Lists, the Mercantile Court, the Commercial Court, the Technology and Construction Court, the Admiralty Court, and the Administrative Court.

The *Chancery Division* deals with cases involving company law, land matters, partnerships, trusts, probate, bankruptcy, tax appeals and specialist patent cases. It also deals with cases involving competition law and the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The Family Division deals with cases involving family law, such as custody and guardianship of children, international child abduction (under the *Hague Convention on the Civil Aspects of International Child Abduction, 1980, and the Jurisdiction, Recognition and Enforcement of Matrimonial and Parental Judgments – Brussels II Regulation (EC) No 2201/2003*), forced marriage, and female genital mutilation.

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4.8 COURT OF APPEAL

The Court of Appeal is the second highest court in the land and hears both civil and criminal appeals in its civil and criminal divisions. The Civil Division of the court hears nearly all civil appeals (including those from some tribunals) and nearly all technical re-hearings. Appeals are normally on the findings and application of law; accordingly, witnesses are not normally called. The criminal division hears only appeals on indictable offences. Three judges normally sit in each appeal hearing.

4.9 SUPREME COURT

Previously known as the House of Lords, the Supreme Court (re-named and re-structured in 2009) is the Highest Court in the United Kingdom and thus the final court of appeal in matters of domestic law. It is primarily an appellate court – hearing appeals from the Court of Appeal on both civil and criminal matters, and sometimes, straight from the High Court, if it, and the Supreme Court, agree that it is expedient to do so. The Supreme Court is also the court of first instance on constitutional and devolution matters. It has twelve justices but only five usually sit at a time, although seven may sit on constitutional or devolution matters. The Supreme Court:

- hears appeals on arguable points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases.
- hears cases on devolution matters under the *Scotland Act 1998,* the *Northern Ireland Act 1988* and the *Government of Wales Act 2006.* This jurisdiction was transferred to the Supreme Court from the Judicial Committee of the Privy Council.
- decides cases involving questions whether the devolved executive and legislative authorities in Scotland, Wales and Northern Ireland have acted or proposed to act within their powers or have failed to comply with any other duty imposed on them.

On matters of EU law, appeal may go from the Supreme Court to the European Court of Justice or the European Court of Human Rights.

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4.10 COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union (CJEU) located in Luxembourg, was established in 1952 under article 7 of the *Treaty of Paris 1951* and became part of the UK court system following the country's membership of the EU in 1973. The ECJ is the highest court in Europe on matters involving the interpretation of EU law, and thus deals with disputes involving member states or the institutions or laws of the union. The purpose of the ECJ is to ensure compliance by EU member states and institutions with EU law. The court is comprised of judges selected from EU member States and a number of advocates-general. It normally sits in panels of three or five judges or a grand chamber of thirteen judges. The jurisdiction of the ECJ (see article *177 of EEC Treaty, 1957*), includes:

- Interpretation of European Union treaties Determination of the legality of the acts of EU institutions, such as the EU Commission, and the Council of Ministers
- Appeals relating to EU Commission's actions against member States
- Preliminary rulings on points of European Law referred by local courts
- Appeals from European Court of First Instance, which became part of the ECJ from 1988

4.11 THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (ECtHR) was created in 1959 and is the highest court in the EU on matters concerning European human rights law, especially as enacted by the *European Convention on Human Rights 1950*. The court sits in Strasbourg, France. Individuals of European states who wish to challenge alleged violations of their human rights as guaranteed under the convention and the decisions of domestic courts on the matter may take their cases to the court. Thus, an application may be made to this court in respect of a decision of the Supreme Court, although such an application will not suspend compliance with the decision.

In addition, governments of EU countries may bring cases to the court to challenge any perceived non-compliance with the convention rights. The ECtHR thus, plays a very important role in ensuring observance by all concerned of the EU Convention on Human Rights. Cases in the court may be heard by a chamber of three or seven judges or by the Grand chamber of 17 judges, depending on the nature of the case.

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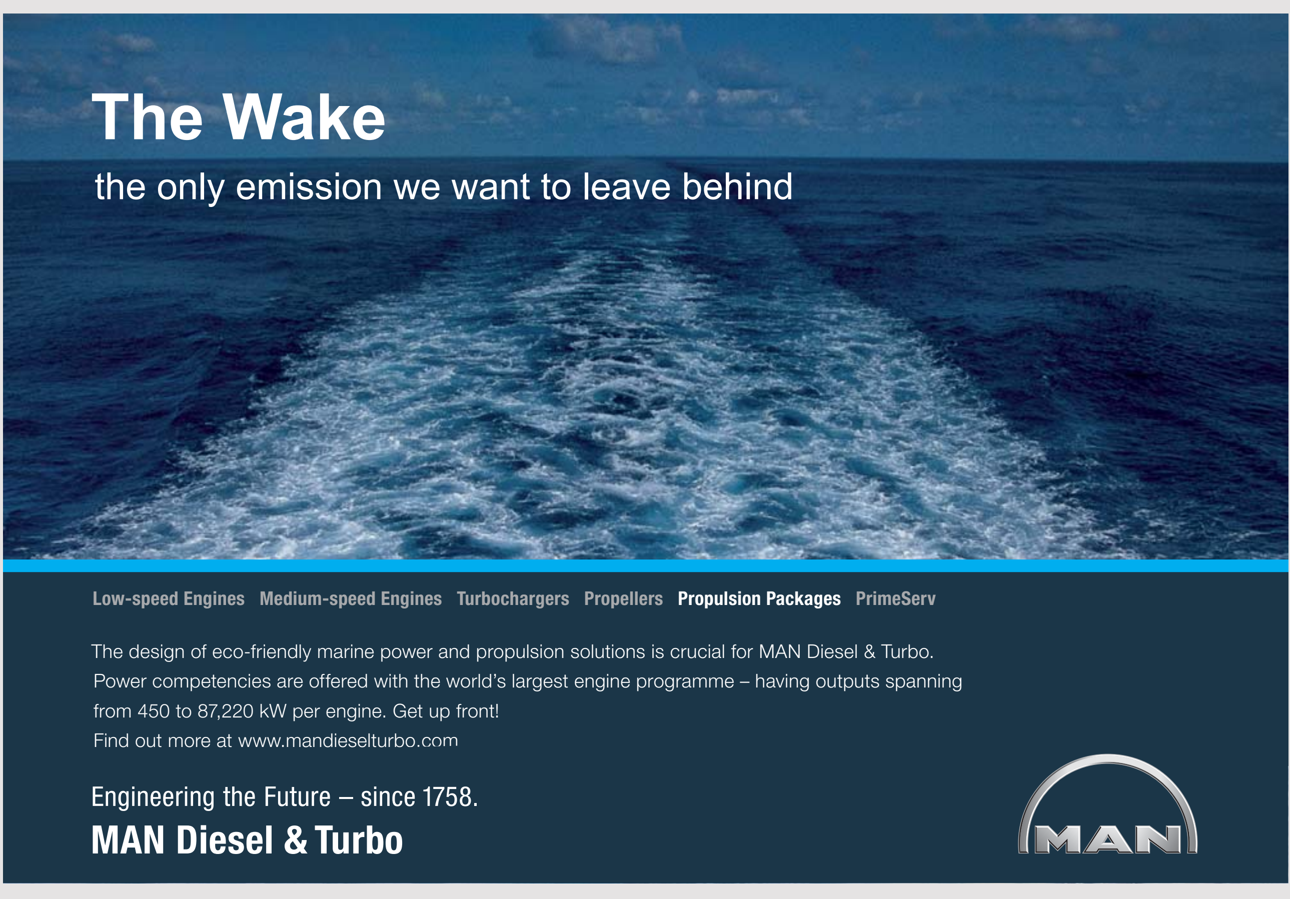
4.12 CHAPTER SUMMARY

- Legal disputes involving individuals and businesses may be taken to tribunals or civil courts for resolution.
- The civil courts of first instance are primarily the County Court and the High court, although the Magistrates Court has very limited civil jurisdiction.
- The County Courts deal with cases of low financial value, while the High Court deals with cases of high financial value in its Queen's Bench, Chancery and Family divisions.
- Appeals from decisions of County Courts (and civil decisions of Magistrates Courts) go to the High Court, while appeals from the decisions of the High Court go to the Court of Appeal.
- The Magistrates' Court and the Crown Court are the principal criminal courts of first instance, but all criminal cases originate at the former.
- The Magistrates Court try relatively minor offences in a summary manner, while more serious (indictable) offences are tried at the Crown Court on indictment. Either-way offences may be tried at the Magistrate or Crown Court on the election of the accused or the magistrate.
- The Court of Appeal and the Supreme Court (formally the House of Lords) are the chief appellate courts in the country.



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- The Court of Appeal hears appeals from the decisions of the High Court and Crown Court in its civil and criminal divisions.
- The Supreme Court is the highest domestic court. It hears both criminal and civil appeals from the Court of Appeal, and in exceptional cases, directly from the High Court.
- The European Court of Justice is the highest court in Europe on matters pertaining to European constitutional law, while the European Court of Human Rights is the highest in relation to European human rights law.

4.13 PRACTICE QUESTIONS

1. What would you consider to be the main advantages of tribunals over traditional courts
2. Explain the importance of Magistrates courts in the administration of criminal justice
3. Explain the importance of county courts in the administration of civil justice
4. Articulate reasons why it is necessary to have appellate courts; what would be the likely consequences if such courts do not exist?
5. Draw a chart showing the hierarchy of courts in the UK. How has UK membership of the EU affected this hierarchy?

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PART 2: CONTRACT LAW

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5 FORMATION OF CONTRACTS

5.1 INTRODUCTION TO CONTRACT LAW

Contracts are essential in our private, commercial and business lives, with individuals, businesses and organizations regularly entering into different types of contractual arrangements. Sometimes, these contracts concern huge amounts of money in goods, properties or services; at other times, they concern relatively minor things. Sometimes, contracts are concluded by complex and formal documents; at other times, they are concluded orally or by mere conduct. However, no matter the value or form of the contract, or who the parties are, the underlining principles are largely the same. The law of contract contains the rules on the meaning, formation, regulation, validation and enforcement of contractual obligations. Although these rules originated largely from the common law, they have, in the course of time, been supplemented by statutory provisions. This chapter explains the meaning of contract and the rules governing its formation and enforcement.

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5.2 LEARNING OBJECTIVES

At the end of the chapter, the reader should fully understand:

- The meaning of contract
- The legal requirements for the formation of a contract
- The formalities required for the validation of some contracts
- The persons who are able to enforce a contract, and why

5.3 MEANING OF CONTRACT

In English law, agreement is central to contracts because contract law involves obligations willingly accepted by parties. No matter the type of contract under consideration, agreement of the parties involved in it is an indispensable requirement. There can be no contract without the genuine agreement of all the parties concerned. However, although a contract is invariably a product of agreement, not all agreements are contracts. A contract may be defined as an agreement involving two or more people, which is recognised in and enforceable by law. Because of the need for agreement, it follows that a person who is not a party to a contract cannot, except in special circumstances, take action to enforce it.

5.4 FORMATION OF CONTRACT

We have seen that a contract must involve the agreement of the parties involved in it. We have also seen that an agreement becomes a contract only if it is recognised as such and enforceable by law. To be legally enforceable, and therefore a contract, an agreement must have the following elements:

- An offer by a party to another
- The acceptance of that offer by the party to whom it is made
- An intention or desire by both parties to be bound in a legal relationship
- The provision or promise of consideration by both parties
- In some cases, a proper form

5.5 OFFER

Offer is a request or proposal by one party to another to enter into a contract with him on the terms he has specified. It is, in other words, a promise by A to B that if B agrees to his terms, A is willing to exchange something of value with him. Whether or not an offer has been made is a question of fact depending on the circumstances of a particular case. The courts would hold that an offer exists if the facts show a desire by the maker to enter into a contract on proposed terms. If no such desire exists, there would not be a valid offer.

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According to Steyn L.J. in *Percy Trentham Ltd v Archital Luxfer Ltd.* [1993] 1 Lloyds Rep 25:

> English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead, the governing criterion is the reasonable expectations of…sensible businessmen… Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential.

An offer may be made orally, in writing, or by conduct. What is important is that a definite willingness to be bound in agreement, if the offer is accepted, exists. The offer, it follows, must be communicated to the offeree. An uncommunicated offer cannot be the subject of an acceptance.

5.5.1 UNILATERAL AND BILATERAL OFFER

An offer may be made to a particular person, many people, or the public. An offer made to a particular person or persons is known as a bilateral offer, while one made to the public is known as a unilateral offer. A bilateral offer implies that the person to whom it is made has to communicate any acceptance of the offer to the offeror. A unilateral offer, on the other hand, does not require the communication of acceptance to the offeror; performance of the stipulated act or the fulfilment of the stipulated condition in the offer will constitute acceptance. Examples of a unilateral offer include advertisements with a reward, display of goods in a vending machine, auctions without a reserve price, and invitations for tender with promise to accept the best.

5.5.1.1 Advertisements with a reward

An advertisement accompanied by an offer of a reward would amount to a unilateral offer.

> In *Carlill v Carbolic Smokeball Co* [1893] 1 QB 256, the defendants advertised their product (smoke balls) in a newspaper claiming that its use could prevent influenza. The advertisement promised that any person who bought and used the smoke ball for two weeks but still caught the disease would receive a £100 reward. The advertisement further claimed that the sum of £1000 had been deposited in a bank for this purpose. The claimant bought and used the smoke ball as advised but still caught influenza. She sued the company for the £100 reward. It was held that the advertisement was an offer to the whole world. According to Bowen LJ:

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> It was also said that the offer was made with all the world – that is, with everybody, and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes and performs the conditions? […] Although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the conditions on the faith of the advertisement.

5.5.1.2 Display of goods in a vending machine

The display of goods in a vending machine would amount to an offer to the whole world that could be accepted by anyone who puts money in the machine and makes a selection.

> In *Thornton v. Shoe Lane Parking Ltd.* [1971] 2 QB 163, a customer was given a ticket by a machine at the entrance of a car park after he had put money into the machine. It was held that the contract was made, not when the ticket was given but when the customer put money into the machine. The offer was made by the proprietor of the machine and accepted by the customer. According to Lord Denning:

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> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by these terms as long as they are sufficiently brought to his notice before hand, but not otherwise.

5.5.1.3 Auctions without reserve price

An auction advertised as being without a reserve price would amount to a unilateral offer. In that case, the auctioneer is bound (if the auction in fact takes place) to sell to the highest bidder, otherwise he will be in breach of contract. The inclusion of the term "without reserve" is an implied offer by the auctioneer to sell to the highest bidder. In *Barry v Heathcote Ball & Co.* [2000] The Times, 31 August (CA), the defendant advertised the auction sale of two "engine analysers" without any reserve price. The market price for the machines was £14,000 each, but the claimant made the highest bids for the machines of £200 each. The auctioneer refused to sell at that price, withdrew the machines and sold them privately later. The claimant sued for damages and claimed the difference between the market price and his bid. It was held that the defendant was in breach of the contract to sell without reserve and was liable to pay the market price less the value of the bid to the claimant.

5.5.1.4 Invitations of tender with promise to accept the best

A call for tender to buy or supply goods or services with a promise to accept the highest or best bid amounts to an offer capable of acceptance by the highest or best bidder.

> *Harvela Investments Ltd v Royal Trusts Co of Canada* [1986] AC 207 was a case where the defendant invited tenders from two individuals H and Q for his shares and promised in his telexes to them to accept the highest one. H bid £2,175,000 while Q bid £2,100,000 but offered to pay an additional £100,000 above any offer made by any other person. The defendant accepted Q's offer. It was held that the defendant was bound to accept H's bid since it was the higher of the two.

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5.5.2 INVITATIONS TO TREAT

An offer is different from a mere invitation to treat. An invitation to treat is a proposal from one person to another requesting an offer or expressing a willingness to commence negotiations. An invitation to treat cannot be accepted by the addressee in order to form a contract; it can only lead to the making of an offer. It is an invitation to make offer.

As explained by Bowen L.J. in *Carlill v Carbolic Smokeball Co.* [1893] 1 QB 256, invitations to treat are:

> Cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or house to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate – offers to receive offers – offers to chaffer.

In *Gibson v Manchester City Council [1979] 1 All ER 972*, the defendant had a policy of allowing its tenants to purchase council houses. Pursuant to this policy, it wrote a letter to the claimant, saying that it may be prepared to sell the house to him at a specified price and invited the claimant to make an application. The claimant made the application, but shortly after, the government of the council changed and the policy was stopped. The claimant sued on the ground that the council was under a contract to sell the house to him. It was held that the council's letter was only an invitation to treat, and that the claimant's application was an offer which the council did not accept.

Other examples of invitation to treat include advertisements without promise of a reward, display of goods in a shop or website, auctions with a reserve price, and call for tenders without promise to accept the best.

5.5.2.1 Advertisements without reward

Mere advertisement of goods, services, etc. in newspapers, magazines, brochures, catalogues, TV, price lists, the Internet, etc. would amount to invitations to treat.

> In *Partridge v Crittendon* [1968] 1 WLR 1204, a person was charged with and convicted of offering wild birds for sale in a newspaper classified advertisement. This was contrary to s.6 of the *Protection of Birds Act* 1954, which prohibited the offering of such birds for sale. The conviction was set aside on appeal on the ground that the advertisement was not an offer but an invitation to treat.

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If, however, the advertisement contains a promise of a specific reward, it becomes an offer that can be accepted by anybody. In *Carlill v Carbolic Smokeball Co,* the advertisement went beyond normal advertisements for a product. The promise of a definite reward converted it into a firm offer.

5.5.2.2 Display of goods in a shop or website

The display of goods in shop windows or floors for the purpose of sale amounts to an invitation to treat not an offer, even if the items have price tags, and even if there is a self-service system in place. A customer cannot therefore "accept" to buy the goods. Rather the customer makes an offer to buy any or some of the goods when he selects and presents them to the salesperson who may accept or reject the offer.

Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953] 1 QB 401 provides a good illustration of this principle.

> The defendant was sued for selling regulated medicine without a pharmacist's supervision as required by law. The medicine had been displayed on the shelves of the defendant's shop. It was held that the display was merely an invitation to treat rather than offer; the pharmacist could still refuse to sell them at the checkout. According to Lord Goddard C.J.:

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> It is a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. I do not think that I ought to hold that the principle is completely reversed merely because there is a self-service scheme, such as this, in operation. In my opinion it comes to no more than that the customer is informed that he may himself pick up an article and bring it to the shopkeeper with a view to buying it, and if, but only if, the shopkeeper then expresses his willingness to sell, the contract for sale is completed. In fact the offer is an offer to buy, there is no offer to sell; the customer brings the goods to the shopkeeper to see whether he will sell or not.

The same principle was followed in *Fisher v. Bell* [1961] 1QB 394. A flick knife was displayed for sale in a shop window. The shop owner was charged with "offering" to sell an offensive knife under the law. It was held that the display was merely an invitation to treat and not an offer to sell. The shop owner had therefore not committed any offence.

The display of goods on a website is similar to the display of goods in a shop window or floor and would be regarded as an invitation to treat. A shopper makes an offer when he selects an item and clicks on the online checkout for payment. The retailer may at that point accept or reject the offer.

5.5.2.3 Auctions with a reserve price

Auctions with reserve prices are regarded as invitations to treat. When customers bid for the goods they make an offer to buy, which may be accepted or rejected by the auctioneer. The auction may be cancelled before it is due to start without the auctioneer being in breach of contract.

In *Harris v Nickerton* [1873] *LR 8 QB 286*, a broker sued an auctioneer for damages after the auctioneer withdrew a lot in which he was interested. The court held that there was no breach of contract since no offer had been made to sell the lots; they merely amounted to an invitation to treat. The "mere declaration of intention", the court said, could not be made a binding contract.

Moreover, until the auctioneer brings down the hammer, a bidder may withdraw his bid. Accordingly, s. 57(2) *Sale of Goods Act 1979* provides that:

> A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and until the announcement is made any bidder may retract his bid.

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The refusal to sell a lot to the highest bidder is not a breach of contract since at that point no contract exists between the bidder and the owner of goods.

5.5.2.4 Call for tenders without promise to accept the best

A call for tenders for the purchase of good or the supply of goods or services is generally not an offer but an invitation to treat. Those who respond to the call would be making offers to buy or supply the goods or services. Those calling for the tenders are not bound to accept the best one. In *Spencer v Harding* (1870) LR5CP 561, it was held that a call for tenders to purchase some stock was not an offer to sell the stock to the highest bidder. However, those who call for the tender may be under a duty to consider all tenders that comply with the conditions of tender.

> In *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195*, the defendant Council failed to consider a tender submitted by the claimants in response to the council's advertisement for certain flight concessions at the city's airport. It was held that the council had a duty to consider the claimant's tender along with the others.

The law regarding invitations to treat makes common and practical sense. If goods on display or advertisement were construed as offers, shopkeepers and advertisers would be under a legal obligation to supply any of the goods to customers who express a desire to buy them even though the goods might be out of stock; or even though for some reasons, the sellers do not wish to sell. Auctioneers and persons calling for tender would face similar problems. As explained by in *Grainger & Son v Gough* [1896] AC 325, at 334, if the law were different, "the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited."

5.5.3 TERMINATION OF OFFER

An offer may be terminated at any time before it has been accepted. Once an offer has been terminated, acceptance of that offer ceases to be possible. Conversely, once an offer has been accepted by the offeree, it can no longer be terminated. Termination could be by death, revocation, rejection, lapse of time, counter offer, and failure to fulfil a relevant condition of the offer.

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5.5.3.1 Death

The death of the offeror terminates an offer where the offer requires the performance of a personal service by the offeror. If the offer does not require a personal service, the offer may continue beyond death unless the death of the offeror was communicated to the offeree before acceptance. Where the offer was made to a specific person or persons, the death of the offeree before acceptance, it seems, will also terminate the offer.

5.5.3.2 Revocation

An offeror may withdraw the offer at any time prior to acceptance even though the duration given for the offer had not elapsed.

> In *Routledge v Grant* (1828) 4 Bing 653, the defendant on 18 March offered to buy the claimant's house for a certain amount of money and required a definite answer within six weeks from the date of the offer. He withdrew the offer before six weeks. It was held that the defendant was entitled to revoke the offer at any time before acceptance even though the stipulated deadline had not expired.

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However, to be effective, any revocation must be communicated to the offeree otherwise, the offer would be deemed to continue and could still be accepted. This was illustrated in *Byrne v Van Tienhoven & Co* (1880) 5 CPD 344, where a letter revoking an offer was sent to the offeree. Before the letter reached him, the offeree had sent his acceptance letter to the offeror. It was held that the revocation was not effective. The communication of revocation however, may be made through a reliable third party. The important thing is that the offeree actually received information about the revocation.

> In *Dickenson v Dodds* [1876] 2 ChD 463, the defendant offered to sell a house to the claimant and the offer was left open for two days. The following day the defendant sold the house to somebody else. That same day, the intermediary between him and the claimant informed the claimant of the sale. Despite this information, the claimant sent a letter of acceptance before the original two-day deadline. It was held that the acceptance was not valid since the offer had been revoked before it was made.

Where the offer was unilateral, it may only be revoked if performance of the required act has not commenced.

> In *Errington v Errington & Woods* [1952] 1 KB 290, a father allowed his son and daughter-in-law to live in his house provided they made the mortgage repayments. He promised the couple that the house would become theirs when they completed the mortgage repayments. The son and daughter-in-law made the repayments as required. However when the father died, his widow claimed the house and sought to remove the daughter-in-law from it. It was held that there was a unilateral contract between the man and his son and daughter-in-law which could no longer be revoked once performance of the required act had begun.

5.5.3.3 Refusal or rejection of the offer

An offer would be terminated if the offeree rejects it. At this point, the offeror would be free to make a new offer to another person and the original offeree would have no right to change his or her mind and require the original offer to remain alive.

5.5.3.4 Lapse of time

An offer would expire after the time stipulated for acceptance. Where no time was stipulated, the offer will end after a reasonable time. What would be a reasonable time would be a matter of fact depending on the circumstances of the case. For example, an offer to supply goods for a specific event would have elapsed after the event had taken place. In *Ramsgate v Montefiore [1970] 1 WLR 241*, it was held that an offer by an investor in June to buy shares in a company had lapsed by November of the same year when the company purported to accept it.

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5.5.3.5 Counter-offer

If the offeree alters the terms of an offer or introduces a new term into it, this would amount to a counter-offer that terminates the original offer. The original offer is no more capable of acceptance unless the offeror desires otherwise.

5.5.3.6 Failure of condition offer condition

If the offer was conditional, it will be terminated if that condition fails to materialise. If this were to be the case, the offer could no longer be accepted.

5.6 ACCEPTANCE

Acceptance is an unequivocal agreement to the terms of an offer. It is an affirmation that one is willing to enter into a contract with the offeror on the terms expressed in the offer. **A**cceptance must be in response to an offer; it cannot be made in ignorance of an offer. In addition, acceptance cannot be made before an offer has been received; neither can it be made in respect of an offer made specifically to another person. Acceptance must conform to the terms of the offer. An agreement takes place once a valid acceptance has been made. However, a purported acceptance that alters the terms of the offer or introduces a new term is not a valid acceptance but a new offer or counter-offer. Similarly, a conditional acceptance is not a valid acceptance; acceptance must be on the basis of the offer.

> *Hyde v Wrench* [1840] 3 Beav 334 is a case where the defendant offered to sell a piece of land for £1000. The claimant said he would buy the land for £950 but the defendant refused. Two days later, the claimant said he would buy the land for the £1000 but the defendant refused to sell. It was held that the original offer had been terminated by the claimant's counter offer; there was therefore no acceptance and no contract.

However, request for more information or a request that the offeror make his terms more favourable to the offeree is not the same as a counter offer.

> In *Stevenson & Co v McLean* [1880] 5 QBD 346, the defendant offered to sell goods at a certain price to the claimant. The claimant sent a telegram asking whether the defendant would consider instalmental payment. The defendant sold the goods to another person without replying the telegram. The claimant, without knowing that the goods had been sold, accepted the original offer. It was held that the defendant was in breach of contract since the claimant's telegram was not a counter offer but a mere request for information.

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5.6.1 COMMUNICATION OF ACCEPTANCE

Acceptance of a unilateral offer need not be communicated; the doing of the requested act or the fulfilment of the stipulated conditions will be enough. Acceptance of bilateral offer, on the other hand, needs to be communicated to the offeror otherwise, the acceptance would not be valid. Acceptance may be oral or in writing but must reach the offeror before it could be valid. If no form of communication is specified, the acceptance may be communicated by any means; but where a particular form is required, acceptance should be communicated in that manner, or one similar to it.

> In *Yates Building Society V Pulleyn & Sons* [1975] 237 EG 183, the offeror requested acceptance by registered or recorded delivery. The acceptance was made by normal mail but got to the offerror without delay. It was held that the acceptance was properly communicated since the offeror was not disadvantaged in any way.

5.6.1.1 Acceptance by post

Where acceptance is made by post, it is deemed to have been communicated once the letter of acceptance has been validly posted even if it was received late or was not received at all by the offeror. This is the so-called "Postal Rule".

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In *Adams v Lindsell* (1818) 1 B & Ald 681, the defendant made a written offer to sell wool to the claimant and requested acceptance "in course of post." The offer letter reached the claimant later than normal, but he promptly posted an acceptance letter to the defendant. The defendant sold the commodity to a third party after the posting of the claimant's acceptance letter which he had not received. It was held that the offer had been accepted by the claimant and that defendant was in breach of contract.

Although the postal rule may seem harsh on an offeror, it could easily be avoided by a stipulation in the offer that acceptance would not be valid until received by the offeror.

In *Holwell Securities Ltd. Hughes* [1974] 1 WLR 155, an offeror required acceptance to be made "by notice in writing" within 6 months. Acceptance was posted but not received by the offeror. It was held that there was neither an acceptance nor a contract since the acceptance was not received.

5.6.1.2 Acceptance by telex, fax, phone, text, e-mail, etc.

Subject to contrary intention being indicated, where acceptance is permissible by telex, fax, telephone message, text, or e-mail, acceptance would be made when the message is confirmed to have been sent to the offeror even though he might not have read or listened to it. However, this may be subject to the message being sent in normal working days and during reasonable hours. In *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327, it was held that a telex acceptance was valid upon being sent to the offeror.

5.6.1.3 Acceptance by conduct

Acceptance may be implied from conduct. This would be the case where a party indicates an unequivocal acceptance of an offer by doing things consistent with such acceptance. This is usually the case where contracts are made by conduct; in cases of unilateral offer; or in purchases at super-markets or similar retail outlets where verbal or written communication is uncommon and unusual.

In *Brogden v Metropolitan Railway Company [1877] 2 App Cas 666*, the defendant sent a draft contract to the claimant who made alterations to it and sent it back to the defendant, but the parties did not sign this altered contract. The claimant continued to supply coal to the defendants on the basis of the altered contract. The defendant later denied the existence of a contract. It was held that there was a contract between the parties on the terms of the altered agreement.

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5.6.1.4 Silence and acceptance

Silence of an offeree will not amount to acceptance unless otherwise agreed by the parties.

> In *Felthouse v Bindley* (1862) 11 CB (NS) 869, there were negotiations for the sale of a horse and the price was in issue. The claimant then suggested a price to the defendant in a letter and concluded: "If I hear no more about him, I consider the horse mine at £30.15 s." The defendant did not reply to this letter and subsequently sold the horse to another person. It was held that silence did not amount to acceptance, and hence there was no contract to sell the horse to the claimant.

5.7 CONSIDERATION

Consideration refers to something of value which a party to an agreement gives or gives up, or promises to give or give up in return for what he receives or was promised under the agreement. It is the price paid or promised to be paid by each party to the agreement. An enforceable contract cannot exist without consideration except in special circumstances. The general rule is that the law does not enforce gratuitous promises but bargains; moreover, appeal cannot be made to equity since equity does not aid a volunteer.

5.7.1 RULES OF CONSIDERATION

There are a number of rules governing consideration, and they are considered below.

Rule 1: Consideration must be sufficient, but does not have to be adequate

Sufficiency of consideration means that what is given, given up or promised must have a monetary value. In *Thomas v Thomas* (1842) 2 QB 851, it was held that consideration must be "something which is of some value in the eye of the law". A promise to give something to another in return for their good behaviour, kindness, love, affection, etc. would not be enforceable for lack of consideration. Thus, in *White v Bluett* [1853] 23 LJ Ex 36, a son's promise to his late father to stop complaining about his allowances in return for the father's promise to forgo the debt the son owed him was not consideration since it had no monetary value. The son was bound to pay back the money to the father's estate.

That consideration need not be adequate means that what is given, given up or promised does not have to be equivalent in value to what one receives or was promised. A house of £1m may be bought for £100 if the owner is willing to sell it for that amount.

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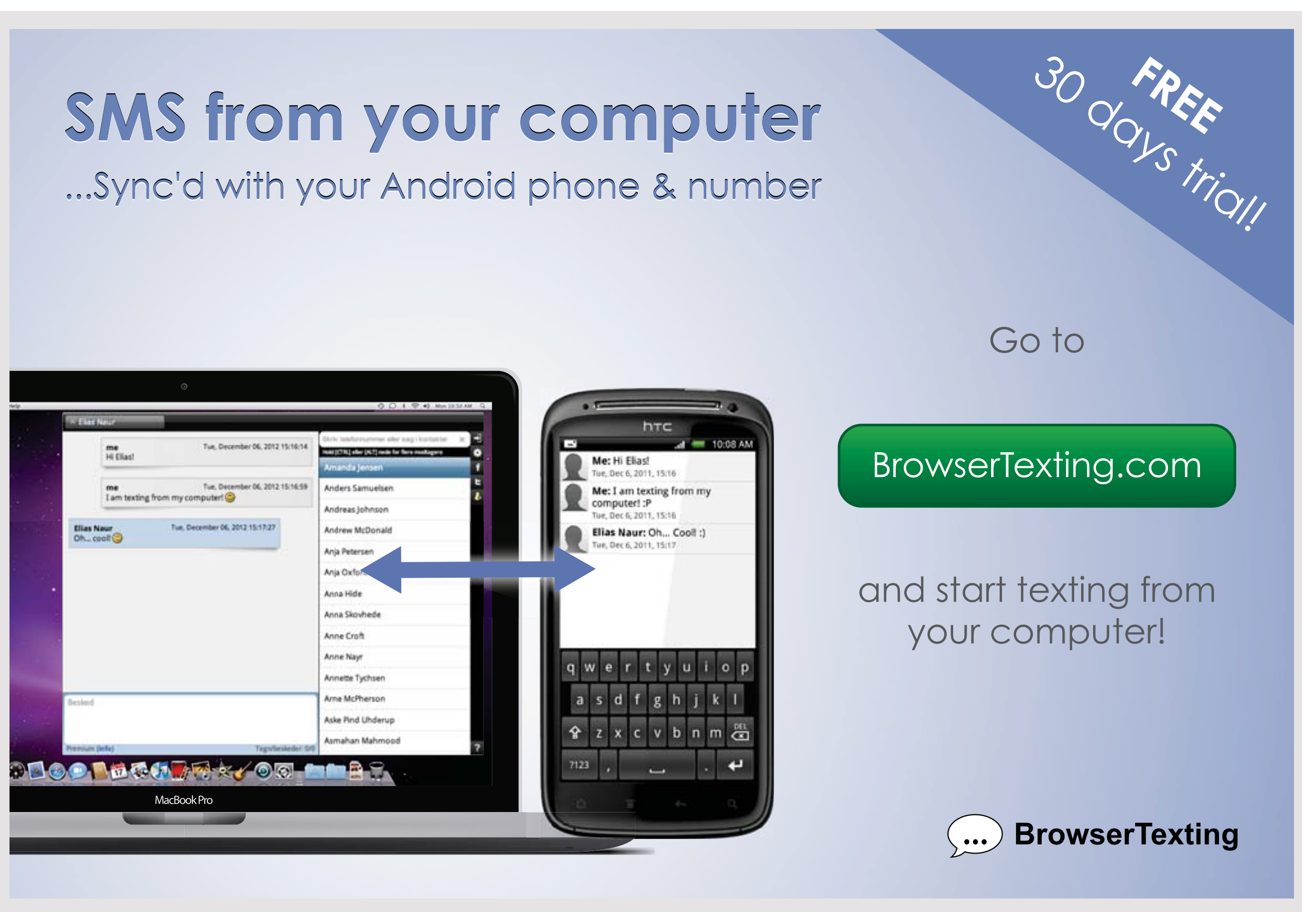
In *Midland Bank Trust Bank Co. Ltd v Green* [1981] AC 513, a man sold his farm worth £40,000 to his wife for £500. It was held that the £500 was sufficient consideration and that the court would not inquire into the adequacy of the consideration.

In *Chapell & Co Ltd v Nestle Co Ltd* [1960] AC 87, the defendant offered music records to the public for 1s 6d and three wrappers of its chocolate. It was held that the chocolate wrappers were part of the consideration. Although they had no intrinsic value, the wrappers were part of the defendant's offer and helped to advertise its chocolates, while in *Thomas v Thomas* [1842] 2 QB 851, it was held that a promise to rent a house for £1 a year was binding since the £1 rent was sufficient consideration.

The rationale for this rule is that since contracts are based on agreements between adults of sound mind, it is not the duty of the courts to re-negotiate contracts by enquiring into the benefits the parties have respectively agreed to have under it. However, some things would not be sufficient consideration for a contract. These include:



a) A promise to perform an existing contractual obligation

In *D and C Buiders v Rees* [1966] 2 QB 617, the claimant carried out some work for the defendant for an agreed fee of £482. After the work has been completed, the defendant refused to pay, belatedly raising complaints about the work. In desperation, the claimant agreed to take £300 in full satisfaction of the whole debt. The claimant subsequently sued the defendant for the balance of £182. It was held that the claimant could recover the money. The promise to accept £300 in full payment was not enforceable since the defendant furnished no consideration for it and took advantage of the claimant's financial difficulties.

However, if extra money was offered by a party to a contract to facilitate the speedy completion of the contract for his own benefit, that promise of extra money is enforceable. The speedy completion of the job would provide the consideration for the promise of extra money.

William v Roffey Brothers [*1990*] 1 All ER 512 – The claimant contracted to do some carpentry work for the defendant for the sum of £20,000. Subsequently it became obvious that the claimant would not be able to complete the job on time at that amount; and if the job was not completed on time, the defendant would suffer serious financial losses. The defendant promised to pay the claimant extra money if the work was done promptly, but later refused to pay it. It was held that the promise to pay extra money was binding. The promise was given for the defendant's own benefit and at his own initiative, and this amounted to consideration for the extra money to the claimant.

Moreover, if the value provided goes beyond the contractual duty, this extra value would be good consideration.

In *Hartley v Ponsonby* [1857] 7 EB 872, when 17 crewmembers out of 36 deserted a ship, the rest were promised additional money to remain on board. In a claim by one of these crew men who were not paid the extra money, it was held that the extra work they did to keep the ship in the sea was a sufficient consideration for the promise of extra pay.

b) A promise to perform a legal duty

Where a person performs a duty required of him by law, he cannot use the performance of that duty as a consideration for a contract.

Collins v Godefroy (*1831*) 1 B & Ad 950 – The claimant was subpoenaed (compelled to attend court) on the defendant's motion to give evidence for the defendant. The defendant subsequently promised to pay the claimant some money for giving evidence in his favour but later defaulted. It was held that the claimant was not entitled to the payment because giving evidence in the case was a legal duty.

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However, if the service provided goes beyond the normal duties under the law, the excess service would be sufficient consideration.

> In *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270, a mining company requested special police protection for their mines during a strike. It required police officers to be stationed in the mines for the period of the strike, a service for which the police charged £2,300. After the strike, the company refused to pay the bill. It was held that the company was liable since the service provided by the police was beyond their normal legal duties.

c) A promise to forgo a debt

A promise by a creditor to release a debtor from a contractual debt is generally not binding since the debtor provides no valuable consideration for the promise. This is referred to as the Rule in *Pinnel's Case* [1602] 5 Co. Rep. 117a. The rule states that the "payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum."

> In *Foakes v Beer* [1884] 9 AC 605, B obtained judgment against D for £2,090 and D asked for time within which to pay. B agreed to accept instalmental payment. When D had finished making the payments, B demanded interest on the money. It was held that B was entitled to the interest (judgment debts normally attract interest) since D did not provide consideration for B's agreement to accept instalmental payments.

There are however, some circumstance when promise to forgo a debt would be binding and enforceable. These exceptions include:

i. *Composition with creditors* – where a debtor reaches an agreement with a number of creditors that the latter would accept partial payment as settlement for the whole debt, the creditors are bound by the agreement.
ii. *Arrangement by third parties* – if a third party agrees to make a partial payment to the creditor as a full settlement of the debtor's outstanding debt, and the creditor accepts it, the creditor is bound by the agreement. To do otherwise would amount to fraud on the third party.
iii. *Early repayment of smaller amount* – If, at the request of the creditor, a debtor accepts to make an early payment of part of the outstanding debt as full settlement of the entire debt, the creditor cannot subsequently ask for the balance. The early repayment amounts to consideration.

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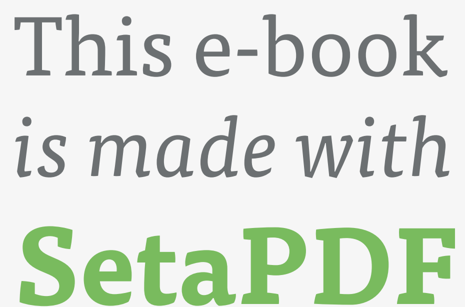
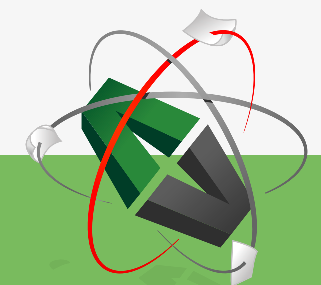
iv. *Promisory estoppel* – If a creditor promises to forgo the debt of a debtor, and this promise was intended to be acted upon by the debtor, and the debtor in fact acts upon the promise, equity may not allow the creditor latter to enforce payment of the whole debt. This is the Rule in Hightree's case:

Central London Property Trust v High Trees House [1947] 130 – During WWII, the landlord of a house promised in writing to reduce his tenants' rent whilst the war lasted. When the war ended, the landlord reverted to the old rent but the tenants resisted. It was held that the landlord was entitled to charge the full rent once the war ended but would not have been allowed to recover the full rent which had accrued during the war because he had promised to forgo it.

The following are the conditions for promissory estoppel:

- The promise to forgo the debt must be voluntary, clear and unequivocal – A promise secured by force or duress, or which is ambiguous will not give rise to estoppel.
- The promise must be intended to be binding and acted upon, and was in fact acted upon. A promise made in jest cannot be a ground for promissory estoppel.

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- It must be inequitable to allow the promisor to go back on the promise – Being an equitable remedy, it would not be granted where the circumstances make it unjust.
- The principle can only be used as a shield and not a sword; it is only a defence to an action and not a cause of action.

d) Past consideration

The thing of value provided by a party to the contract must be at or after the formation of the contract and not in the past. Something given in the past cannot be used as valuable consideration for a present contract because it was not given in exchange for the current promise received. This principle was illustrated in *Re McArdle* [1951] Ch 669:

> A mother refurbished her children's house. Subsequently, the children signed a document in which they promised to repay her some money from the estate "in consideration for her carrying out certain alterations and improvements to the property." The children failed to keep this promise. It was held that the refurbishment of the house had been completed before the promise to pay the money was made. The mother had therefore not provided any consideration and could not enforce the promise.

The rule on past consideration will not apply:

a) Where the past value was provided in a business or commercial setting at the instance of the other contracting party on the understanding that it would be paid for in the future.
b) Where a statute allows for it. For example, the *Bill of Exchange Act 1882, 27(1)* provides that valid consideration for a bill of exchange may be constituted by (a) any consideration sufficient to support a simple contract; and (b) an antecedent debt or liability.

Rule 2: Consideration may be executed or executory

Consideration is executory when it is to be provided in the future; it is executed when it is provided at the time the contract is concluded. If a person buys goods on credit and takes delivery of them the seller's consideration is executed while the buyer's consideration is executory.

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Rule 3: Consideration must be legal and possible

An illegal or impossible promise cannot furnish valid consideration. Thus, a promise to supply illegal or non-existent goods or substances would not be valid consideration.

Rule 4: Consideration must move from the promisee, but need not move to the promisor

This means that once a contractual party has provided or promised a valid consideration it does not have to be given to the other contractual party, but could be given to his nominee or beneficiary. The promisor or other contractual party is entitled to enforce the contract, although the nominee cannot, he not being a party to the contract (*Tweedle v Atkinson* [1861] *1 B&S 393*).

Rule 5: Consideration is not required for contracts made by deed

Consideration is not needed to enforce a promise or agreement if that promise or agreement is made formally by deed. A deed is a document in writing signed by the parties in the presence of witnesses and delivered, by which rights or benefits are conferred by one person to another. The preparation of the agreement in this way shows an intention to be legally bound in the absence of consideration.

5.8 INTENTION TO CREATE LEGAL RELATIONS

Not every agreement supported by consideration is enforceable as a contract. A contract will not exist unless the parties actually intend to form a legally binding agreement. In many cases the intention to form this relationship is clearly expressed. In some other cases, especially where the contract is not in writing, it may be implied. Yet in some other cases, it may not be easy to identify this intention. To help solve this problem, certain presumptions on intention have been established by the courts.

5.8.1 DOMESTIC, FAMILY OR SOCIAL AGREEMENTS

There is a presumption that agreements made in domestic, family or social circumstances are not intended to create a binding contract unless a contrary intention can be proved. Domestic and family agreements include those involving a parent and a child, a husband and wife, etc. Social agreements are those made between friends in non-commercial settings; or agreements made on social occasions. Such agreements are usually light-hearted and not legally enforceable, unless a contrary intention is clearly indicated, as demonstrated in the following cases:

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Balfour v Balfour [1919] 2 KB 571 – A husband who had to go abroad to work promised his wife, who had to stay back in England, an allowance of £30 a month. When the husband failed to keep up the payments, the wife sued him. It was held that there was no intention by the husband to enter into a binding contract with the wife.

Jones v Padavatton [1969] 2 All ER 616 – A mother promised to pay her daughter a monthly allowance if she moved to England and studied to become a barrister. The mother allowed her to live in a part of her house and to collect rent on the rest for her allowance. When both quarrelled, the mother took possession of the house whereupon the daughter sued for the allowance. It was held that both the promise to pay the allowance and the agreement to allow the daughter to live rent free and collect rent from the house were not enforceable since there was no intention in them to create legal relations.

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This presumption may however be rebutted by evidence that the agreement was in fact intended to be binding, as shown in the following cases:

> *Merritt v Merritt* [1970] 1 WLR 1121 – The defendant who left his wife to live with another woman reached a written agreement with the wife. In the agreement, the defendant agreed to pay the wife £40 every month to help in repaying the mortgage, and on completion of the mortgage repayment, to transfer ownership of the house to her. The wife paid off the mortgage but the defendant refused to transfer the house to her. It was held that there was an intention to create a legal relationship and hence there was a contract.

> *Simpkins v Pays* [1955] 3 All ER 10 – The defendant, her granddaughter and a lodger (the claimant) regularly contributed money to play a competition in a newspaper. On one occasion, they won the competition; the defendant collected the prize money but refused to pay the claimant. It was held that defendant was in breach of contract as there was an intention to create legal agreement in the arrangement.

5.8.2 COMMERCIAL AGREEMENTS

Agreements made in commercial or business circumstances are presumed to intend the creation of legally binding obligations unless contrary intention could be shown. Thus, there would be little doubt that promises made by a bank to a customer; or by a university to its students were intended to be taken seriously unless a different intention is clearly indicated. The presumption can be rebutted by strong evidence to the contrary by the party who claims that the agreement was not meant to be binding.

- Such phrases as "*subject to contract*," "binding in honour only," "a gentleman's agreement," when inserted in a commercial agreement might show that the agreement was not intended to be binding.
- A "*letter of comfort*" given by a parent company to its subsidiary's creditor is deemed not to create a binding obligation on the part of the parent company to pay the money in the event of default by the subsidiary.

> In *Kleinwort Benson Ltd. v Malaysian Mining Corporation* [1989] 1 All ER 785, a parent company wrote a comfort letter to a creditor of its subsidiary which read in part: "it is our policy to ensure that the business of MMC Metals Ltd is at all times in a position to meet its liabilities to you." The creditor later claimed the outstanding debt from the parent company. It was held that this letter did not create a binding contract to pay or guarantee the loan.

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- A *letter of intent* does not create a binding contract unless the contrary is indicated. A letter of intent is a letter suggesting that a person intends to enter into a contract with another in the future.
- *Collective agreements* between trade unions and an employers are deemed not to create legal relations unless they are in writing and clearly state that the parties intend to have a legally enforceable agreement – *Trade Unions and Labour Relations (Consolidation) Act 1992, s. 179.*
- *Claims in an advertisement* about a product do not also create a binding obligation in law. They are normally regarded as mere "puffs."

5.9 RELEVANT FORM

Since the repeal in 1954 of most of the provisions of the *Statute of Frauds 1677*, most types of contract do not require particular formalities. They may therefore be made orally, by conduct, or in writing or. However, once parties to a contract have put their agreement in writing, they are generally not allowed to adduce oral evidence to contradict the express wordings of that agreement. This is known as the "parole evidence rule". Certain contracts, though, are required to be in writing or to follow specific forms, while some must be by deed.

Contracts that must be by deed include those involving:

- Conveyance or transfer of legal estate in land or other real properties
- Legal leases over three years

Contracts that must be in writing include those:

- Contracts for the sale or transfer of interest in land
- Bills of Exchange ("an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinate future, a sum certain in money, to, or to the order of, a specified person, or to bearer." – s. 3 *Bills of Exchange Act 1882*). Examples of bill of exchange are cheques and bank draft.
- Bills of Sale ("a document intended to give effect to the grant of chattels (movable property) where the possession remains unchanged." – *Bills of Sale Act 1878*).
- Contracts for the transfer of company shares
- Consumer protection legislation is also increasing the need to put certain contracts in writing like loans, investment services etc. for example, consumer credit contracts must be in writing.

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Contracts that must evidenced in writing are:

- Contracts of Guarantee
- Employment contracts. Employers are required to give their employees written particulars of their employment within 2 months of the employment – *Employment Rights Act 1996*.

A contract that does not comply with the necessary formalities would not be valid or enforceable.

5.10 PRIVITY OF CONTRACTS

A contract is, as we have seen, a product of agreement between the persons involved in it. This agreement creates rights and obligations for the contractual parties. A person who was not involved in the contract cannot, generally, pursue any right or be made to fulfil any obligations under it. This is the doctrine of privity. Put another way, a contract is a private matter for those who are parties to it; a person cannot sue or be sued under a contract of which he is not a party.

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This doctrine is illustrated in *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd* [1915] AC 847:

> The claimant (who is a tyre manufacturer) sold tyres under a contract to a distributor. The contract stipulated that the distributor should not re-sell the tyres below the manufacturer's recommended retail price. It also stipulated that the distributor should impose the same price restriction on its customers. The distributor sold the tyres to Selfridge Ltd. who resold them to its customers below the recommended retail price. The claimant brought an action against them. It was held that the claimant could not enforce the price restriction against Selfridge Ltd. because it was not a party to it.

5.10.1 EXCEPTIONS TO THE PRIVITY RULE

There are a number of exceptions to the rule on privity of contract, including the following:

- *Statutory provisions* – If a statute provides otherwise, the privity rule will not apply. Thus under the *s. 1, Contract (Rights of Third Parties) Act 1999*, a non-party to a contract may enforce the contract if the contract expressly confers a benefit on the third party, or expressly states that the third party could enforce a provision of the contract. Therefore, a third party motorist can claim the benefits of an insurance contract of which he is not a party. In the same way, a spouse can claim on a life insurance contract made by the other spouse.
- *Trust relationship* – A beneficiary in a trust can enforce the provisions of the trust even though not a party to the trust deed. A person may also enforce a contract under an implied trust.
- *Agency* – A principal may sue under a contract between his agent and another party; similarly a person may sue the principal under a contract involving him and the principal's agent.
- *Assignments* – A person to whom contractual rights have been assigned by a party to the contract, can enforce it against the other party.
- *Guarantee* – A person who guarantees a contract between one party and another may be sued by the other party to the contract.
- *Restrictive covenants* attaching to real property may be enforced by a subsequent purchaser or tenant of the property even though he was not involved in the initial agreement.
- *Collateral contracts* – Where a separate collateral contract exists between the promisor and a third party, this can be used by the promisee to avoid the operation of the rules on privity. A collateral contract is one which is independent of, but subordinate to, another contract affecting the same subject-matter.

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5.11 CHAPTER SUMMARY

- A contract is a legally binding and enforceable agreement
- For an agreement to amount to a contract, it must satisfy some legal requirements, namely the existence of an offer, acceptance, consideration and intention to create legal relations.
- An offer may be unilateral or bilateral, but is different from an invitation to treat
- Acceptance is the unequivocal agreement to an offer and its terms. It must be communicated to the offeror, except if done by post. A purported acceptance that alters the terms of the offer is a counter-offer.
- Consideration must be present before an agreement could be considered a contract. It may be executed or executory; must be sufficient though not necessarily adequate; and it must not be past. Although it must move from the promise, consideration need not move to the promisor.
- Intention to create a legal relationship means that the parties to an agreement must wish to be legally bound by it. This is presumed to exist or not to exist in some situations.
- In addition to the above, some contracts must be made in a specified form; otherwise, they will not be valid.
- Subject to a few exceptions, contracts are only binding on the parties to it and only them could enforce them.

5.12 PRACTICE QUESTIONS

1. Define the term “contract”; how is a contract different from a mere agreement?
2. State and explain the requirements for a valid contract, explaining the importance of each of them.
3. Explain why the claimant succeeded in *Carlill v Carbolic Smoke Ball* Co even though she only acted on an advertisement by the defendant in a newspaper.
4. Explain the presumptions relating to intention to create legal relation and their rationale.
5. In January, Max, a motor dealer, entered an oral agreement with Benco Motors Ltd (BML) to supply him with 20 new Mercedes Benz 230 convertible cars by 30 April of the same year. Payment was to be made upon the delivery of the cars, which Max intended to sell during the summer. On 1 April, BML wrote to Max expressing regret that it could not fulfill the contract due to problems at the Mercedes Benz plant. Max was angry with BML because he had spent money on advertisements and refurbishment of his business premises in expectation of the new cars. He wrote a reply to BML insisting on the deliveries and threatening legal action if he did not get them. BML insists it has done nothing wrong since there was no binding contract between it Max.

   Advise the parties on whether there was a valid contract between them.

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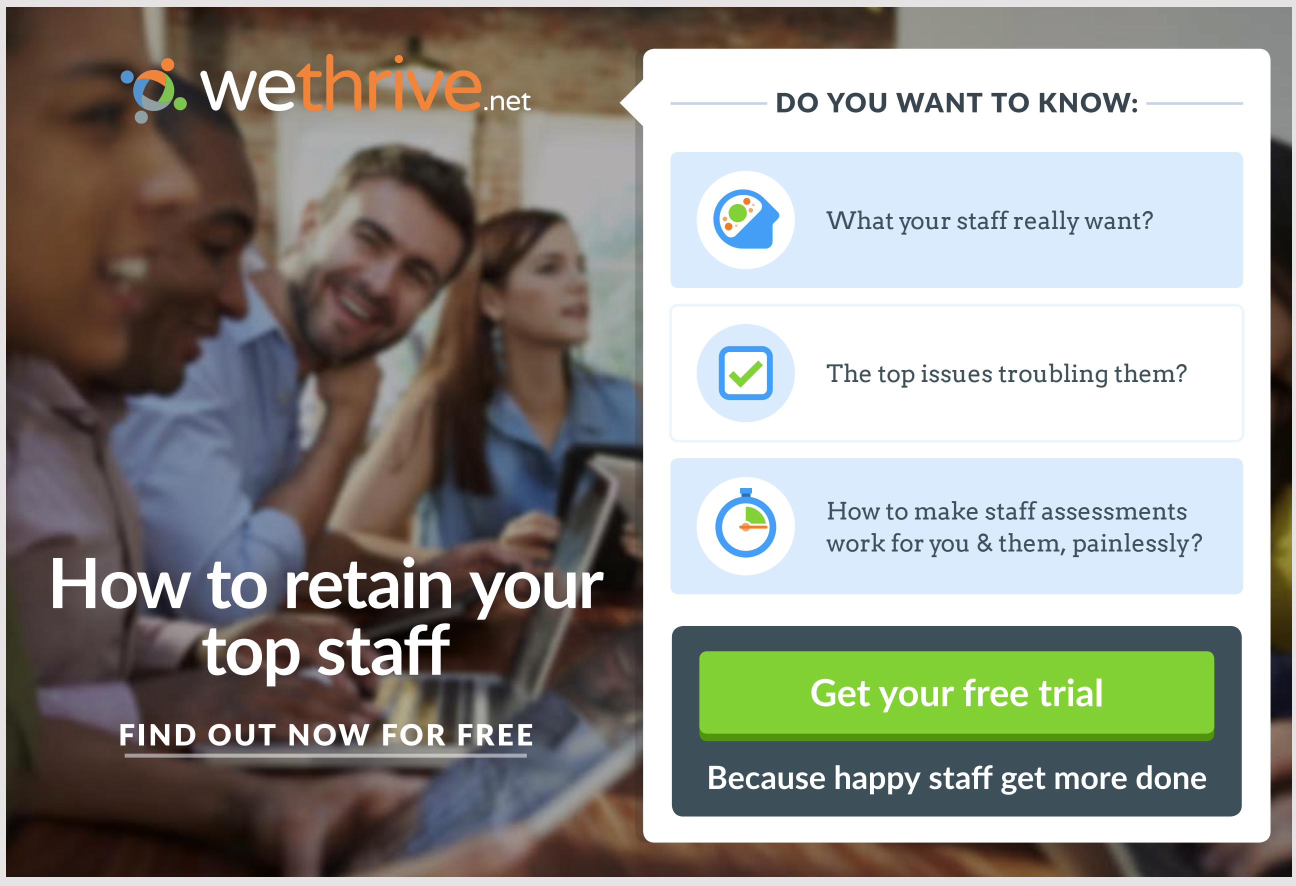
6 CONTRACT TERMS

6.1 INTRODUCTION

A contract, as we have seen, is a product of agreement between the parties involved. Usually the parties would agree on the important particulars of their transaction and the obligations of each of the parties. These important particulars and obligations would constitute the terms of the contract and form an integral part of it. Sometimes however, contract parties do not mention any or all of the particulars or obligations which they would want to be in their contract, or there may be no need to do so. In these cases, the terms may be deemed to have been included in the contract by law. Contract terms may therefore, be express or implied.



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6.2 LEARNING OBJECTIVES

At the end of this chapter, the reader should clearly understand:

- The meaning and types of terms
- When and how terms might be implied into a contract;
- The meaning of exclusion and limitation terms and why they might be used in a contract;
- The conditions that must be satisfied before exclusion or limitation clauses could be enforceable;
- The limitations on the enforceability of exclusion or limitation clauses in the context of consumer protection;
- How the courts have applied the law on the above matters to real cases
- How individuals and businesses could best use contract terms to protect their interests.

6.3 EXPRESS TERMS

These are terms that the contract parties have actually stated or mentioned in the contract, either orally or in writing. Not everything mentioned by the parties during their negotiations would be a term of the contract – some would be representations. Representations are statements made by parties in the course of their negotiation but which do not usually form part of the essential particulars or terms of the contract even though they may, at times, induce one of the parties to enter into the contract. Whether something said by the parties is a term of the contract depends on their intention and the circumstances of each case. If the contract is in writing, it is usually easier to identify the terms since these would also be in writing. If the contract is oral, determining whether a statement is a term may be more difficult and might be a matter of evidence. Generally:

- Particulars of an oral agreement that have been included in a written contract would be terms and those left out would not be.
- If an aspect of an agreement is necessary for the proper working of the contract such that the contract would not have enough meaning without that provision, that provision would usually be regarded as a term.
- If one party had clearly indicated that a particular thing is important to him, that thing would be considered a term, if it has been included in the contract.
- If a party would not have entered the contract but for a particular provision, that provision would be considered a term of the contract.

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In *Bannerman v White* (1861) 10 CBNS 844, the defendant entered into a contract with the claimant for the purchase of hops. Before the conclusion of the contract, the defendant insisted that he did not want hops that had been treated with sulphur. Five out of the claimant's three hundred fields where the hops were cultivated were treated with sulphur. Consequently, the defendant cancelled the contract. It was held that the demand not to treat the hops with sulphur was a term of the contract.

6.4 IMPLIED TERMS

These are terms not stated or mentioned by the parties but which are nevertheless read into, or presumed to be part of, a contract. Sometimes parties may not cover everything they need to insert in their contract or the law may provide that certain terms should be part of a contract whether the parties thought about them or not. Terms may be implied into a contract from usage or custom, by statute, or by the courts.

6.4.1 TERMS IMPLIED BY CUSTOM

A contract may be deemed to incorporate any relevant custom of the market or locality in which it was made. For this to happen, the custom must be firmly established and widely known to, and obligatorily followed by, the people in that line of business. In other words the custom or usage must be "notorious, certain, and reasonable", and not merely followed out of choice or courtesy. It is not necessary, however, that the parties in a particular contract actually know about the existence of a particular custom; it suffices that the custom or practice is so well known that an outsider who makes a reasonable enquiry cannot fail to be made aware of it (*Cunliffe – Owen v Teather & Greenwood* [1967] 1 WLR 1421).

In *Hutton v Warren* (1836) 1M and W 466, an agricultural tenant was given notice to quit a farm. However, there was a local custom which entitled the tenant in such circumstances to a fair allowance for seeds and labour. It was held that the local custom must be deemed to be part of the lease.

Custom or usage may not however imply a term into a country against the expressed will of the parties. In other words, the parties can displace a custom by express agreement.

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6.4.2 TERMS IMPLIED BY COURTS

A court may imply a term into a contract in order to bring out the presumed but unexpressed intention of the contracting parties. Such terms would be implied if it is necessary in order for the contract to make business sense; i.e. the contract would lack "business efficacy" if the term is not read into it. However, before the court would imply a term into a contract, it has to pass the "officious bystander" test. This means that the term will not be read into the contract unless it would be obvious to an un-interested bystander that the term should be in the contract. In other words, the term would be so obvious to any reasonable person without interest in the contract that there would be no point inserting it into the contract. This principle was demonstrated in *The Moorcock* [1889] 14 PD 64:

> The claimant's ship was moored on the defendant's wharf on the River Thames, which was a tidal river. Both parties knew that at low tide the ship would settle on the riverbed. There was no express term as to the suitability of the riverbed for mooring. The ship was damaged at low tide because of the nature of the riverbed at the time. It was held that a term was implied into the contract that the defendant should take reasonable care to ascertain that the riverbed would be fit for mooring since without such term the contract would lack business efficacy.

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The court may also imply a term into a particular contract as a matter of law or policy in that such a term is reasonably necessary as part of a particular type of contract.

> In *Liverpool City Council v Irwin* [1977] AC 239, the defendant had entered into tenancy agreement with the claimant for the occupancy of a 9th floor flat in a tower block. Nothing was said in the tenancy agreement about whose responsibility it was to maintain the common areas in the block of flats, namely, the lifts, staircases passageways, rubbish chutes, and the playground. Upon being sued for arrears of rent, the defendant counterclaimed that the claimant had failed in its implied duty to maintain and repair the common areas. It was held that a term was implied in the agreement that the claimant was under an implied duty to take reasonable care to maintain and repair the common areas (although it was found not to be in breach of this duty). That implication was necessary to make the contract complete.

6.4.3 TERMS IMPLIED BY STATUTES

Some legislations provide for certain terms to be part of certain contracts whether the parties mention it or not. The reason for such parliamentary intervention is usually, but not exclusively, to protect weaker parties to certain types of contract. For example, the *Consumer Rights Act 2015* (sections 9 to 17, 34–36, 41)[2] imply terms into contracts for the sale of goods by traders to consumers. Some of the terms implied are:

- That the goods must be of satisfactory quality;
- That the goods must be fit for the purposes for which they are bought;
- That if sold by sample, description or model, the goods must match those.
- That the trader has the right to sell the goods.

The Act also implies terms into consumer contracts for the performance of services. Some of the terms implied are that:

- The service would be performed with reasonable care and skill – s. 49(1)
- Information given by the trader about his business or service would be binding if it was taken into account by the consumer before or after entering the contract – s. 50(1)
- The consumer would pay a reasonable price for the service, where no price, or the mechanism for determining it, is not stated in the contract – s. 51
- The service would be performed within a reasonable time where no time or mechanism for deciding the time of performance was fixed – s. 52
- Any necessary and possible repeat performance of the service would be done within a reasonable time – s. 55

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Another example is the *Employment Rights Act 1996* that guarantees many rights for employees. Employers are not entitled to remove any of these rights without the consent of the employees. These rights would be implied into employment contracts.

6.5 NATURE OF TERMS

The effect of a contractual term depends on the nature of the term. A contractual term may be a condition, a warranty, or innominate.

6.5.1 CONDITIONS

Conditions are the major or fundamental terms in a contract. They are vital to the contract since they go to the heart of it. Breach of a condition entitles the innocent party to repudiate or cancel the contract.

> In *Poussard v Spiers & Pond* [1876] 1 QBD 410, an actress employed to play a leading role during an opera season missed the first week of the programme. The organiser employed a substitute performer to replace her and repudiated the contract. Upon an action by the actress for breach of contract, it was held that her failure to perform in the first week – the most important of the season – was a breach of condition which entitled the organisers to terminate the contract.

However, instead of repudiation, the parties may specifically agree on the remedies available for the breach of any term, including conditions. If this were so, the agreement of the parties would be respected. As the court has observed in *Bunge v Tradax* [1981] 1 WLR 711:

> It remains true…that the courts should not be too ready to interpret contractual clauses as conditions. Nonetheless, it is open to the parties to agree that, as regards a particular obligation, any breach shall entitle the party not in default to treat the contract as repudiated (Lord Wilberforce).

The question whether a term is a condition does not depend necessarily on the description given to it by the parties. Rather, it is a matter of fact depending on the deducible intention of the parties and the effect on the contract of any breach of the term. If a breach would deprive the innocent party of substantially the whole benefit he would have received under the contract, the term would be classed as a condition; otherwise, it would be a warranty.

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6.5.2 WARRANTIES

Warranties are minor terms in a contract. These terms do not go to the heart of a contract. A breach of a warranty may cause loss but it will not substantially affect the contract. Breach of a warranty will only give the innocent party the right to sue for damages – it will not give a right to repudiate the contract.

> In *Bettini v Gye* [1876] 1 QBD 410, a singer was contracted to perform during a season and the contract required her to attend rehearsals six days before the start of the season. The singer only attended the rehearsals for three days before the start of season, and the organisers cancelled the contract for breach. It was held that the requirement for pre-season rehearsals was a mere warranty which did not give rise to a right to cancel the contract but only to damages.

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6.5.3 INNOMINATE TERMS

These are terms which cannot easily be classified as a condition or warranty. They are intermediate terms which may be interpreted by the court as conditions or warranties depending on the circumstances. Whether they are conditions or warranties will depend on the effect of their breach; and this is decided by the court on a case-by-case basis. Classification of terms as conditions or warranties are relatively easy where the contract is simple and the terms are clear-cut. In some contracts, however, especially commercial ones, the obligations of the parties might too complex for such interpretation. The use of innominate terms gives the courts flexibility to consider the relative positions of the parties and provide a remedy that is appropriate and justified by the breach. The following cases illustrate the point.

> *Hong Kong Fir Shipping Co Ltd v Kawasaki Keishen Kaisha* [1962] 2 Q.B. 26 – A merchant vessel was chartered for two years and was described as being 'in every way fitted for ordinary cargo service'. After the voyage started, it was found that the engine room crew were not competent and that the engines were in a state of disrepair. It took 20 weeks to repair the engines before the voyage could continue. The charterers repudiated the contract on the ground that the un-seaworthiness of the ship was a breach of condition. The ship owners contended that it was only a breach of warranty. It was held that the term was neither a condition nor a warranty but an 'intermediate or innominate' term. Since the breach did not deprive the defendants of substantially the whole benefit of the contract, they were not entitled to repudiate the contract.

> *The Hansa Nord* [1976] Q.B. 44 – The claimants, a Dutch company agreed to buy a large quantity of Florida citrus pulp pellets for use as animal feed from the defendants at the price of £100,000. The defendants promised that the goods would be shipped in "good condition" and would be of satisfactory quality. When the cargo arrived at Rotterdam, it was discovered that some of the goods had deteriorated due to overheating although the goods in the second hold were satisfactory. Meanwhile, the price at which the pellets could be re-sold had fallen. The claimants rejected the entire cargo, but subsequently re-purchased it for £30,000 through their agent. The question was whether the claimants had the right to repudiate the contract. It was held that there was no breach of the requirement of satisfactory quality. The term 'in good condition' was classified as an intermediate term. The consequences of the breach did not go to the root of the contract as the buyers still had the substantial benefit of the contract.

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Although this approach may be criticised on the ground that it might introduce uncertainty in a contract, the courts would mostly use it where the status of a particular term is not very clear; where the consequences of breach were not clearly stated; or where the effect of the breach is not sufficient to justify a repudiation of the contract.

> Thus, in *The Mihalis Angelos* [1971] 1 QB 164, a clause in a charter contract that stated that the vessel "was expected ready to load" about 1 July 1965, but was only ready on 23 July, was a breach of condition, since the ship owners could not reasonably have expected it to be ready as contracted.

6.6 EXCLUSION OR LIMITATION TERMS

These are contract terms that seek to exclude or limit the liability of one of the parties for failure to perform some or all of its obligations under the contract. It is sensible to use these types of terms to control exposure to liability in the event of unexpected breach of contract. The use of these clauses rests on the basic assumption that contracts are products of agreements and that parties to a contract are equal. However, in many situations, the parties do not contract on an equal footing, with the effect that an unfettered use of exclusion clauses could work unfairly against a party. For example, where a monopoly, near-monopoly or cartel operates, those who deal with them hardly do so from a position of equality. In addition, an individual dealing with a large multinational company could hardly be said to be an equal contracting party with that company. Because of inequality in bargaining power in some contracts, the law tries to regulate the use of exclusion or limitation terms or clauses. Now in order for an exemption clause to be valid:

- It must be incorporated into the contract
- It must cover the risk which has arisen
- It must not be unfair

6.6.1 EXCLUSION CLAUSES MUST BE INCORPORATED INTO CONTRACT

To incorporate an exclusion clause into a contract is to make it a part of the contract. This may be by signature, notice, or course of dealing.

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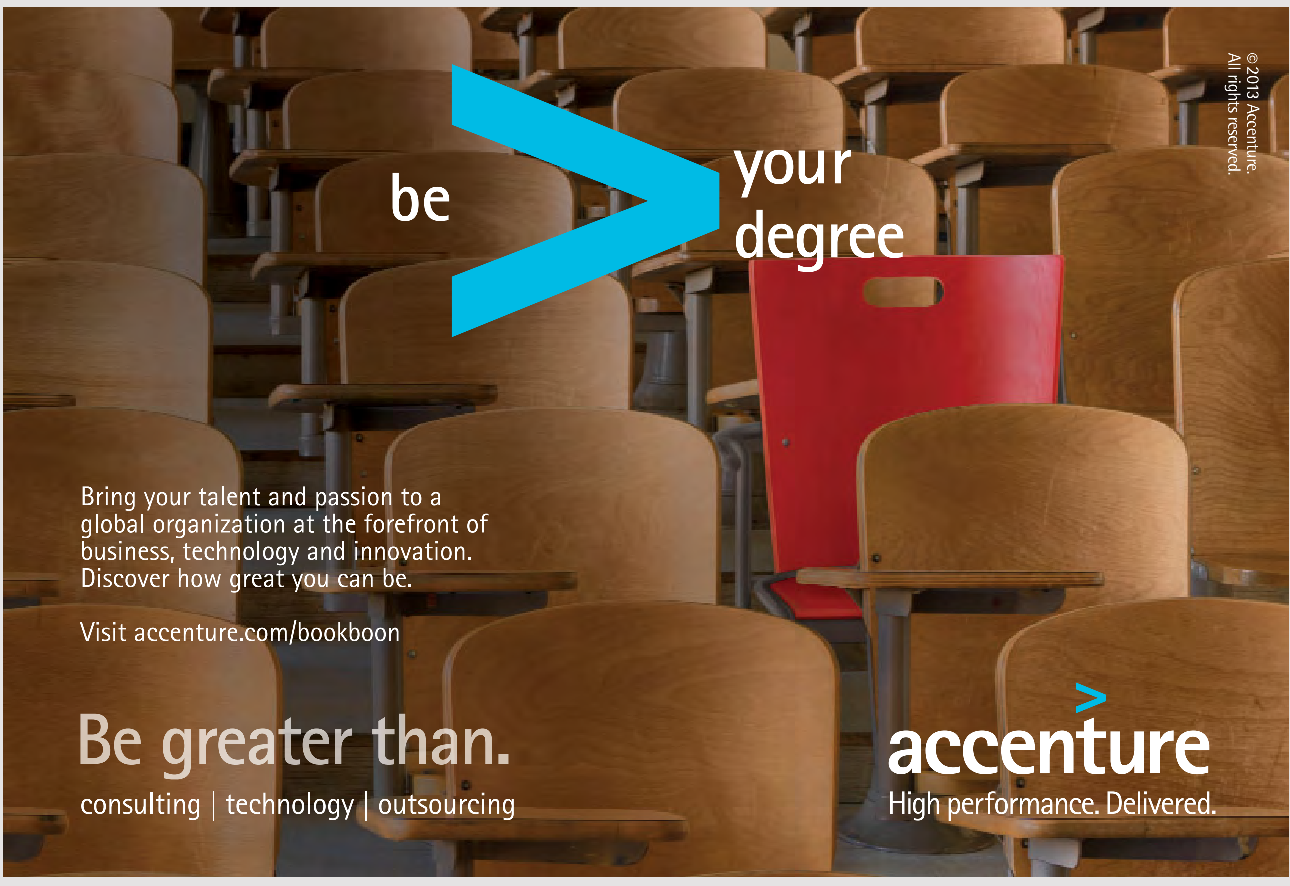
6.6.1.1 Incorporation by signature

In general, if a person signs a contractual document knowing its contractual nature, he will be bound by all of its terms even if he did not read it.

> In *L'Estrange v Graucob* [1934] 2 KB 394, the owner of a modest cafe bought a cigarette vending machine. She signed a sales agreement that contained in small print a clause exempting the seller from any liability if the machine did not work properly. The machine did not work properly. It was held that the seller could rely on the exemption clause.

This rule will, however, not apply if the signature was secured by fraud, misrepresentation, duress or other legally inappropriate means.

> In *Curtis v Chemical Cleaning & Dying Co.* [1951] 1KB 805, the claimant took her white sequined and beaded wedding dress to the defendant for cleaning. She was given a "receipt" by the defendant's shop assistant to sign. Before she signed, the defendant asked what the document was about and was told that it merely exempted the defendant from liability for any damage to the beads and sequins. The document in reality contained an exclusion of liability for "any damage however caused." The dress was returned stained. It was held that the exclusion was not applicable because the defendant had misrepresented the content of the document to the claimant.



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6.6.1.2 Incorporation by notice

An exemption clause may be part of a contract if notice of it in another document or place is given to the other party who had not signed it. For incorporation to take place by notice, the other party must either know that the exclusion clause was part of the contract, or the party seeking to rely on it must show that he took all reasonable steps to bring its terms to the attention of the other party as part of the contract negotiation. A notice containing exclusion clauses would be regarded as a contractual document if the other party knew the notice was meant to be part of the contract or if a reasonable person would have known that it was meant to be so.

> In *Chapelton v Barry U.D.C. (1940) 1 KB 532*, a man hired a deck chair from the Council at the seaside for which he handed over a sum of money and for which sum he was given a ticket. On the back of the ticket was a statement that the Council was not liable in the event of an accident or damage arising "from the hire of the chair." The chair was defective and injured the man when he sat on it. When he sued for damages, the council relied on the exclusion clause. The court held that a reasonable person would have viewed the ticket as a mere receipt evidencing payment and not a contractual document; the exclusion clause was therefore not valid.

Whether or not reasonable steps have been taken to bring the clause to the attention of the other party is a question of fact depending on the circumstances of each case.

> In *Parker v South Eastern Railways* (1876–77) LR 2 CPD 416, the claimant left a bag at the defendant's left luggage room and paid £10 for the service. The claimant received a ticket on the back of which was a clause limiting the company's liability to £10. The bag disappeared from the left luggage room and the claimant sued for the value of the bag and its contents which were more than £10. The defendants sought to rely on the exclusion clause. It was held that the defendant had not shown that it took all reasonable steps to bring the exclusion clause to the knowledge of the claimant; it could not therefore rely on it.

The more serious or unusual an exclusion clause is, the more serious the steps required to bring it to the notice of the individual affected by it would be. In such circumstances, prominence should be given to the clause to make it clearly visible, e.g. by the putting it on the front of the document, in large print or different colour of ink. Simply burying it in an obscure corner of the contract may not suffice as shown in *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1989] QB 433.

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In that case, a loan of 47 photo transparencies was taken from a library by the claimant who had used the library on a previous occasion. Conditions printed on the contract included a 'holding fee' of £5 per day per transparency if not returned within 14 days." On return after four weeks, the claimant was given a bill for over £3,750. The court held that such an onerous condition must be brought fairly and reasonably to the attention of the other party if it was to apply. Since this had not been done by the defendant, the condition was not incorporated into the contract. The court substituted a reasonable charge of £3.50 per transparency per week.

Any notice of the terms must be given during negotiations, not after the contract has been concluded. A notice given after the contract had been made would be too late and would not form part of the contract.

In *Olley v Marlborough Court Ltd. [1949] 1 KB 532*, a husband and wife booked into a hotel at the reception desk and went to their room. On the wall of the room was a notice excluding liability for articles lost or stolen unless handed to the manager for safe custody. The wife's fur coat was subsequently stolen from the room. It was held that the hotel could not rely on the exclusion clause since it was brought to the notice of the guests only after they had concluded the contract.

A similar judgment was reached in *Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686.*

The Claimant drove his car into the defendant's automated car park. At the entrance, he put money into a machine which issued him a ticked that contained the time and other words. The claimant did not read the words on the receipt before putting it into his pocket. The ticket, in fact, contained a statement that it was issued subject to conditions displayed on the premises. The claimant did not see these conditions which not only excluded liability for damages to cars but also any injuries to customers. The claimant was injured in an accident when he returned to the car park. The defendant was held liable for the accident. The exclusion clause was not valid since it was not brought to the notice of claimant before the contract was concluded (which was at the moment the machine issued the receipt).

It is not necessary that a full set of terms be displayed or notified to the other party; it might be enough to make sufficient reference to the terms and give the other party the opportunity to consult them before making entering into the contract (e.g., "for terms and conditions see our brochure"). Where this happens and the other party has access to the brochure before the conclusion of the contract, he might be deemed to have 'constructive' notice of the terms even if he did not bother to read them.

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6.6.1.3 Incorporation by course of dealing

Where parties to a contract have been involved in previous transactions, the courts may imply an exclusion clause in their contract if such clause has been part of their dealings. The clause may also be implied where, although there had not been a previous dealing between the particular parties, they are in the same line of business and such exclusions are customary in that business.

> In *Spurling v Bradshaw* [1956] 2 All ER 121, the defendant delivered barrels of orange juice to the claimant's warehouse for storage. A few days later the claimant sent him a document, according to their previous practice, acknowledging receipt of the goods and referring to the terms and conditions on the back of the document. One of the conditions exempted the claimants from liability for "any loss or damage occasioned by negligence, wrongful act or default" of the claimant. When the defendant came to collect the barrels, he found them empty and therefore refused to pay for the storage. On being sued by the claimant, the defendant counter-claimed for negligence, in response to which the claimant relied on the exclusion clause. It was held that the exclusion clause was valid because it was the usual course of dealing with the parties.

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The above case may be contrasted with *McCutcheon v David MacBrayne* [1964] 1 All ER 430.

> The claimant shipped a car on the defendant's ship that sank due to the defendant's negligence and the car was written off. The defendant relied on exclusion clauses on their printed conditions of carriage, which were also displayed at the premises. Reference was made to these conditions on the receipt issued to the claimant. Although the defendants had at times in the past asked the claimant to sign a 'risk note' that included the conditions, the practice was not regular and the claimant was not given the 'risk note' on this occasion. It was held that the exclusion clauses were not applicable since they were not incorporated into the contract; there was no course of dealing sufficient to make it part of the contract.

6.6.2 EXCLUSION CLAUSE MUST COVER RELEVANT RISK

Interpreting an exclusion/ or limitation clause involves a determination of the precise meaning of the term to see the eventualities it actually covers. In doing this, the court would examine the language used and the circumstances of the case. The main rules of interpretation used are (a) the *contra proforentem* rule and (b) the main purpose rule.

6.6.2.1 The Contra-proferentem rule

The *contra proferentem* rule rests on a strict construction of the exclusion clause. It requires that any ambiguity or other doubt in the contractual term must be resolved against the person who is seeking to rely on it.

> In *Andrews Bros Ltd v Singer and Co* [1934] 1 KB 17, the claimant contracted to buy some "new Singer cars" from the defendant. An exemption clause in the contract excluded "all conditions warranties and liabilities implied by statute, common law or otherwise." One of the cars supplied was a used car and the plaintiff sued. The defendant pleaded the exemption clause. It was held that the term 'new Singer car' was an express term; therefore the defendant was not protected by the exclusion clause that covered liability for implied terms.

A similar judgment was delivered in *Baldry v Marshall* [1925] 1 KB 260.

> The claimant asked the defendant (car dealers) for a car suitable for touring purposes and the defendants recommended a Bugatti which the claimant purchased. The sale contract contained a clause excluding the supplier's liability for "any warranty…statutory or otherwise." The car proved unsuitable for touring purposes. It was held that the defendant was liable for breach of contract since the clause only protected against the breach of a warranty whereas the term breached was a condition.

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The *contra proferentem* rule also requires that very clear words be used before an exclusion could be made for liability in negligence; either by explicitly mentioning negligence or using words wide enough to cover liability for negligence. The following cases provide an illustration.

> *White v John Warwick & Co* Ltd [1953] 2 ER 1021 – The plaintiff hired a tradesman's cycle from the defendants. While the plaintiff was riding the cycle, the saddle tilted forward and he was injured. He sued the defendant. The written agreement stated that, "nothing in this agreement shall render the owners liable for any personal injuries." It was held that the clause did not protect the owners. They were under strict liability as well as negligence liability. The somewhat vague wording of the clause was sufficient to exclude their strict liability but not their negligence liability.
>
> *Hollier v Rambler Motors* [1972] 2QB 71 – The claimant's car was destroyed in the garage of the defendant where it has gone for repairs due to the defendant's negligence. There was a term in the contract that, "the company is not responsible for damage caused by fire to customers' cars on the premises." It was held that the exemption was ambiguous and inapplicable since it covered fires caused by defendant's negligence and those not caused by their negligence.

The above cases may be contrasted with *Alderslade v Hendon Laundry [1945] 1 KB 189*.

> The defendants contracted to launder the plaintiff's handkerchiefs. The contract limited their liability for lost or damaged articles to 20 times the laundering charge. The handkerchiefs were lost through the defendants' negligence. The Court of Appeal held that the limitation clause must apply, because if it did not apply to liability for negligence it would "lack subject-matter;" there was no other liability it could apply to since the laundry did not have strict liability.

6.6.2.2 The main purpose rule and fundamental breach

The main purpose rule requires that in constructing an exemption clause there is a presumption that it is not intended to defeat the main purpose of the contract. However, a contractual term may seek to exclude or limit liability for a breach of the main purpose of the contract, i.e., fundamental breach. The current position on exclusion of liability for fundamental breach of contract under the common law is that it is a question of interpretation whether liability for fundamental breach was meant to be excluded. If the words are specific enough and unambiguous, the term would be upheld, since how parties to a contract decide to allocate their risks is entirely up to them.

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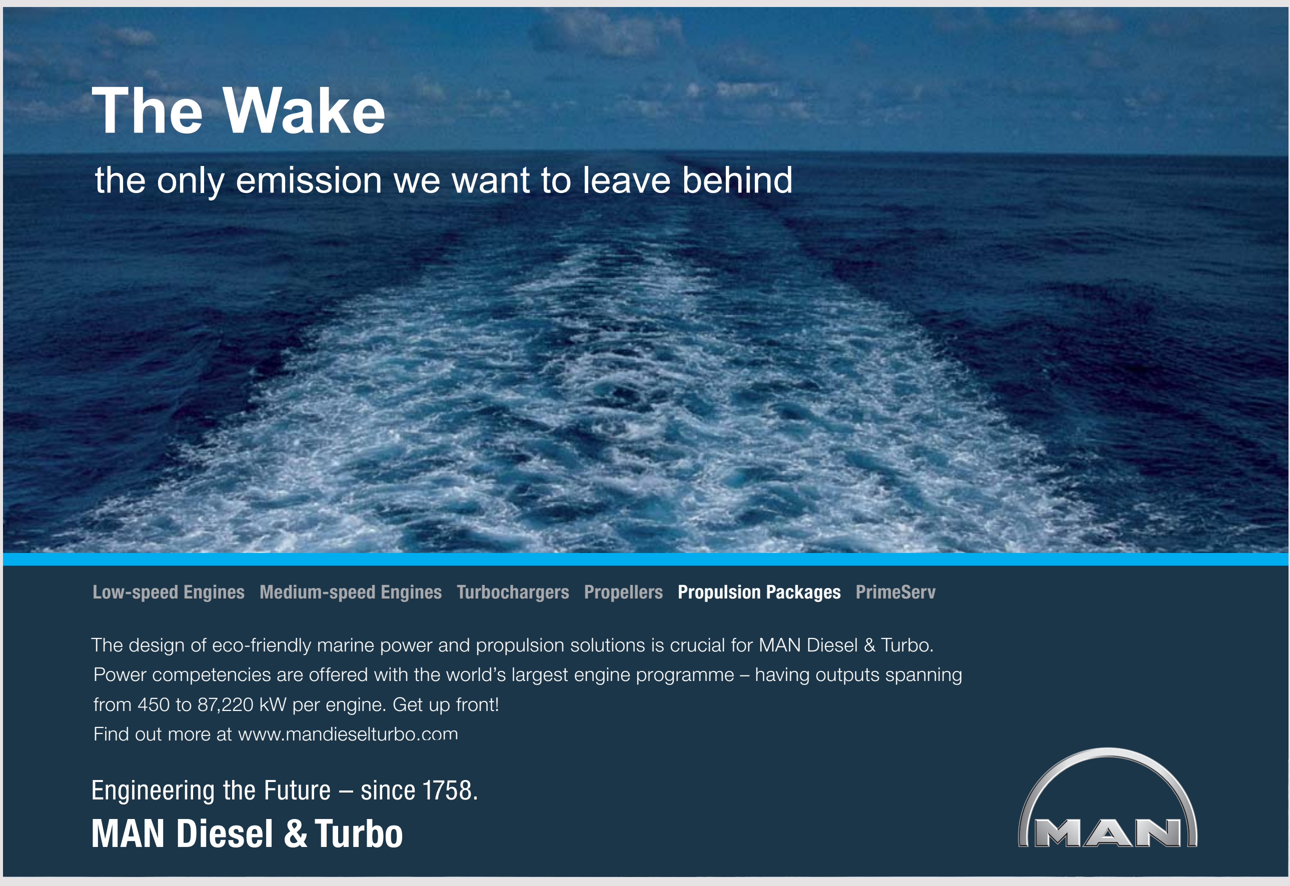
Photo Productions Ltd v Securicor Transport Ltd [1980] AC 827 – P had a contract with the defendant for the provision of security presence at their factory. On one occasion, an employee of the defendant started a small fire, which got out of control and destroyed the factory causing damages of over £600,000. In court, the defendant relied on a clause in the contract which stated that "under no circumstances" were they "responsible for any injuries, act or default by any employee…unless such act or default could have been foreseen and avoided by the exercise of due diligence" by the defendant. There was no suggestion that the defendant had been negligent in hiring the employee.

The House of Lords (overruling the Court of Appeal which had rejected the exclusion clause on the ground of fundamental breach) held that the exclusion clause was valid. According to the court, "the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract."

For contracts where both parties are companies or businesses, it remains a matter of construction if liability for fundamental breach has been excluded. However, in consumer contracts, exclusion or limitation of liability for fundamental or any breach of contract by a business may be invalid for unfairness under consumer protection legislations.



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6.6.3 EXCLUSION CLAUSE MUST BE FAIR

Statutes restrict the ability of companies or businesses to employ unfair terms, including those in the form of exclusion or limitation clauses, in contracts. Notable examples are the *Unfair Contract Terms Act (UCTA) 1977* and the *Consumer Rights Act 2015*.

6.6.3.1 The Unfair Contract Terms Act (UCTA) 1977

This Act deals with exemption and limitation clauses in respect of breach of contract or breach of duty of care in respect of those who deal with businesses both as consumers and as non-consumers. It renders some exclusion clauses totally void and unenforceable and others enforceable only if they satisfy certain guidelines based on 'reasonableness.' "Business" includes trading, professions, and the activities of any government department or local or public authority. A person deals as a consumer if:

- He does not make, or hold himself out as making, the contract in the course of business; and
- The other party makes the contract in the course of business; and
- The goods are of a type usually supplied for private use or consumption (in the case of a contract for the supply of goods)
- A person does not deal as consumer if he buys goods in a public auction where he has an opportunity to examine the goods (s.12).

Invalid terms under the Act, include those excluding or limiting liability for:

- death or personal injury arising from negligence;
- death or injury caused by the production or distribution of defective goods;
- losses or damages suffered due to defects in goods or the negligence of the manufacturer where the goods are supplied for private use or consumption;
- breach of implied terms as to title, goods' satisfactory quality, fitness for purpose, or correspondence with description or sample in consumer contracts.

Terms valid only if reasonable are those:

- excluding or limiting liability for negligence liability involving no death or personal injury
- excluding or limiting liability for breach of consumer contracts, or non-consumer contracts based on a party's standard terms;

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- excluding or limiting liability (in non-consumer contracts) for breach of implied terms as to goods satisfactory quality, fitness for purpose, or correspondence with description or sample;
- excluding or limiting liability (in non-consumer contracts) for any breach of contract for the sale, transfer or hire-purchase of goods;
- excluding or limiting liability for misrepresentation
- requiring indemnity for losses to another party due to negligence or breach of contract;

The burden of proving reasonableness is on the party seeking to rely on it; and the test is objective. The court considers what a reasonable person who is not interested in the contract would think sensible. In determining whether a term was reasonable, the court would generally consider, among other things:

- whether the term was reasonable and fair to be included having regard to the circumstances of the transaction;
- In the case of a notice, whether it would be fair and reasonable to allow reliance on it, having regard to all the circumstances of the transaction;
- whether and to what extent the other party could meet any liability imposed by the term and their ability to take insurance cover with respect thereto;
- the relative bargaining strength of the parties to the contract;
- whether any inducements were given to the consumer and whether he had an opportunity to enter into a similar contract with someone else;
- whether the customer knew or ought reasonably to have known about the existence of the exclusion clause;
- whether compliance with any condition at the time of the contract would have been practicable; and
- whether the goods were manufactured or adapted to the order of the customer (s. 11 and Schedule 2).

In *St. Albans City & District Council v International Computers Ltd* [1996] 4 All ER 481, the court had to determine the reasonableness of a term that restricted liability for the supply of faulty computer software to £100,000. The defendant was insured against losses to the amount of £50 million, while the faulty software had caused the claimant to lose more than £1 million. It was held that the exclusion clause was unreasonable given the huge size of the defendant's business and its superior bargaining power.

The provisions of the UCTA cannot be excluded, either by contractual provision (s.10); imposing conditions, restrictions or penalty for a consumer's reliance on the Act (s13); nominating a foreign law to govern the transaction (s 27(2)).

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Consumer contracts excluded from the Act are:

- insurance contracts
- contracts for the sale, transfer or termination of interest in land
- contracts for the creation, transfer or termination of interest in intellectual properties like patent, trademark, copyright, etc.
- contracts for the formation or dissolution of a company or the constitution, rights or obligations of members
- contracts for the creation or transfer company securities
- international contracts for the supply of goods (Sch. 1).

In the above contracts, the parties would normally be able to look after their contractual interests, or employ professional help thereby equalizing the bargaining powers of the parties.

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6.6.3.2 The Consumer Rights Act 2015

The provisions of the *Consumer Rights Act (CRA) 2015* relate to all unfair contract terms, including exclusion clauses in consumer contracts. Non-consumer contracts and contracts of employment or apprenticeship are excluded from the application of the Act (s. 61). Under the act, unenforceable terms include those removing implied terms, terms that are not transparent, and terms that are unfair.

6.6.3.2.1 Terms removing implied terms

Any terms in contracts for the sale of goods or digital contents between traders or business and consumers purporting to remove or restrict the rights or remedies given to consumers under the Act would not be binding on the consumer – s. 31(2), s. 47. Similarly, any notices in consumer contracts for the supply of services by traders or businesses purporting to remove any implied terms would not be binding – s. 57. These types of exclusion or restricting terms would be unfair and unenforceable.

The terms implied into consumer contracts under sections 9 to 17 include, the requirement that goods must be of satisfactory quality; must match any description, model or sample, or digital content; and must be fit for purpose. Others are that the goods would conform to the contract; that the seller has the right to sell and transfer possession and ownership to the buyer; and that risk would not pass to the buyer until the goods have been delivered to him or his nominee. There is also an implied term that that the seller must deliver the goods to the buyer on time, unless the parties agree on a specific delivery time.

The terms implied in consumer contracts for the supply of services include those requiring that the service would be performed with reasonable care and skill; and that information given about the trader or service would be binding. Others are that the service would be performed within a reasonable time; and that the consumer would pay a reasonable price for the service if no price was fixed in the contract and the contract did not state how it would be determined – see sections 49–52.

Contracts for the supply of services to non-consumers and contracts of employment and apprenticeship are not covered by these provisions – s.48(1) and (2).

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6.6.3.2.2 Non-transparent terms

Traders and businesses must ensure that written terms or notices in consumer contracts for the sale of goods or supply of services are transparent. This means that they must be in plain and intelligible language (s. 68). A non-transparent term or one which is unintelligible would not be fair. If a particular term were to be capable of more than one meanings, the meaning most favourable to the consumer would be adopted (s. 69).

6.6.3.2.3 Unfair terms

Unfair terms or notices in consumer contracts will not be binding on consumers unless they choose to rely on them (s. 62(1) & (3)). The rest of the contracts may remain binding only if they are capable of operating without the unfair terms. Under S. 62(4) (6), a contract term or notice would 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." In determining whether a term or notice is indeed unfair, the court will consider the nature of the subject matter of the contract, all the circumstances existing when the term was agreed, and all of the other terms of the contract or of any other contract on which it depends (s. 62(5)(7)). A non-exhaustive list of unfair terms are included in Schedule 2 of the Act. These are similar to the ones listed under the UCTA 1977.

> In *Director General of Fair Trading v First National Bank* [2001] 3 WLR 1297, the court had to decide if a term in a loan contract term was unfair. The contract had stipulated that if the borrower defaulted in the payment of his loan and the bank obtained judgment against him, the contractual rate of interest would continue to apply until the debt is fully paid. The House of Lords held that this term was not unfair within the meaning of the *UTCCR 1999* (whose definition of unfair was similar to the one in *CRA 2015*). According to the court:
>
> > Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position, or any other factor listed or analogous to those listed in Schedule 2 of the Regulations.

6.6.3.2.4 Enforcement

The Competition and Markets Authority (CMA), the Office of Communications, the Consumer association, the Information Commissioner, among other regulators, are responsible for enforcing the provisions of the Act upon the complaint of consumers (s. 70).

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6.7 CHAPTER SUMMARY

- Terms are particulars of a contract and designate the rights and obligations of the parties.
- Terms are different from representations which are not part of a contract.
- Contract terms may be express or implied and may classified as conditions, warranties or innominate depending on their seriousness and the effect a breach would have on a contract.
- Terms may be implied into a contract by custom, course of dealings, the court or statute.
- Terms excluding or limiting liability for breach of contract are called limitation or exclusion clauses.
- Before a limitation or exclusion clause could be valid and enforceable, it must be incorporated into the relevant contract, must cover the relevant risk and must be fair, in that it does not contravene the law on consumer protection.

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6.8 PRACTICE QUESTIONS

1. Explain and discuss the following:
   i) Terms and representations
   ii) Express and implied terms
   iii) Conditions, warranties and innominate terms

2. Explain why and how terms may be implied into a contract
3. Ashley, a staff of the Oldcastle University parked her car in the university's car park. She pays a monthly fee of £30 to use the car park. At the entrance of the car park and in the four corners of the premises were signs stating that all cars are parked at owner's risk; and that the university would accept no liability for any damage to, or loss of, any cars parked at the car park.

   When Ashley returned to her car at the end of work, she discovered that it had been vandalised and her laptop stolen. As Ashley was walking to the security office to report her car's damage, debris from the construction of a new faculty building fell on her head, causing her serious injury. Citing the signs in and around the car park, the university denies liability for Ashley's damaged car, her stolen laptop, and her injury.

   Advise the parties on their potential claims and liabilities in the law of contract with respect to these events.

4. Belinda booked and paid for a room at Sunrise Holiday Inn Oldcastle over the Internet for a 5-day stay. She arrived at the hotel one week later, collected the key to her room from the reception and checked in. Belinda usually came to Oldcastle every Christmas and usually stayed at that hotel. On the wall of her room (as in every room in the hotel) was a notice stating that the hotel would not be liable in any way for guests' properties lost or stolen from the room, and that responsibility for the security of those properties was entirely on the guests.

   Belinda's expensive diamond wedding ring was stolen from the room when she went out shopping. She reported the theft to the hotel management but the hotel, citing the above notice, denied any liability. Belinda is now considering legal action against the hotel for damages for breach of contract.

   Advise the parties on their rights and liabilities in the law of contract.

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7 DISCHARGE OF CONTRACT

7.1 INTRODUCTION

To discharge a contract means to bring the contractual obligations of the contracting parties to an end. Once a contract is made, it is usually expected that the parties will perform it to the full extent stipulated. This however is not always the case as a contract may be discharged even though performance, full or partial, has not been done. The four ways in which a contract may be discharged are performance, agreement, frustration and breach.

7.2 LEARNING OBJECTIVES

By the end of this chapter, it is expected that readers should be able clearly to understand and explain:

- The meaning of discharge of contract and it significance
- The rules governing full performance and partial performance of a contract;
- How termination by agreement works;
- The meaning and effects of frustration and how parties could protect themselves from it;
- The meaning, types and consequences of breach of contract;
- The different remedies available for breach of contract, the principles governing them, their importance, when they could be awarded and the limitations to their use;
- Factors that could diminish the damages awarded to a claimant for breach of contract.

7.3 DISCHARGE BY PERFORMANCE

A contract would be discharged by performance if the parties have fulfilled their obligations under it. The law expects contracting parties to do exactly what they have agreed to do under the contract. Thus, part performance will usually not be enough to discharge the contract; a party would normally not be able to claim a proportional payment for an uncompleted work, or for supplying goods that do not meet the contractual specifications. This principle was illustrated in *Cutter v Powell* [1795] 6 Term Rep 320. A seaman entered into a contract to serve on a ship sailing from Jamaica to Liverpool for the sum of 30 guineas. The money was payable on the completion of the voyage. The seaman died during the voyage and his widow claimed for a proportion of the contract money for the work done by the husband until his death. It was held that she could not be paid any money since the contract, which was entire, had not been completed.

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7.3.1 EXCEPTIONS TO THE RULE ON COMPLETE PERFORMANCE

The general rule on complete performance may not apply in situations of severable contracts; where there has been substantial performance; where there has been only slight breaches of implied conditions; where one party was responsible for the incomplete performance; where the other party accepts the partial performance; and where there was merely late performance.

7.3.1.1 Severable contracts

Unless, a statute provides otherwise, a contract might be interpreted as 'severable' rather than 'entire'. This means that the contractual obligations may be enforced independently, and that failure to perform some of them might not be considered a breach of the whole contract. The contract may state expressly that it is severable; otherwise, the court may infer this from the circumstances of the particular case. An example of a severable contract would be one to supply ten cars for £1million at £100,000 per car. If the dealer supplies eight cars and is unable to supply the remaining two, he may be entitled to payment for eight since the supply of the cars could be done independently.

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7.3.1.2 Substantial performance

Where a party to a contract has fulfilled most of his contractual obligations with only minor matters or defects remaining, the doctrine of substantial performance may be applied to enable him receive payment of the contract money minus the cost of completing or rectifying the work. The non-completion would be regarded as a breach of warranty instead of a breach of condition.

7.3.1.3 Slight breaches of implied conditions

Where there has been a breach of an implied condition in non-consumer contracts but the breach is so slight that it would be unreasonable for the other party to reject the goods, this may be treated as a breach of warranty. In the same vein, if a wrong quantity has been supplied but the excess or shortfall is very negligible the buyer may not reject the whole goods as this would be unreasonable. See s. 15A, *Sale of Goods Act 1979*, ss. 5A and 10A, *Supply of Services Act 1982*, and s. 11A *Supply of Goods Implied Terms Act, 1973*.

7.3.1.4 Where the other party accepts partial performance

If a partial performance has been made, the other party may elect to accept it and pay a proportional amount of the contract sum. However, this principle only applies if the other party has a real choice as to whether to accept the partial performance. Where there is no choice but to carry on the contract (e.g. where a builder abandons an ongoing building project), no right to proportional payment may arise.

7.3.1.5 Where one party prevents completion of the contract

Where the innocent party tenders performance, but the other party prevents the completion of the contract, the innocent party is discharged from his obligations and becomes entitled to payment proportional to the performance made plus any damages arising from the non-completion.

7.3.1.6 Late performance

Failure to complete the contract on time will not necessarily mean the contract has not been discharged unless it is a contract in which time is of the essence – e.g. a construction project that had to be completed within a stipulated time – or the delay is unreasonable. However, in most commercial contracts there is a presumption that time of performance is of the essence.

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7.4 DISCHARGE BY AGREEMENT

The parties to a contract may agree to bring the contract to an end before its time expires or before it has been completed. Discharge by agreement may happen in four ways: contractual provision, unilateral action of one of the parties, bilateral action of both parties or novation.

7.4.1 CONTRACTUAL PROVISION

The parties may agree in the original contract as to how it would be discharged. For example, the contract may provide that that it will not come into effect unless a particular thing happened. This will be known as 'condition precedent'. Conversely, it may specify that the contract would come to end at a determinate time in the future or at the future happening of a specified event. This will be known as a *condition subsequent*.

7.4.2 UNILATERAL ACTION

Where one party has fully performed his obligation, the other party will need to provide fresh consideration for his release from his contractual obligation. This is known as 'accord and satisfaction', where "accord" stands for the agreement of discharge and "satisfaction" stands for the consideration given to the other party for it. A good example would be where a party is required to pay a fee for the cancellation of an existing contract before a new contract is created. The need for "satisfaction" will however, not arise if the party that has performed his obligations relieves the other of his obligation by deed.

7.4.3 BILATERAL AGREEMENT

Where both parties have not fully performed their obligation under the contract, they may, without more, agree to discharge the contract and relieve each other of their obligations. Mutual consideration for this agreement would be provided by each party being released and accepting to release the other from their respective obligations.

7.4.4 NOVATION

The parties may agree to end the old contract and form a new one subject to the rules discussed above and under such terms as they think appropriate for their needs.

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7.5 DISCHARGE BY FRUSTRATION

If some outside event, unforeseen by the parties, occurs for which neither of them is responsible or to blame, and renders the performance of the contract impossible, or even if possible, fundamentally different from what was agreed or envisaged, the contract would become frustrated and discharged. A frustrating event is often referred to as a *force majeure* or 'act of God.' It would include the destruction of the subject matter of the contract by things like fire, tornado or earthquake; or the transformation of performance into something radically different by events like, war, government embargoes or the criminalisation of the transaction. Death, Ill-health, or other incapacitation of a person pivotal to the performance of a contract may also frustrate it. As explained by the court in *Davies Contractors v Fareham UDC* [1956] AC 696 at 729, frustration arises:

> Whenever the law recognizes that, without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

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Frustration involving destruction of the subject matter of the contract occurred in *Taylor v Caldwell* [1863] 32 L.J.Q.B 164.

> A music hall hired for a series of concerts burnt down before the first concert even started. It was held that the fire had frustrated the contract and that there was no obligation on the hirer to pay the hire charges.

Frustration involving impossibility of realizing the object of the contract occurred in *Krell v Henry* [1903] 1 KB 740.

> The defendant had agreed to let a room from the claimant in order to enable him watch the coronation procession of King Edward VII on a certain day. The coronation was however postponed. It was held that the contract was frustrated since its only object could not be realized.

> In *Tatem Ltd v Gamboa* [1939] 1 KB 132, the defendants (Spanish government) chattered a ship from the claimant to evacuate civilians. The ship was seized and detained for close to two months by the other side to the Spanish civil war. It was held that the contract was frustrated because the purpose of the hire had been defeated.

In all cases of frustration, the change in circumstances must be so radical as to make the performance of the original contract impossible. If there is an alternative method of carrying out the contract then the parties will have to use it unless this would amount to something radically different from what was agreed under the contract. Whether an event amounts to frustration would be determined objectively based on the circumstances of each case. The fact merely that performance of the contract has become more inconvenient, expensive or difficult would not amount to frustration.

7.5.1 EFFECT OF FRUSTRATION

Frustration usually ends the future obligations of the parties under the contract but does not render the contract void from the beginning. Under s. 1, *Law Reform (Frustrated Contracts) Act 1943*, any monies paid before the frustrating event may be recovered and any sums not yet paid will cease to be payable. However, if the party holding or entitled to receive money under the contract has incurred expenses pursuant to the contract, the court may allow him to keep the money or award him money as it considers just. Certain contracts are excluded from the operation of the Act. These are charter party (except time charter party and charter party by way of demise) and other contracts for the carriage of goods by sea, insurance contracts, and certain contracts for the sale and delivery of specific goods which perish before the sale has taken place and risk transferred to the buyer – s. 2(5).

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7.5.2 FORCE MAJEURE CLAUSES

It would be prudent for contract parties, especially businesses, to make provisions as to what should happen if a frustrating event occurs. Most commercial contracts contain such clauses. Where parties have made provisions for frustration in the contract, the contract will no longer be regarded as frustrated if the anticipated event happens. Instead, the rights and obligations of the parties would be determined by the contractual provision. In order to be regarded as precluding the operation of frustration, the contract provision must specifically cover the event that took place; in other words, the clauses are interpreted strictly. If what did transpire was significantly different from what the contract provided for, the contract might still be held to be frustrated.

> In *Metropolitan Water Board v Dick, Kerr and Co* [1918] AC 119, the parties had a contract for the construction of a reservoir over 6 years. The contract stipulated that in the event of delay "whatsoever and howsoever occasioned" the contractors would apply to the engineer for extension of time. The contractors were subsequently required by the government to stop the construction and to sell their plant. The contract was held to be frustrated since the delay envisaged by the contract was not the type that occurred. Whereas the contractual clause intended to cover temporally difficulties, what did take place was a fundamental change to the nature of the contract.

7.6 DISCHARGE BY BREACH

Breach of contract occurs where one of the contracting parties does not fulfil their obligations under the contract without any lawful excuse. Breach of contract may be *repudiatory* or *anticipatory*. Repudiatory breach occurs where one party simply fails to perform the contract wholly or partly when performance is due**.** On the other hand, anticipatory breach occurs where one of the parties indicates before performance is due an intention not to perform the contract. This may be express or implied.

Anticipatory breach is express where a party announces in advance his intention not to perform the contract. It is implied where the conduct of the party clearly indicates an unwillingness to perform the contract or renders performance impossible. Depending on the seriousness of the breach, the innocent party may treat an anticipatory breach as immediately terminating the contract and sue for damages. He may however wait until performance is due and actual breach occurs before suing for damages (subject to the rule on mitigation of losses, for which see below).

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In *Hochester v De La Tour* [1853] 2 E & B 678, the claimant had a contract to accompany the defendant on a European tour beginning on June 1. On 11 May, the defendant wrote to the claimant to say that he no longer needed his services. On 22 May, the claimant sued the defendant for breach of contract but the defendant claimed there was no breach of contract until I June. It was held that the claimant was entitled to bring the action immediately he received the letter of 11 May.

In *Omnium D' Enterprises v Sutherland* [1919] 2 KB 618, the defendant had contracted to charter a ship to the claimant. However, before the due date for the hire, the defendant sold the ship to somebody else. It was held that the sale was a breach of contract entitling the claimant to sue immediately for damages.

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7.6.1 CONSEQUENCES OF BREACH

Where one party has breached a contract or term thereof, the contract is not automatically discharged or terminated by reason of that breach. It is for the innocent party to accept or reject it. That is to say, he may decide to regard the contract as still in force (an *affirmation*), carry out his side of the bargain, and thereafter claim the contract sum from the other party. Since the *affirmation* by the innocent party keeps the contract alive, it means that the party who had earlier purported to breach it could not be sued for breach of contract. It also means that that party is also entitled to his rights under the contract.

> In *White & Carter (Councils) v McGregor* [1961] AC 413, the defendant entered into a contract with the claimants to place advertisements on refuse bins for three years. On the same day that the contract was signed, the defendants informed the claimants that they would not proceed with the contract. The claimants ignored the purported cancellation and proceeded to place the advertisements as agreed for the full three years. At the end of the period, they sued the defendant for the full contract sum. It was held that the claimants were entitled to receive the full contract sum since the defendant's purported cancellation did not terminate the contract.

On the other hand, the innocent party may accept the breach and may consider the contract as terminated. This however depends on the nature of the breach. If there was a fundamental breach – a total failure of consideration – or a breach of a condition in the contract, the innocent party is entitled to terminate the contract. In this case, he may sue for damages for the breach. If the term breached is a warranty, the other party will only be entitled to damages but will have no right to terminate the whole contract.

7.7 REMEDIES FOR BREACH OF CONTRACT

A party who has suffered loss as a result of the other party's breach of the contract will want a remedy for such loss. There are different kinds of remedies available to the injured party, of which the most important are damages, specific performance and injunction.

7.7.1 DAMAGES

This is the oldest and most common remedy available for breach of contract. It is a common law remedy. The intention of damages is to compensate the injured party monetarily for his loss consequent upon the breach of contract.

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7.7.1.1 Measure of damages

The aim of damages is to put the innocent party, as much as possible, in the position he would have been *if the contract had been performed*. As explained by Parke B in *Robinson v Harman* (1848) 1 Exch 850 at 855:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.

In measuring damages, therefore, the court will try to help the claimant recover the expenses incurred in furtherance of the contract and the loss of profit suffered because of the breach. Damages awarded for losses incurred in the execution of a contract that has been aborted by the other party is known as "reliance loss".

> In *Anglia TV Ltd v Reed* [1971] 3 All ER 690, the defendant entered into a contract to play the lead role in the claimant's TV show. After the claimant had spent money preparing for the show, the defendant repudiated the contract. The claimant could not find a replacement for the defendant and had to abandon the show. It was held that the claimant was entitled to recover the entire amount it had spent on the show.

In cases involving breach of building contracts, damages could be measured:

a) by the difference between the value of the building as constructed and what its value would have been if it had been constructed as agreed; or
b) by the cost of rebuilding or bringing the project to the required state, unless this would be disproportionate to the damage suffered.

> In *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 WLR 118, there was a contract of £18,000 for the construction of a swimming pool. Although the contract stipulated that the deep end of the pool should be 7ft 6in deep, the eventual depth was 6fth 9in. To rectify this error would require a total reconstruction of the pool at the cost of £21,000. It was held that the claimant could not recover any damages since the constructed pool was equally good for swimming at the current depth as the one required under the contract. In other words, the claimant had suffered no loss of amenity.

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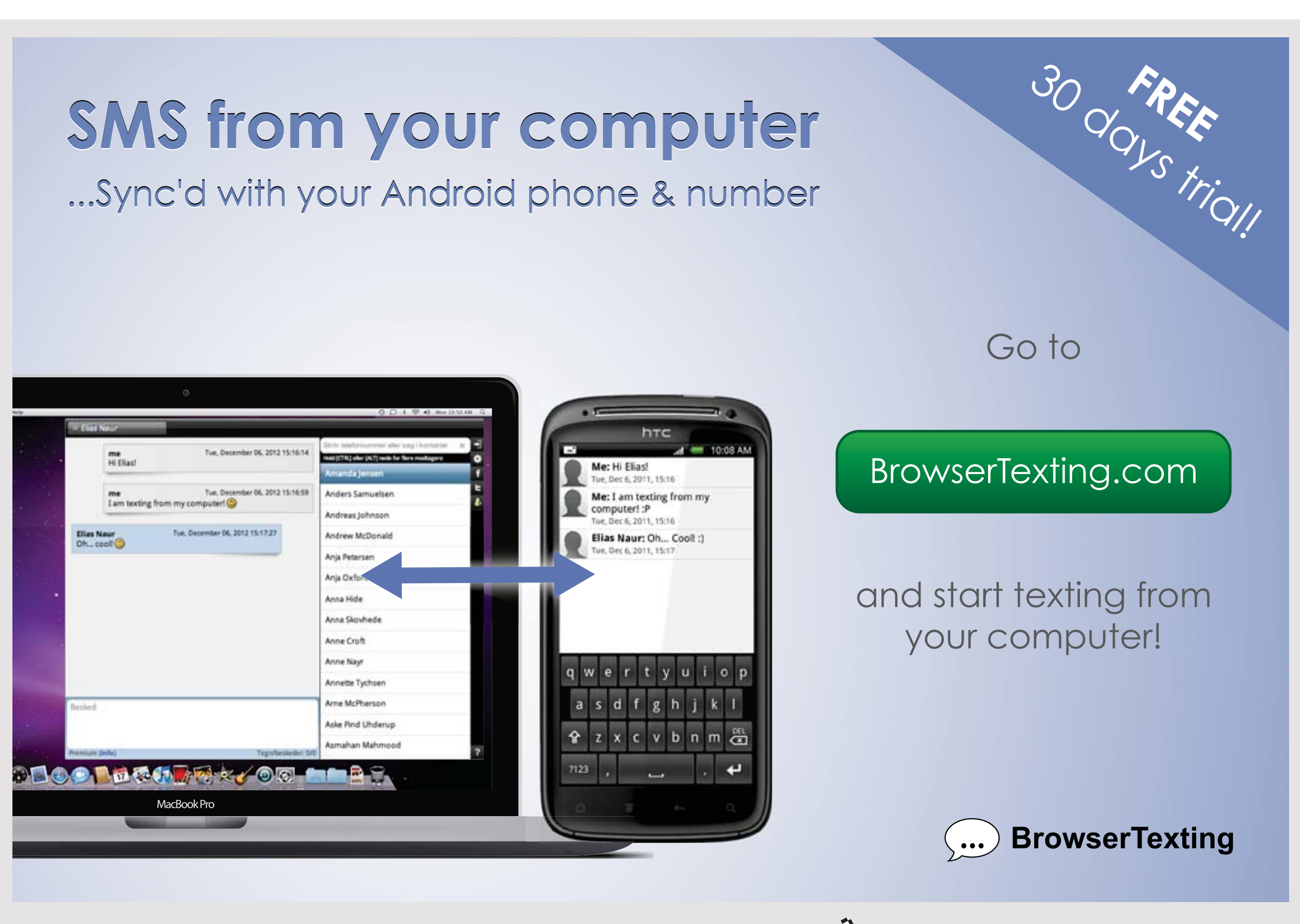
The award of damages is not intended to punish the party in breach or to allow the injured party to make an undue profit. Thus, in awarding damages, the court would make deductions for tax and National Insurance as may be appropriate and would pay the claimant a net amount. In *GTC v Gourley* [1956] AC 185, damages awarded to the claimant for loss of earnings excluded deductions for income tax and National Insurance.

7.7.1.2 Causation and remoteness of loss

The claimant will usually need to show that his losses are caused by the breach of the contract. If the losses and the breach are not linked, or if the losses are unforeseeable and not within the contemplation of the parties, they would be considered too remote and irrecoverable. These principles are articulated in *Hadley v Baxendale* [1854] 9 Exch 341 at 354 as follows:

> The damage must *arise naturally according to the usual course of events* from the breach (this would be regarded as normal losses and usually poses little problem); or the loss must *reasonably be supposed to have been within the contemplation of the parties* at the time they made the contract (this will usually cover special losses).



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Therefore, if a contract party anticipates that they would suffer special or unusual losses were the contract to be breached, they should clearly warn the other party of the circumstances that are likely to increase their losses in the event of a breach. If the other party is not aware of the special circumstances or the likelihood of special losses, such losses may not be recoverable, a point illustrated in the cases below.

Hadley v Baxendale [1854] 9 Exch 341 – The claimant who owned a mill in Gloucester contracted with the defendant under which the defendant was to transport a broken crankshaft to London in order for a replacement to be made and returned. The defendant delayed unduly in doing this and the claimant's plant was closed throughout the period of delay, leading to loss of profit. It was held that the defendant, though in breach of contract, was not liable in damages for the losses since they were unexpected. Moreover, it was not made known in advance to the defendant that delay in transporting the crankshaft would cause the closure of the plant.

Kpohraror v Woolwich Building Society [1996] 4 All ER 119 – The defendant wrongly delayed the clearance of the claimant's cheque by one day. As a consequence of this delay, the claimant incurred losses on a contract for the shipment of goods. The claimant sued for damages for the loss and for injury to his credit. It was held that the claimant could recover general damages for loss of credit but that he could not recover damages for the loss in the shipment contract since there was no indication that a one-day delay in payment could lead to such a loss. The loss was therefore too remote.

Czarnikow Ltd v Koufos (*The Heron II*) [1969] 1 AC 350 – The defendant had contracted to ship a consignment of sugar for the claimant from Constanza to Basra. The shipment was delayed by 9 days in which time the price of sugar fell. The claimant lost money as a result of the price fall. It was held that the claimant could recover the losses since it was a natural consequence of the delay.

Victoria Laundry v Newman Industries [*1949*] 2 KB 528 – The claimant ordered a new equipment for its laundry and dyeing business due to expansion and a very lucrative contract it had secured. The defendant delayed in supplying the equipment by five months. This caused the claimant to lose the lucrative contract and to make normal daily losses. The claimant sued for normal daily losses for the period of the delay as well as the more substantial losses arising from their inability to fulfil the lucrative contract. It was held that the claimant was entitled to recover damages for the normal daily losses but not the losses arising from the loss of the lucrative contract. The later was not within the knowledge or reasonable contemplation of the defendant, and therefore too remote.

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7.7.1.3 Liquidated damages and penalties

A contract may state the amount of damages each party is entitled to get upon its breach. If this amount is a reasonable estimate of expected losses due to the breach, it would be regarded as liquidated damages and could be recovered. If, however, this sum is excessive or not based on a reasonable estimate of loss but intended to punish the party in breach, it would be regarded as a penalty and would not be enforced by the court. Instead, the court would substitute the amount with a reasonable estimate of the losses.

> *Dunlop Pneumatic Tyres v New Garage & Motor Co Ltd* [1915] AC 79 – The defendant had a contract with the claimant to sell the latter's tyres on retail. The contract contained a clause that the defendant would not sell the tyres below their recommended retail price. The sum of £5 was stated in the contract as payable by the defendant for any tyre it sells below the recommended price. The defendant sold some tyres below the recommended price. It was held that the £5 was a reasonable estimate of loss and was therefore a liquidated.

In *Dunlop Pneumatic Tyres v New Garage & Motor Co Ltd*, the court laid down the following principles on penalties:

- A sum will be a penalty if it is extravagant having regard to the maximum possible loss that may arise as a result of the breach.
- If the contract imposes a liability on a party to pay a certain amount of money, and states that failure to pay that sum will result in the payment of a larger sum, the larger sum of money would be regarded as a penalty.
- If the contract states that a single sum of money would be payable for different types of breaches, some minor and some major, then there is a presumption that that sum is a penalty.

> In *Ford Motor Co v Armstrong* [1915] 31 TLR 267, the defendant was a dealer in the claimant's cars. The contract contained a clause that the defendant would not sell the cars to other dealers and would not display any other cars without permission. The sum of £250 was stated as payable by the defendant for each breach he might make. It was held that that sum of £250 was a penalty since it applied to different types of breach and was therefore not a reasonable estate of losses.
>
> See also *Bridge v Campbell Discount Co Ltd* [1962] AC 600.

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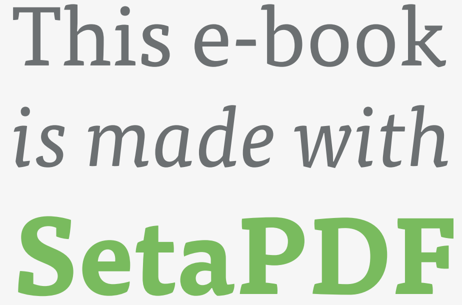
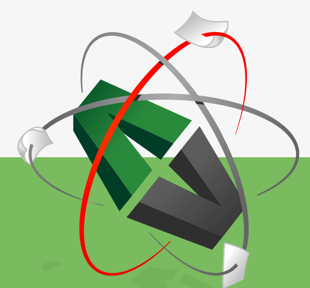
7.7.1.4 Damages for non-financial losses

In commercial contracts, damages may only be awarded for financial losses and not for such things as distress, disappointment, or injured feelings, which cannot be measured in monetary terms (see *Addis v Gramophone Company* Ltd [1909] AC 488; and *Johnson v Gore Wood & Co* [2002] 2 AC 1). Damages may however be recovered for distress, disappointment, etc. if the essence of the contract is enjoyment or pleasure (as in contracts for holidays), or if physical inconvenience or discomfort results directly from the inconvenience or discomfort. The position of the law was neatly summarized in *Watts v Morrow* [1991] 1 WLR 1421:

> A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party […]. But the rule is not absolute. Where the very object of the contract is to provide pleasure, relaxation, peace of mind, or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law does not cover for this exceptional category of case it would be defective. In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort (per Bingham LJ at p. 1445).

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Thus in *Jarvis v Swans Tours* [1973] 3 WLR 954, the claimant recovered damages for disappointment he suffered on holiday due to the failure of the defendant to provide many of the facilities expected under the contract.

In *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468, the claimant booked a holiday for himself, his wife and two children. The hotel was described as being "of the highest standard" in the brochure which also listed several amenities. The hotel was not up to the standard claimed and most of the amenities were absent; consequently, the holiday was a fiasco. The claimant was awarded a refund of some of the money paid and £500 for "mental distress".

In *Perry v Sidney Phillips and Son* [1982] 1 WLR 129, the claimant bought a house on the basis of a survey prepared by the defendant. The survey stated that the roof of the house was in good order. However, when the claimant moved into the house, he discovered that the roof was leaking and that the septic tank was inefficient and very smelly. These necessitated a repair of the house. The Court of appeal awarded damages to the claimant for the distress or discomfort caused by the physical inconvenience of living in the house whilst repairs were done.

Conversely, in *Alexander v Rolls Royce Motor Cars Ltd* [1995] RTR 95, it was held that the owner of a Rolls Royce car was not entitled to damages for disappointment, loss of enjoyment or distress for the defendant's breach of contract for the repair of his car.

Similarly, in *Knott v Bolton* [1995] Const LJ 375, it was held that a breach of contract for the design of a house by an architect did not entitle the claimant to damages for distress and disappointment since the provision of pleasure was not the main purpose of the contract but ancillary to it.

7.7.1.5 Mitigation of losses

When a contract has been breached, the injured party is usually under a duty to mitigate (minimize) his losses as far as possible. This means he must take reasonable steps to keep the losses to a minimum. If he fails to do so, he cannot recover the preventable losses in damages. In *Dunkirk Colliery Co. v. Lever* [1878] 9 Ch. D. 20, at 25, James L.J. observed that:

> The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.

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The above statement was cited with approval by the House of Lords in *British Westinghouse Electric & Manufacturing Co. Ltd v Underground electric Railways Co Ltd* [1912] AC 673. According to Viscount Haldene, the victim of a breach of contract has:

> the duty of taking all reasonable steps to mitigate the loss consequent on the breach and is debarred from claiming in respect of any part of the damage which is due to his neglect to take such steps (at p. 689).

This principle is well illustrated in *Brace v Calder* [1895] 2 QB 253.

> The claimant had been employed as a branch manager by a firm on a two-year contract. The partnership was dissolved after 5 months following the retirement of two of the four partners. This meant that the contract of the claimant was terminated. However, a new partnership was immediately formed by the remaining two partners to take over the business. They offered the claimant back his job on the same terms, but he refused to take it and sued for damages in respect of his remaining contract salary under the original 2-year contract. It was held that the claimant was not entitled to anything more than nominal damages as he failed to mitigate his damages.

7.7.1.6 Contributory negligence

If the victim of the breach of contract was partly to blame for the losses or damages sustained (due to things done or omitted before or after the breach), the court may consider that factor in measuring damages. Accordingly, the proportion of the losses attributed to the claimant's negligence could be deducted from any damages to be awarded in line with the *Law Reform (Contributory Negligence) Act 1945.*

7.7.2 QUANTUM MERUIT PAYMENT

The phrase "*quantum meruit*" means "for as much as he deserves". It is an alternative to damages which may be given:

- Where a contract has been part performed, but the innocent party was prevented from completing it by the conduct of the other party. The innocent party would be awarded payment for the work done on a proportionate basis.
- Where a person has expressly or impliedly requested another person to perform a service for which payment is expected but the amount of money payable was not specified. The person performing the service would be entitled to receive such payment as his work deserves.

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This remedy is restitutory in that it aims to put the innocent party to the position he would have been if the contract *had not been made.*

> In *De Barnardy v Harding* [1853] 8 Exch 822, the claimant entered into a contract to advertise and sell tickets for the defendant who was erecting stands for spectators who wished to view the funeral procession of the Duke of Wellington. The defendant suddenly cancelled the arrangement without justification. It was held that the claimant was entitled to the value of service already rendered.

7.7.3 SPECIFIC PERFORMANCE

This is a court order commanding a person to carry out a contract on its terms. Failure to comply with the court order would be contempt of court that could result in imprisonment. However, being an equitable remedy, it is at the discretion of the court whether or not to grant an order of specific performance. The court will only grant the remedy if justice and the conduct of the claimant justify it. In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898 (see facts below), the House of Lords declined to grant the order because (among other things) the balance of convenience was against it.

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As a general rule, an order of specific performance will not be made where there is an adequate remedy in law, i.e., where damages would satisfy the legitimate and reasonable expectations of the innocent party in the contract. Thus, the remedy would be available where the object of the contract is special or unique, e.g. land, house, painting, or antique car. Specific Performance would not normally be available in ordinary commercial transactions or sale of goods contracts where the claimant could buy similar goods elsewhere, unless exceptions have been made to that effect. For example, s.52 and s.48E(2) of the *Sale of Goods Act 1979* give the court a discretion to make an order of specific performance in a contract for the sale of specific or ascertained goods, and for the repair or replacement of goods in consumer contracts.

Moreover, the remedy will not normally be used to enforce personal contracts. It is therefore (subject to exceptions) not generally available to employers for breaches of contracts of employment or for contracts involving personal services (see chapter 17).

> In *Page One Records Ltd v Britton* [1968] 1 WLR 157, the claimants were the managers and publishers of a pop music group known as 'The Troggs'. The parties had a contract that the group would not "engage any other person, firm or corporation to act as their managers or agents or act themselves in such capacity". The group sought to engage another company as their agents and managers. The claimants sued for an injunction to stop them from doing this. It was held that the enforcement of these negative covenants would be tantamount to ordering specific performance of a contract of personal service. It would be wrong to put pressure on the defendants to continue to employ in the fiduciary capacity of a manager and agent, someone in whom they had lost confidence.

Furthermore, the remedy will not be granted where constant court supervision would be required in order to enforce it.

> In *Co-operative Insurance Society Ltd v Argyll Stores* (Holdings) Ltd [1997] 2 WLR 898, the Co-op rented a retail space in a shopping centre belonging to Argyll for a period of 35 years. The contract provided that the Co-op would keep its store open during the usual hours of business in the locality. This covenant was inserted to protect the interests of Argyll in making the shopping centre lucrative. About I6 years after the commencement of the contract, the Co-op closed its stores and vacated the premises. Argyll sought specific performance of the contract. The House of Lords held that the grant of specific performance would be inappropriate since it would be difficult to formulate an order precise enough to ensure its compliance. The order might also have the effect of forcing the Co-op to continue an unprofitable business, an outcome not justified by the losses that might be suffered by Argyll.

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Finally, an order of Specific Performance will not be awarded against a minor; neither can it be granted in his favour.

7.7.4 INJUNCTION

This is another equitable remedy. While specific performance is used to enforce positive obligations in a contract, injunctions are used to enforce compliance with contractual clauses of a negative or restrictive nature. Typically, injunctions are used to enforce reasonable restraint of trade clauses in a contract. Such clauses may involve:

- *A restriction imposed on an employee by an employer* not to divulge trade secrets or from setting up a rival business on leaving the company. An injunction could be granted to prevent the employee from breaching that agreement provided the restraint is reasonable.

- *Exclusive dealing agreement* where a business undertakes to sell only products belonging to the other contractual party. The other contractual party could sue for an injunction to prevent dealing with a different person or business.

  In *Esso Petroleum Ltd v Harper's Garage Ltd* [1968] AC 269, the parties had a contract that the defendant would only purchase petrol from the claimant for sale in its two stations in return for a discount on the price. The agreement for the first station was for 4 years while that for the second station was for 21 years due to a mortgage on it. An injunction was granted to protect the first covenant while the second covenant was declared unreasonable and void.

- *Exclusive service agreements* whereby a person (e.g. a singer, an author) undertakes to work for a particular company (e.g. a recording or publishing company) for a period of time. An injunction could be obtained to safeguard these agreements.

  In *Warner Bros Pictures Inc. v Nelson* [1937] 1 KB 209, the defendant, an actress, signed an exclusive service contract with the claimant for 52 weeks with an option of renewal. Under the contract, the defendant undertook not to render a similar service to any other person or company. In breach of this agreement, the defendant signed a contract with a third party to perform in the UK. The claimant sought an injunction to forbid the defendant from rendering any services in any motion picture or stage performance for anyone except the claimant. The injunction was granted.

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- *Restriction in protection of business goodwill* where a business has been sold. The purchaser of the business can obtain an injunction to prevent the former owner from setting up a similar business in the vicinity.

  In *Nordenfelt v Maxim Nordenfelt* [1894] AC 535, the defendant sold his guns and ammunitions manufacturing business and its goodwill to the claimant. The sale agreement contained a covenant that the defendant would not set up a rival guns and ammunitions business for a period of 25 years. It was held that the claimant was entitled to enforce the agreement. However, another covenant that the defendant should not set up any type of business that might compete with the claimant's business was held to be unreasonable and void.

- *The Mareva (Freezing) Injunction (s. 37 of the Supreme Courts Act 1981)*. This is an order or injunction preventing a person from removing assets from the court's jurisdiction or from dealing with any asset within the courts' jurisdiction. The object of the order is to preserve assets for the purpose of settling the claimant were he to win the case. The injunction originated from the case of *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509, [1980]1 All ER 213, but is now governed by the *Civil Procedure Rules 1998*.

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The above types of injunctions are called *prohibitive* injunctions; i.e. an injunction to prohibit or forbid the doing of something. In some cases, an injunction would have the effect of compelling the performance of a positive act**.** In these situations, the grant of an injunction might be equivalent to an order to perform the contract. In such cases, its grant would be subject to the same restrictions on the grant of specific performance discussed above.

> *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954 – The claimant had a contract to buy all its petrol and diesel from the defendant for a period of 10 years. After three and half years, the defendant claimed to have terminated the agreement on the ground of alleged breach of contract by the claimant. The claimant sued for an interim injunction to prevent the defendant from stopping its fuel supplies. It was held that the grant of the injunction would amount to an order to specifically perform the contract. However, since damages would not be an adequate remedy for the claimant (who depended entirely on the defendant for its business) the injunction would be granted.

7.8 CHAPTER SUMMARY

- The discharge of a contract means its legal termination and the end of contractual relationships.
- A contract may be discharged by performance, agreement, frustration or breach
- In order for a contract to be deemed as performed, the performance must be complete unless it falls within any of the accepted exceptions.
- Termination by agreement could be by contractual provision, unilateral, bilateral or by novation.
- Frustration may only discharge a contract if the event in question was extraordinary, unforeseen, not the fault of either party, and makes performance impossible or radically different from what was agreed. To deal with the effects of frustration, parties might include a force majeure clause in their contract.
- Breach of contract might by anticipatory or repudiatory. However, it is up to the innocent party to choose how to treat the breach – either as ending the contract or ignoring it and completing his own performance.
- Whether a breach would terminate a contract depends on what was breached – the whole obligation, a condition or a warranty.
- The remedies available to the innocent party for a breach of contract are damages, specific performance and injunction, although the principal one is damages.
- While the award of damages is a matter of right, the award of specific performance and injunction is discretionary.

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- Damages are financial compensation designed to put the innocent party in the position in which he would have been had the contract not been breached. Thus, exceptional losses or those outside the contemplation of the parties will not normally be recovered. Damages may also not be recovered for losses which could have been mitigated or which arise from the fault of the claimant.
- Except for special types of contracts intended for that purpose, damages are not recoverable for inconvenience, discomfort, distress, etc.
- Specific performance may be ordered at the discretion of the court where the circumstances allow it and damages would not provide an appropriate remedy.
- Injunctions are also discretionary and may be ordered to mandate or prevent the doing of certain things under a contract.

7.9 PRACTICE QUESTIONS

1. Explain the term frustration, the effect it has on a contract and how contract parties could deal with it.
2. Provide three examples of events that could frustrate a contract giving reasons for your choices.
3. Explain the meaning, types and consequences of breach of contract.
4. Explain the rule rules relating to the performance of contract; provide three examples when partial performance could discharge a contract and explain the rationale behind them.
5. Explain the rule in *Hadley v Baxendale* [1854] 9 Exch 341 concerning the award of damages for breach of contract.
6. Distinguish between special damages and liquidated damages
7. Explain the functions of an order of injunction and the circumstances in which it may be granted against a party to a contract.
8. Go back to the problem question in chapter 5 (question 5). If there was a breach of contract in that scenario, do you think that Max would be entitled to an order of specific performance in the circumstances?

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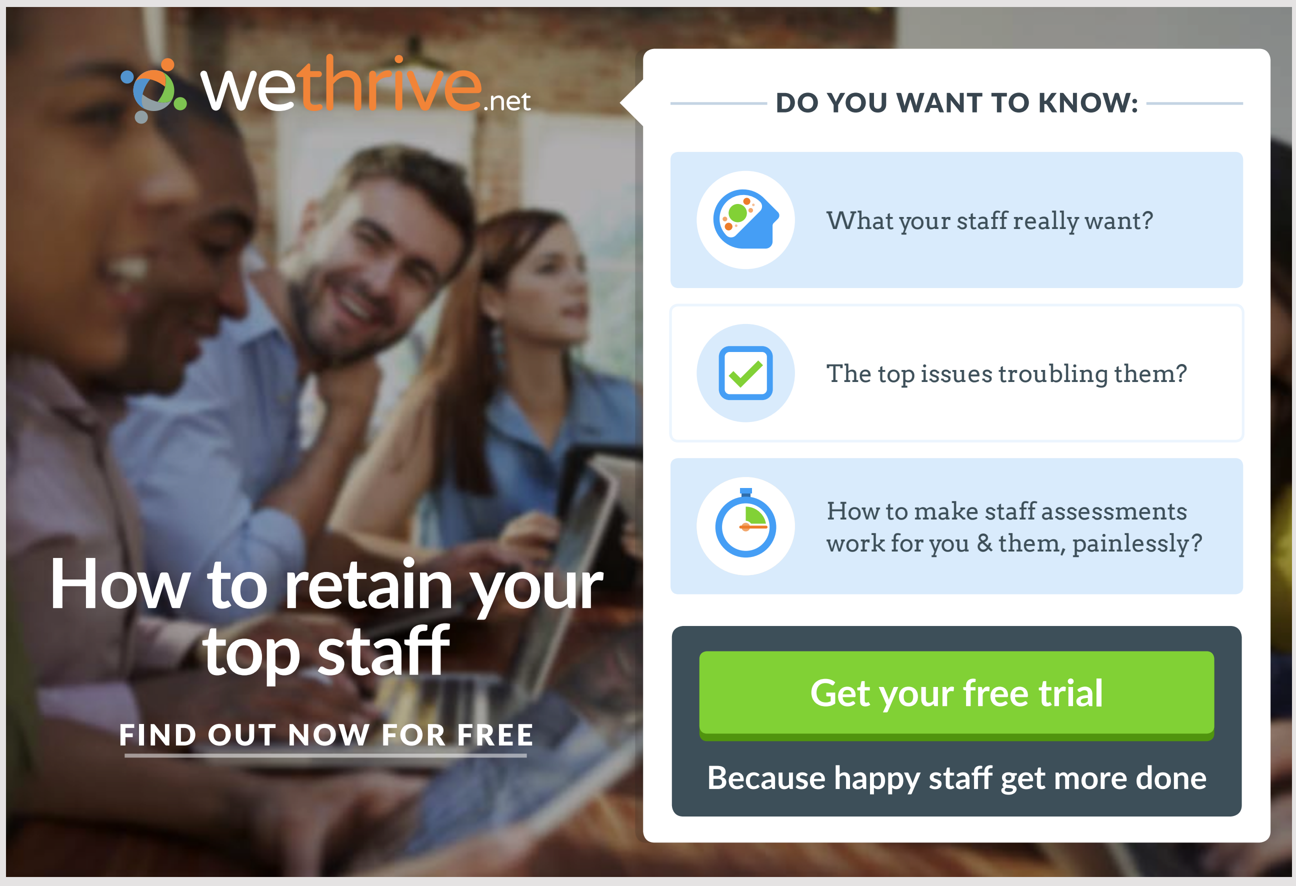
8 VITIATION OF CONTRACTS 1 MISREPRESENTATION, DURESS AND UNDUE INLFUENCE

8.1 INTRODUCTION

A contract may be rendered voidable by something that happened before its conclusion but which was an important factor in the decision of one of the parties to enter into it. This may be a statement made by one of the parties that convinced the other to enter into the contract. It may also be some illegitimate threat, pressure or force exerted by one party on the other; or unacceptable or illegitimate influence wielded by one party on the other. In all these cases, a contract party may, with the order of the court, pull out of the contract and be freed from any obligations he had assumed under it.



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8.2 LEARNING OBJECTIVES

By the end of this chapter, the reader should be able fully to understand and explain:

- The meaning of vitiation of contract, the forms it may take, and how it differs from discharge of contract
- The meaning of and conditions for misrepresentation
- The types of misrepresentation and the differences between them
- The circumstances in which silence would amount to misrepresentation
- The consequences of misrepresentation and how this might be avoided
- The meaning and types of duress
- The effects of duress on a contract
- The meaning and types of undue influence
- The conditions for undue influence
- The effects of undue influence on a contract

8.3 MISREPRESENTATION

A pre-contractual statement might become a term of the contract. If such a term proves to be false, the victim may choose whether to pursue a remedy for breach of contract or for misrepresentation. A representation that does not become a contract term may give rise to a remedy at common law or under the *Misrepresentation Act 1967* if it amounts to actionable misrepresentation. An actionable misrepresentation is a false and unambiguous representation of fact (or law) made by one party to the contract which induces the other party to enter the contract. This representation or statement may be made by words or in writing (express), or implied from conduct, e.g., by a nod or shake of the head, a wink, or a smile. Ordering goods or food carries an implied representation that the customer is willing and able to pay for it. Where a contract has been induced by misrepresentation, it means that the agreement of the other party has been obtained wrongly.

8.3.1 CONDITIONS FOR MISREPRESENTATION

An actionable misrepresentation will necessarily have the following elements: there must be a false statement of fact or law; the statement must induce the contract; and the statement must be made to or for the innocent party.

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8.3.1.1 A false statement of fact or law

There must have been a false statement of existing fact; a false statement of opinion or belief will not be an actionable misrepresentation. However, what looks like a statement of opinion may be regarded as involving a statement of fact if:

- The representor does not in fact hold the opinion; here, the representor misrepresents an existing fact, i.e. the fact that he or she does actually holds that opinion;
- The representor has some special skill or knowledge not possessed by the other party, but has no grounds on which to base his or her statement of opinion. Here, the representor makes an implicit representation that facts exists which form a reasonable basis for the statement of opinion, and if no such facts exist, there is a misrepresentation of fact.

> In *Esso Petroleum Ltd v Mardon* [1976] QB 801, the claimant leased a petrol station from the defendant on the "opinion" of the latter's expert that the station would sell at least 200,000 gallons of fuel per annum. In reality, it sold only 78,000. It was held that the opinion of the defendant was actionable as a breach of warranty as well as negligent misrepresentation. According to Lord Denning:
>
> > It is plain that Esso professed to have – and did in fact have – special knowledge or skill in estimating the throughput of a filling station. They made the represeantation – they forecast a throughput of 200,000 gallons – intending to induce Mr Mardon to enter into a tenancy on the faith of it. They made it negligently. It was a 'fatal error'. And thereby induced Mr Mardon to enter into a contract of tenancy that disastrous to him. For this misrepresentation, they are liable in damages.

A misrepresentation of intention will not normally amount to actionable misrepresentation, since the promise of a future action is generally only binding if it is a term of the contract. However, a person who does not in fact have that intention misrepresents his or her present state of mind, and that will be a misrepresentation of existing fact – the fact that he or she does have that intention. As Bowen LJ observed in *Edgington v Fitzmaurice* (1885) Ch. D 459), "there must be a miss-statement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion".

8.3.1.2 Statement to induce the contract

The misrepresentation must actually have induced the innocent party to enter into the contract. This means that the false statement was a significant or substantial, even if not the only, reason why the innocent party entered the contract.

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In *Edgington v Fitzmaurice* (1885) LR 29 Ch D 459, company directors issued a prospectus to investors claiming that the money raised would be used to renovate the company's premises, invest in its business and develop the company's business. In reality, they used the money to pay off existing debts. The claimant had bought the debentures partly because of this prospectus and partly because of his mistaken belief that he would have a charge on the company's property. It was held that defendant was liable for misrepresentation even though the prospectus was not the only inducement for the claimant entering the contract.

There could still be an inducement if the claimant could have checked the reliability of the information, but did not, unless it was unreasonable not to check.

In *Redgrave v Hurd* (1881) 2 Ch D 1, the claimant contracted to purchase the defendant's solicitor's practice after being told that the practice had an annual income of £300 accruing from the practice and associated business. Although the claimant was given the opportunity to examine documents relating to the other business, he declined to do so. It turned out that the total income from the practice was only £200. The claimant sought to rescind the contract. It was held that the claimant was entitled to rescind the contract due the misrepresentation.

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Where however, the claimant did not rely on the false representation, either because he was unaware of it, because he knew it was false, or because he was not influenced by it, there would be no actionable misrepresentation.

> *Horsfall v Thomas* [1862] 1 H and C 90 – The claimant bought a gun with a hidden defect, but without inspecting the gun. It was held that the defect was not a misrepresentation since the claimant was not induced by it to enter the contract.

> *JEB Fastners v Mark, Bloom & Co* [1983] 1 All ER 583 – The claimant took over a company despite having reservations about the accounts negligently prepared by the defendants. It was held that there was no actionable misrepresentation since the accounts had not induced the claimant to enter the contract.

Similarly, if the claimant had relied wholly on his own investigation to enter the contract, he will not be able to sue, even if there had been a false statement of fact by the defendant.

> *Attwood v Small* (1838) 6 Cl & Fin 232 – Before buying a large estate from the defendant, the claimant had brought in his accountants and directors to examine and confirm the accounts and reports prepared by the defendant. It turned out, however, that the claims about the income from the estate were grossly exaggerated. The claimant sought to rescind the contract due to misrepresentation. His action failed because he contracted on the basis of his own expert investigation.

Whether the claimant was induced by the statement is a question of fact depending on the circumstances of the case. In the event of dispute, the matter would be assessed objectively: would the statement have caused a reasonable person to enter into the contract?

8.3.1.3 Statement to or for the innocent party

The misrepresentation must have been made to the innocent party either directly or through a third party for onward transmission to him. Thus a misrepresentation made by a bank to another bank which gave the information to its own customer was actionable by the customer – *Commercial Banking Co. Sydney v Brown & Co* [1972] 2 Lloyd's Rep 360. No cause of action, however, can arise over a statement not made or directed to the claimant.

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8.3.2 SILENCE AND MISREPRESENTATION

As a general rule, mere silence will not be actionable as a misrepresentation, since parties to a contract have no duty to disclose all information at their disposal. There are however, exceptions to this, when non-disclosure would amount to misrepresentation. These include contracts *uberimae fidei*, where there are changed circumstances, half-truths, active concealments, fiduciary relationships, and statutory requirements.

8.3.2.1 Contracts *uberimae fidei*

In contracts utmost good faith (*uberimae fidei),* such as those of insurance, there is a duty to disclose relevant or material information. Failure to do so will amount to misrepresentation.

> In *Lambert v Co-operative Insurance Society* [1975] 2 Lloyds Rep 485, the claimant failed to disclose her husband's criminal convictions for crimes involving dishonesty when taking and renewing insurance policy of their jewellery. It was held that her failure to disclose the information invalidated the policy.

8.3.2.2 Changed circumstances

Where a change of circumstances has occurred which renders a previous statement false, the changed circumstances must be disclosed. This is illustrated in *With v O'Flanagan* [1936] Ch. 575.

> The claimant had agreed to buy the defendant's medical practice based on the statement that it made £2,000 per annum. Although that statement was true at the time it was made, by the time the sale was concluded, the value of the practice had gone down drastically due to the illness of the defendant. This change in circumstances was not disclosed to the claimant. It was held that the no disclosure was a misrepresentation.

In addition, if a contract party makes a statement which he subsequently discovers to be false or mistaken, he must inform the other party accordingly, otherwise he would have made a misrepresentation.

8.3.2.3 Half-truths

Where a half-truth has been told, thereby giving misleading information, this will be regarded as misrepresentation.

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In *Curtis v Chemical Cleaning and Dyeing Co.* [1951] 1 KB 805, the defendant was unable to rely on an exclusion clause to avoid liability for damaging the claimant's wedding dress. The claimant had signed the document containing the exclusion after being told by the defendant's assistant that it covered damage to the beads on the dress, when it in fact excluded all damages however caused.

8.3.2.4 Active concealment

Where there has been an active concealment of facts, this will be treated as misrepresentation.

In *Gordon v Selico* [1986] 278 EG 53, the claimant bought a house on a long lease but subsequently discovered that it was badly affected by dry rot which was concealed by the defendants. It was held that the concealment was a fraudulent misrepresentation.

Similarly, in *Schneider v Heath* [1813] Camp 506, there was misrepresentation when the sellers of a ship kept it afloat in order to hide from the purchaser the fact that the bottom had been eaten up by worms and the keel broken.

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8.3.2.5 Fiduciary relationship

Where a contracting party is in a fiduciary relationship (a relationship of trust and confidence) with the other, there is a duty to disclose relevant information relating the contract. In such situations, there would normally be a presumption of undue influence. The party having the influence is under a duty to disclose relevant information.

8.3.2.6 Statutory requirement

Where a statute requires full disclosure, then non-disclosure or partial disclosure would be tantamount to misrepresentation.

8.3.3 CONSEQUENCES OF MISREPRESENTATION

Once the representee has established that he was induced to enter into a contract on the basis of a misrepresentation, the law gives him a remedy. A contract made as a result of a misrepresentation will be voidable at the option of the victim (i.e. it may be "set aside" or "rescinded"). Where a voidable contract is rescinded, the parties will be put back in the position they were in before the contract was formed. The victim of a misrepresentation may also be able to claim damages, but the availability of damages depends on whether the misrepresentation was made fraudulently, negligently or innocently.

8.3.3.1 Fraudulent misrepresentation

A fraudulent misrepresentation gives the innocent party the right to rescind the contract and damages for the tort of deceit. A misrepresentation will be fraudulent if the representor knew it was false, had no belief in its truth, or made it recklessly, not caring whether it was true or false.

> In *Derry v Peek* (1889) 14 App Cas 337, the claimant bought shares in a tram company on the representation by the company that it was going to use steam powered trams instead horse-drawn ones. Eventually, the company failed to get the necessary government approval to run the trams. It was held that there was no fraudulent misrepresentation because the defendant believed it would get the required approval.

Where fraudulent misrepresentation is proved, the motive of the maker is not important.

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8.3.3.2 Negligent misrepresentation

A misrepresentation will be negligent if it is made carelessly, without reasonable care as to whether it is accurate or not. Under s. 2(1) *Misrepresentation Act 1967*, the maker of an untrue statement in relation to a contract is liable in damages unless he can prove that he had reasonable grounds to believe and did believe up until the time the contract was made that the facts represented were true. This type of misrepresentation also gives the right to rescission and a claim for damages in negligence.

> In *Hedley Byrne and Co Ltd v Heller and Partners* [1964] AC 465, it was held that there could be liability for damage including economic loss caused by a negligent misstatement, provided that a *special relationship* existed between the parties.

> In *Esso Petroleum v Mardon* [1976] QB 801, it was held that a 'special relationship' could exist between the parties engaged in negotiating a contract if the negligent party has some special knowledge, expertise or skill and the other relies on the statement in entering into the law of contract (for more discussion on this, see chapter 11).

8.3.3.3 Innocent misrepresentation

If the misrepresentation has been made neither fraudulently nor negligently, then it would be wholly innocent. That means the maker reasonably believed the statement was true or had no reason to believe it was false. In such a case, the innocent party would be entitled to rescission of the contract plus an indemnity for expenses made, but he would not be entitled to damages.

8.3.4 DAMAGES IN LIEU OF RESCISSION

Sometimes, the granting of an order of rescission may have very serious consequences to the misrepresentor and the court may feel that justice is better served by compensating the innocent party. Accordingly, s.2(2) of the *Misrepresentation Act 1967* provides that a court can, instead of granting a rescission of the contract either for negligence or innocent misrepresentation, award damages. An example of such a situation is *William Sindall v Cambridgeshire County Council* [1994] 1 WLR 1016, where the loss following a possible misrepresentation was £18,000 but the rescission of the contract would have cost the misrepresentor some £6 million.

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8.3.5 LOSS OF RESCISSION RIGHT

The right to rescind a contract due to misrepresentation will be lost in certain circumstances, including where the contract has been subsequently affirmed, where restitution has become impossible, and where rescission would be inequitable.

8.3.5.1 Affirmation of the contract

If the innocent party affirms the contract by treating it as still subsisting after he becomes aware of the misrepresentation or if an unreasonable time has elapsed after he became aware, the right to rescind would be lost.

> In *Leaf v International Galleries* [1950] 2 KB 86, the plaintiff bought a painting from the defendant gallery on the basis of an innocent misrepresentation that the painting was a "Constable". Five years later, when he wished to sell he discovered that it was not. He took action immediately but the Court of Appeal refused a remedy. He had a reasonable time in which to verify the statement of authenticity from the date of his purchase and after that he was to be taken to have affirmed the contract.

For fraudulent misrepresentation, reasonable time would be calculated from the time the fraud was discovered.

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8.3.5.2 Restitution impossible

If restitution by either party has become impossible, rescission will not be ordered. This would be the situation, for example, if the purchaser of a mine has worked out the mine; or the subject-matter of the contract has been used. However, if substantial restitution is possible, it would be ordered with a financial adjustment between the parties.

8.3.5.2 Restitution inequitable

Since rescission is an equitable remedy, the court will not grant it where it would be inequitable to do so. This will be so, for example if an innocent third party has acquired rights to the subject matter of the contract. Thus, if A sells goods to B on credit after being induced to do so by B's misrepresentations as to his credit-worthiness, and B sells the goods on to C, A will not get restitution of the goods because of C's rights to the property now. An order of rescission would also be refused where the circumstances or conduct of the claimant renders it inequitable. In these circumstances, the claimant would be able to recover only damages.

8.3.6 EXCLUSION OF LIABILITY

Liability for fraudulent misrepresentation cannot be excluded. However, liability for negligent or innocent misrepresentation may be excluded in contracts between businesses if properly incorporated into the contract and if such exclusion is reasonable (s. 3(1) *Misrepresentation Act 1967*, as amended by s. 8 of the *Unfair Contract Terms Act (UCTA) 1977*). Exclusions involving consumer contracts would be governed by the rules on unfairness under *UCTA 1977* and other consumer protection laws.

8.4 DURESS

Contracts entered into as a result of duress are voidable by the innocent party in a similar way as those induced by a misrepresentation. "Duress" involves some sort of threat to a person, goods or economic interests that compels the victim to enter into a contract. A contract procured by duress lacks the voluntary agreement essential for the formation of a valid contract.

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8.4.1 DURESS TO PERSON

Duress applied against a person to cause him to enter a contract will be actionable. Such a duress may be one of actual or threatened physical attack, death threat, or wrongful imprisonment. It may also be unlawful acts or threats directed against persons close to the claimant, such as close family members or partners. Such a duress does not need to be the only reason for entering the contract; it is sufficient that it was a reason. The working of this doctrine was demonstrated in *Barton v Armstrong* [1976] AC 104:

> The claimant signed a contract with the defendant to buy the latter's shares in a company in which they are co-owners. The shares were grossly over-priced and the terms very unfavourable to the claimant and the company. Shortly after the contract, the company became insolvent. Before the contract was made however, the defendant had made several threats against the claimant, including one to kill him. The claimant was also motivated by the desire to see the defendant leave the company, against which interest the defendant had been acting. It was held that the contract was liable to be set aside for duress, even though the threats were not the only reason why the claimant entered the company.

8.4.2 DURESS TO GOODS

Duress to goods will occur where goods, the subject matter of a contract, are unlawfully detained, threatened with detention, destruction, or similar outcome by the defendant unless the claimant enters into a contract with him. In such situations, the doctrine of duress applies to allow the claimant to rescind the contract – *Dimskall Shipping Co SA v International Transport Workers' Federation* (The Evia Luck) [1992] 2 AC 152.

8.4.3 ECONOMIC DURESS

Instead of actual or threatened force, it might be more common to find one party using their economic power against the other to coerce them into a contract. Economic duress is the illegitimate use of economic pressure to make another party to enter into a contract. Such duress makes the contract voidable at the instance of the innocent party. For economic duress to exist, two tests must be satisfied:

a) The threat must be illegitimate and unlawful; and
b) The threat must be the main cause of the threatened or pressured party entering into the contract. This means that the party would not have entered into the contract but for the threat. He would have had no real choice but to agree.

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The following cases illustrate the existence of economic duress:

> *D&C Builders v Rees* [1966] 2 QB 617 – The defendant who had engaged the claimant to build for him at a particular price compelled the claimant, whom he knew was in dire financial situation, to accept a reduced amount in full settlement, otherwise he would get nothing. It was held that the claimant was entitled to the balance since his agreement for the reduced amount was procured by duress.

> *North Ocean Shipping v Hyundai Construction* (*The Atlantic Baron*) [1979] QB 709 – There was a contract to build an oil tanker for an agreed price. The builder refused to complete the contract unless the buyer paid a further 10% of the contract sum because of a 10% devaluation in the value of the dollar. The buyer agreed and made the payment because the vessel was urgently needed to fulfil a charter contract. 8 months after the contract, the claimant sued to recover the extra payment. It was held that the payment could have been recovered due to duress, however the right to rescind had been lost due to delay.

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Universe Tankship Inc. of Monrovia v International Workers' Federation [1983] 1 AC 833 – The claimant's ship was "blacked" by a trade union so that it could not leave the port. In order to secure its release, the claimant paid a sum of money to the union's welfare fund as demanded by the union. The claimant sought to recover the money. It was held that the money was recoverable since it was paid as a result of economic duress.

Atlas Express Ltd v Kafco [1989] QB 833 – The claimant contracted with the defendants to deliver certain goods at a certain price. Due to an over-estimation in the number of items per trailer load, the claimant refused to make more deliveries unless the rate per item was doubled. Unable to afford another transporter, the defendant agreed to pay this increased rate, but subsequently refused to do so. The claimant sued of the money. The defendant pleaded economic duress. It was held that the payment of the increased rate was due to economic duress and was therefore not recoverable.

However, the mere exercise of commercial power or pressure that is not unlawful or illegitimate would not amount to economic duress as the following examples show:

Pao On v Lau Yiu Long [1980] AC 614 – The defendant had to sign an indemnity and guarantee before the claimant would complete their contract for the purchase of shares. The defendant was under pressure to sign the guarantee and indemnity in order to avoid delay in the issuance of the shares that would have negative consequences on his company. It was held that the defendant was bound by the contract; there was no economic duress since nothing illegitimate was done and he had a choice of action.

CTN Cash and Carry Ltd. v Gallaher Ltd. [1994] 4 All ER 714 – The claimant agreed to pay £17,000 being the cost of a consignment of cigarettes stolen from its supplier, the defendant's warehouse. Although the claimant disputed that it should pay that money, it agreed to do so after threats by the defendant to withdraw its credit facilities. Subsequently, the claimant brought an action to recover the money on the ground of economic duress. It was held that the claim must fail because the coercion of the defendant was not illegitimate.

Where economic duress has been applied, the innocent party would need to take steps within a reasonable time to avoid the contract. If he fails to do this, he could be taken to have affirmed and thereby lost the right to rescind it (see *North Ocean Shipping v Hyundai Construction* (*The Atlantic Baron*), above).

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8.5 UNDUE INFLUENCE

This is the improper or illegitimate exploitation of one's position of influence to secure a contract at the detriment of the other contract party. Undue influence "arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage." *Royal Bank of Scotland plc v Etridge* (No. 2) [2002] 2 AC 773, per Lord Nicholls at 775). Thus, for undue influence to arise, one of the contract parties must be in such a superior position relative to the other party that the later places great reliance or trust on him. In addition, the stronger party would have behaved in an unconscionable manner or abuse of his position. The presence of undue influence destroys a contractual agreement because the weaker party could not be said to have exercised the kind of contractual freedom or independence necessary for a normal contract.

8.5.1 CONDITIONS FOR UNDUE INFLUENCE

To amount to undue influence:

a) There must exist between the parties, a relationship of trust and confidence or of ascendancy and dependency (this may be presumed or proved), and
b) There must be an abuse or exploitation of that relationship in order to obtain an undue or unwarranted advantage.

In *National commercial Bank (Jamaica) Ltd Hew* [2003] UKPC 51, it was noted that:

> [...] The doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must have been abused. The necessary relationship is variously described as a relationship "of trust and confidence" or "of ascendancy and dependency". Such a relationship may be proved or presumed.

The mere fact that some pressure was applied on somebody would not be sufficient.

> In *R v A.G. for England and Wales* [2003] UKPC 22, it was held that there was no undue influence where a soldier was made to sign a confidentiality agreement or be returned to a less favourable regiment of the army, because the claimant had a choice whether to sign or a not.

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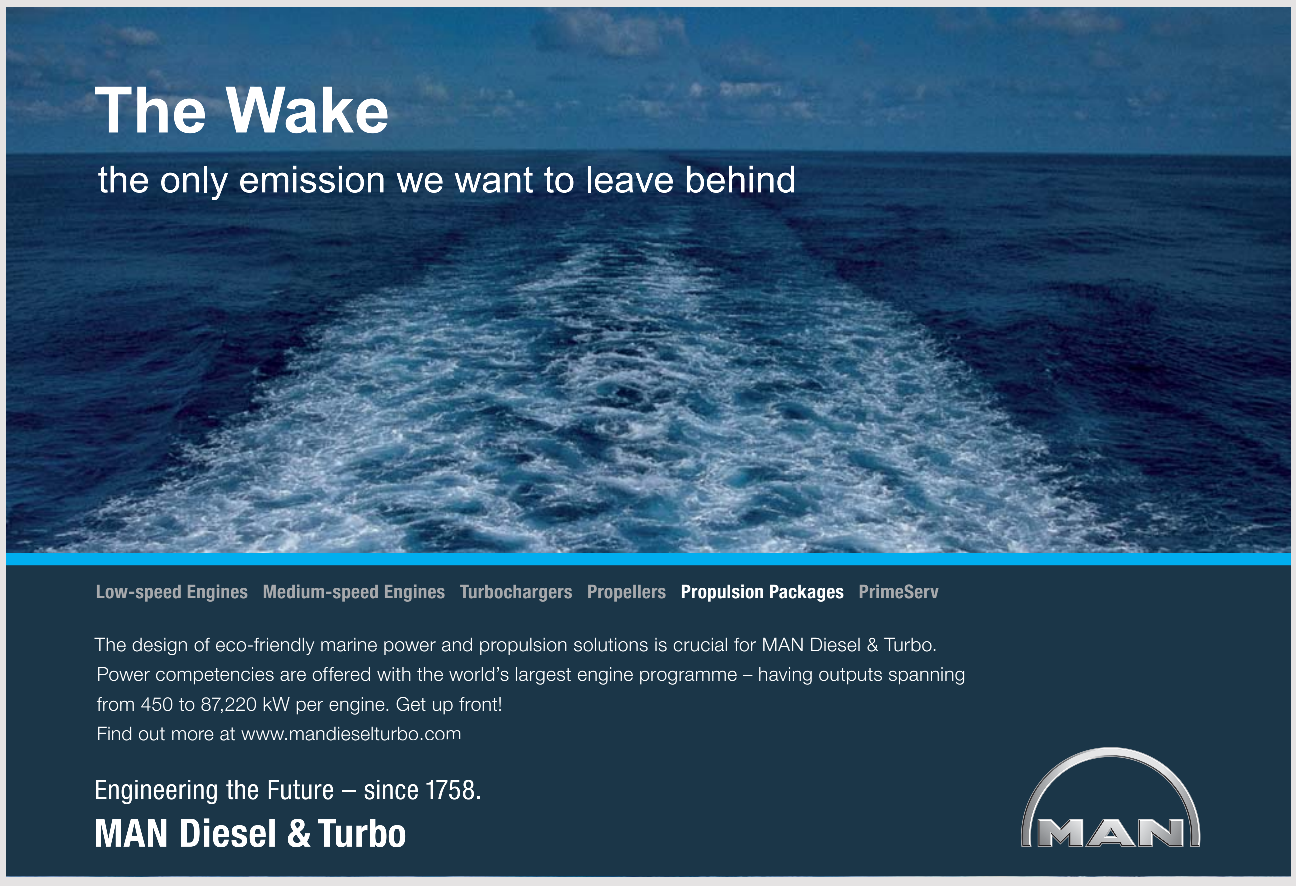
Similarly, the fact that somebody made an unwise or unprofitable contract; or that there was an inequality in the bargaining power of both parties, will not be sufficient.

> In *National commercial Bank (Jamaica) Ltd Hew* [2003] UKPC 51, an elderly man took a bank loan for a specific project. The loan was negotiated by the bank's branch manage with whom the claimant had a long-standing relationship. The project failed and the claimant sought to set aside the loan on the ground of undue influence. The claim failed because there was no evidence of improper pressure, and the bank had no abnormal benefit from transaction. The mere fact that the transaction proved disadvantageous to the claimant was not undue influence. According to the court:
>
> > However great the influence which one person may be able to wield over another, equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimised by other people [...] However commercially disadvantageous the transaction may be to the vulnerable party, equity will not set it aside if it is a fair transaction as between the parties to it (at para. 32 and 34).



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8.5.2 TYPES OF UNDUE INFLUENCE

Undue influence may be *presumed* or *actual.* Presumed undue influence arises where there is a relationship of trust and confidence, for example, between a solicitor and a client; a medical adviser and a patient; and a trustee and the beneficiary. There is also a presumption of undue influence in relationships between a guardian and a ward; and between a spiritual adviser and a follower. In such cases, the claimant only has to prove that the other party had abused or unduly exploited the position of influence. The presumption of influence may however be rebutted by contrary evidence.

Where there is no presumption of undue influence, the actual presence of the influence, as well as the fact of its exploitation or abuse, would have to be proved by evidence. This would be the situation, for example, in cases involving a bank and a customer; an employer and employee; or a husband and wife.

> In *Davies v EIB Group (UK) plc* [2012] EWHC 2178, where a wife failed to prove that she was unduly influenced by her deceased husband in respect of a joint personal loan, her claim to set aside the loan was dismissed.
>
> Similarly, in *National Westminster Bank plc v Morgan* [1985] AC 686, a bank customer failed to prove the existence of undue influence from a bank in favour of whom it signed a loan and charge agreement.

The above cases may be contrasted with *Lloyds Bank Ltd v Bundy [1975] QB 326*.

> The claimant was able to prove undue influence against a bank with which he had a long and trusted relationship. He had mortgaged his home to the bank and signed a guarantee in respect of money owed to the bank by his son. He acted entirely on the advice of the bank manager without an opportunity to seek legal advice. It was held that the bank employed undue influence against the claimant.

The presence of undue influence was also found in *Pesticio v Huet* [2004] EWCA Civ 372.

> A sick and mentally ill patient was made to execute a power of attorney in favour of his sister and her daughter (both of whom had moved into his house) and appoint them his executors. Subsequently, he made a gift of the house to the sister who sold it to her daughter's boyfriend. It was held that the gift was procured by undue influence and therefore void at his instance.

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Although, generally, the onus is on the claimant to prove undue influence, where the benefit or advantage obtained by the stronger party is so large or unusual as to require an explanation, the onus might be on that party to establish that it was conferred without undue influence.

> In *Allcard v Skinner* [1887] 36 Ch D 145, a wife had given all her property to her husband, but later sought to rescind the gift on the ground of undue influence, the court observed that:
>
> > The mere existence of the influence is not enough: 'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift (per Lindley LJ).

8.6 CHAPTER SUMMARY

- Contracts may become voidable due to what was said or done before or at the time it was concluded. This may be misrepresentation, duress or undue influence.
- Misrepresentation may be innocent, negligent or fraudulent. While all types give rise to a right to rescind the contract, only the last two may also give rise to an award of damages in tort.
- For there to be actionable misrepresentation, the statement must be false, relate to fact or law, and must induce the innocent party to enter into the contract. Except in special circumstances, statements of intention or opinion will not give rise to actionable misrepresentation.
- Generally, misrepresentation relates to words or conduct; silence would not amount to representation except in special circumstances.
- The consequences of misrepresentation may be minimised or removed by exclusion clauses provided the rules on those are complied with.
- Although misrepresentation gives the innocent party a right to rescind the contract, that right may be denied where the innocent party has affirmed the contract or in circumstances where it would be unjust or inequitable to grant it.
- Duress may be in relation to a person, goods, or economic interests.
- A contract procured by duress could be avoided by the innocent party on the order of the court.
- Undue influence may also lead to a contract being avoided by the innocent party, provided the influence exists and has been unduly exploited or abused by the dominant party.

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- Undue influence may be presumed – in that the law assumes that one party occupies a dominant position relative to the other who is dependent on him – or actual, in that the presence of the influence or dominance has to be proved. In either case, the claimant has to establish that the influence has been exploited or abused to his detriment.

8.7 PRACTICE QUESTIONS

With reference to decided cases where applicable:

1. Explain the three types of misrepresentation and their consequences to a contract and its parties.
2. Explain the circumstances in which silence may be tantamount to misrepresentation
3. Explain the circumstances in which the right to rescind a contract following misrepresentation might be lost.
4. Distinguish between personal and economic duress. In what circumstances could the latter lead to the rescission of a contract?
5. Explain the circumstances in which undue influence would be presumed to exist and the circumstances in which it must be proved to exist.

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9 VITIATION OF CONTRACT 2 MISTAKE, ILLEGALITY AND INCAPACITY

9.1 INTRODUCTION

Apart from Misrepresentation, undue influence and duress discussed in the previous chapter, other factors can also negatively affect the validity and enforceability of a contract after its formation. In these instances, however, the effect may be more drastic in that the contract may be rendered void and treated for, all intents and purposes, as if it never existed. The factors that may affect a contract in this way are mistake by one or both parties; illegality of the contract, its purpose, or execution; and contractual incapacity of one or both parties.

9.2 LEARNING OBJECTIVES

At the end of this chapter, the reader should clearly:

- Understand the factors that could make an otherwise valid contract void or unenforceable
- Understand the meaning and types of mistake and their effects on a contract
- Understand the meaning and types of illegality and their effects on a contract and the parties thereto
- Understand the importance of legal contractual capacity
- Understand the different types of contractual incapacity and their effects on a contract

9.3 MISTAKE

A mistake (misunderstanding, wrong belief) by both or one of the parties to a contract about a matter fundamental or essential to the contract could make the contract void, thereby relieving the parties of any obligations they had assumed under it. The rationale behind this principle is that if the parties – or one of them – had contracted under a mistaken belief about a fundamental matter, their agreement was founded on a false premise, or was, at least not genuine. The mistake may relate to fact or law, but must exist at the time the contract was concluded.

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It must be noted however, that the law on mistake is not intended to release people from the contractual obligations they had undertaken out of recklessness, failure to carry out due diligence, or lack of knowledge. As the House of Lords observed in *Norwich Fire Insurance Society Ltd v Price* [1934] AC 455 at 463, "it is […] essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or as being fundamental or basic." To render a contract void, the mistake must be such that if the parties had been aware of the true state of affairs, they would not have entered the contract or; such as would make the contract something radically different from what the parties had contemplated. Mistake may be unilateral, common, or mutual, or in relation to the execution of a wrong contractual document.

9.3.1 COMMON MISTAKE

In this type of mistake, the parties, in making the contract, would both be mistaken on the same fundamental issue. This may relate to the existence of the subject matter of the contract, or to its identity or quality, or to the possibility of performing the contract.

9.3.1.1 Mistake as to the existence or identity of the subject matter

In this type of mistake, the contract is based on a subject matter, which unknown to both parties, and without their fault, no longer exists (*res extincta*), or already belongs to the purchasing party (*res sua*); or is radically different from what the parties had in mind. In effect, such cases would disclose a total failure of consideration, in that one party has nothing of value to give in the contract; or that what was offered is different from what was sought. Thus, for example, *s. 6 Sale of Goods Act 1979* provides that a contract undertaken in ignorance of the perishing of the goods to which it relates would be void. The following case illustrate this principle:

> *Couturier v Hastie* [1856] 5 HL Cas 673 – The parties contracted to buy and sell a shipment of corn, which unknown to them had fermented and been sold to a third party by the shipmaster. It was held that the contract had been voided by mistake.
>
> *Cooper v Phibbs* [1867] LR 2 HL 149 – The claimant contracted to lease a property from the defendant, but unknown to both parties, the property actually belonged to the claimant. It was held that the contract was void due to common mistake.
>
> *Galloway v Galloway* [1914] 30 TLR 531 – The defendant, after separating from his wife promised to pay her a certain amount of money regularly as maintenance. He defaulted in the payment, when his first wife whom they believed was dead, turned up alive. It was held that the agreement to pay the maintenance was voided by the mistake of both parties that they had a valid marriage.

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Where a written contract does not substantially represent the clear oral agreement of the parties, it may be rectified, or otherwise rendered void by mistake.

However, where the mistake concerns only the quality of the subject matter, it would not invalidate the contract unless it renders it radically or fundamentally different from what the parties intended. The following cases illustrate the principle:

> *Bell v Lever Brothers Ltd* [1932] AC 161 – Bell was made redundant by Lever Brothers who agreed to pay him a large sum of money in compensation. Subsequent to the agreement, the company discovered that Bell had committed some breaches of his duty as a director that would have justified his dismissal without compensation. The company sued to recover the compensation on the ground of common mistake. The action failed on the ground that there was no fundamental mistake in relation to the contract subject matter.

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Oscar Chess Ltd v Williams [1957] 1 WLR 370 – The claimant sold a car to the defendant and accepted his car in part exchange. Both parties believed the exchange car was a 1948 model because the registration document stated that it was first registered in that year. The claimant later discovered that the car was in fact a 1939 model and sued for breach of contract. It was held that there was no breach; the mistake about the car's age was not so fundamental as to nullify the contract.

Great Peace Shipping Ltd Tsavliris Salvage (international) Ltd [2003] QB 679 (*The Great Peace*) – The defendant, in urgent need of assistance, agreed to hire a ship from the claimant for five days on the common understanding that the ship was only 12 hours away. In truth, the claimant's ship was 39 hours away. On discovering the correct position, the defendant hired another ship and sought to cancel the contract with the claimant. When sued for breach of contract, the defendant argued that the contract should be declared void for common mistake. It was held that the contract was valid even though the ship would have been useful only for part of the period envisaged by the parties – the miscalculation of distance did not make the contract radically different from what was intended.

9.3.1.2 Mistake about performance of the contract

Parties normally enter into contracts in the belief that it could be performed. If however, the contract is incapable of performance due to legal, physical, or commercial reasons, it may be nullified on the ground of mistake. This will be the case, for example, where parties contract to lease property which the lessee already owns (*Cooper v Phibbs* [1867] LR 2 HL 149); or to carry out a transaction, which unknown to them was prohibited by law. Other examples would be a contract relating to produce which, unknown to the parties cannot be obtained from the land (*Sheikh Brothers Ltd v Ochsner* [1957] AC 136); or a contract based on an event which, unknown to the parties, had been cancelled (*Griffith v Brymer* [1903] 19 TLR 434).

9.3.2 MUTUAL MISTAKE

In mutual mistake, both parties genuinely and mutually misunderstand each other on a fundamental aspect of the contract. In that situation, they would be at cross-purposes and the essential agreement or meeting of minds necessary for a contract would be missing. The following cases provide an illustration:

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Raffles v Wichelhaus [1864] 2 H & C 906 – There was a contract to sell and buy a consignment of cotton "ex Peerless from Bombay" between the claimant and the defendant. However, there were two ships named *Peerless* sailing with cotton from Bombay in the same period – one in October, the other in December. Apparently expecting the October consignment, the buyer refused to accept or pay for the December consignment. It was held that the defendant was not bound to accept the December consignment as no genuine agreement existed between the parties.

Scriven Bros & Co v Hindley & Co [1913] 3 KB – The defendant made a bid for the claimant's bales of tow in the belief that they were hemp, while the claimant believed the defendant was bidding for tow. It was held that there was no binding contract due to mutual mistake.

However, a mere misunderstanding as to some details or quality of the subject matter of the contract would not affect its validity (although in some cases, the court may for equitable reasons refuse to order specific performance) as demonstrated by the following cases:

Wood v Scarth [1858] 1 F & F 293 – The claimant agreed to let property from the defendant at £65 per annum. In addition to the rent, the defendant intended that a one-off payment of £500 would also be paid by the tenant. However, the claimant believed that only the rent was payable. It was held that the claimant was bound to pay the £500 despite his misunderstanding.

Scott v Littledale [1858] 8 E & B 815 – The defendant contracted to sell to the claimant a consignment of tea on board a certain ship. However, the defendant mistakenly submitted a wrong and cheaper sample of tea to the claimant and apparently based his pricing on it. It was held that the contract was valid despite the mistake of the defendant.

9.3.3 UNILATERAL MISTAKE

In cases of unilateral mistake, only one party is mistaken on a fundamental aspect of the contract and the other party knows, or is otherwise presumed to know, about this mistake. This may occur as a mistake regarding a fundamental term of the contract, a mistake as to identity, or the signing of the wrong document.

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9.3.3.1 Mistake as to a fundamental term

Where a contract party enters into a contract on the basis of a mistake relating to a fundamental term of the contract and the other party knows, or is deemed to know, about this mistake, the contract could be rectified or declared void on the ground of unilateral mistake. The following cases illustrate this principle:

> *Webster v Cecil* [1861] 30 Beav 62 – The defendant mistakenly offered to sell his land to the claimant for £1,250 having earlier refused to sell it to him for £2,000. The defendant had intended to offer the land for £2,250. Upon the claimant's action for specific performance of the contract, it was held that there was no binding contract due to mistake which the claimant must have known about.

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Van Praagh v Everidge [1902] 2 Ch 266 – The defendant mistakenly bid for the wrong property at an auction and the hammer was brought down for him. On discovering his error, the defendant refused to sign the contract, whereupon the auctioneer purported to sign it on his behalf. However, instead of 18 November 1901 when the sale took place, the contract papers and conditions contained the date of 17 October 1901 (the date previously set for the sale, under which the defendant was required to complete performance by 24 November 1901). It was held that there was no enforceable contract between the parties and that the error in respect of the dates was material.

Roberts & Co Ltd v Leicestershire County Council [1961] Ch 55 – The claimants made a tender for the defendant's building with completion date of 18 months. However, it signed a contract prepared by the defendant which set the completion date for 30 months without being aware of the change in the completion date. The defendant was aware of the claimant's ignorance. It was held that the contract should be rectified for unilateral mistake.

Hartog v Colin & Shields [1939] 1 All ER 566 – The defendant contracted to sell 30, 000 hare skins to the claimants at a unit price per pound (in weight). However, the defendant made a mistake in the offer, having intended that the unit price was per piece of skin (the price per skin was roughly three times the price per pound). The custom in the business was to sell per piece; the claimant was aware of this custom; and negotiations with the defendant was done on that basis. When the defendant realised his mistake, he refused to perform the contract. The claimant sued for breach of contract. It was held that the claimant was not entitled to any damages as the contract was entered into by mistake, which was known to the claimant.

Taylor v Johnson [1983] 151 CLR 422 (Australian case) – The defendant contracted to sell 10 acres of land to the claimant for £15,000 on the mistaken belief that the stated price was in respect of each of the ten acres. The true value of the whole land could reach almost £200,000. The claimant was aware of the defendant's error and took steps to prevent its discovery. The contract was set aside for mistake.

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However, if one party was not aware of the mistake of the other party, the contract would remain valid and enforceable. This point is clearly illustrated in *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158:

> The claimants had offered a renewed lease of their premises to the defendant at a "reviewed" rent of £65,000 per annum, an offer, which the defendant accepted. However, the new rent was less than the amount the defendant was then paying on the premises. The claimant subsequently wrote a correction letter to the defendant insisting that they had intended to offer the premises at the rent of £126, 000 per annum. The defendant refused to accept this rent correction and insisted on the enforcement of the contract. The claimant insisted that no valid contract existed between the parties and that the offer was made in error, which the defendant knew, or ought reasonably to have known about.
>
> It was held that the contract of lease at £65,000 per annum was binding between the parties and that the claimant was not entitled to withdraw its offer due to any mistake on its part, which was not known to the defendant.

If the mistake relates to a minor term, detail or quality of the subject matter, the contract will remain valid:

> *Templin v James [1880] 15 Ch D 215* – The defendant bid for a house in an action on the mistaken belief that an adjoining land was part of the sale, even though there was no such information or claim from the auctioneer. When he discovered that it was not, he refused to pay. It was held that the defendant was bound to perform the contract irrespective of his mistake.

9.3.3.2 Mistake as to identity

Unilateral mistake may also relate to the identity of one of the parties to the contract. Mistake as to identity of one of the contract parties may render the contract void if the identity is essential to the contract, and if the transaction was carried out from a distance. In situations such as this, the party who obtains property as a result of the mistake will not be able to pass title to a third party who might have purchased the goods from him in good faith.[3]

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Cundy v Lindsay [1878] 3 App Cas 459 – A rogue (Mr Blenkarn) obtained goods on credit from the claimant (L) after disguising his order to appear as if it was from a reputable company (Blenkiron & Son) operating on the same street and known to the claimant. The rogue failed to pay for the goods and sold them on to a third party who bought them in good faith. It was held that the contract to buy the goods from the claimant was void due to the claimant's mistake.

Shogun Finance Ltd v Hudson [2004] 1 AC 919 – A man bought a car on hire purchase from a car dealer using a different name. The car dealer had faxed the buyer's documents, including driving license (which were in the name of another person) to the claimant finance company which provided the credit facility after conducting a credit cheque on the name provided by the buyer. The buyer subsequently sold the car to the defendant. It was held that there was no contract between the rogue and the finance company; that the hire purchase contract was void due to mistake; and that the defendant did not acquire a good title to the car.

In cases such as the above, the seller who had been misled as to the identity of the other contract party would only be entitled to an order to avoid the contract for fraudulent misrepresentation as between him and that fraudulent party and for damages.

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However, where the contract is entered into face to face, a fundamental mistake as to identity will not render the contract void. This is because the party making the mistake must be presumed to intend to deal with the person before him.

> *Phillips v Brooks* [1919] 2 KB 243 – A criminal, passing himself off as a respectable and well-known person, came to the claimant's shop and bought some jewellery. He paid by cheque, collected one of the items and sold it to a third party. His cheque bounced. It was held that the contract was not void for mistake as the claimant sold the item to the person who came to the shop.

> *Lewis v Averay* [1972] 1 QB 198 – A rogue bought a car from the claimant and paid with a cheque after pretending to be, and convincing the claimant that he was, a famous actor. It turned out that the cheque had been stolen. The claimant sued to recover the car, which by that time had been sold to a third party. It was held that the contract to sell the car to the criminal was not void due to mistake.

> *King's Norton Metal Co Ltd v Edridge, Merrett and Co Ltd* (1897) 14 TLR 98 – A crook bought some brass rivet wire from a metal manufacturer on credit after convincing the latter that he ran a big business and was creditworthy. The crook sold the goods to a third party but failed to pay the manufacturer for it. It was held that the manufacturer could not recover the goods from the third party to whom it was sold.

9.3.4 SIGNING THE WRONG DOCUMENT

Where a person is made or deceived to sign a document that is radically, fundamentally, essentially or totally different from what he thought he was signing, he may not be bound by that document, provided he was not careless in signing it. Thus, for example, if a blind or illiterate person was deceived into signing a document different from what he thought he was signing, he could plead *non est factum* means, which it to say "not my deed." The principle will also apply in favour of a literate and sighted person who signs, without reading, a document different from what he intended to sign provided his failure to read was not due to his own carelessness.

The rationale for this principle is that the person signing the document did not give the consent necessary to have a contract; or that the consent given was obtained by fraud or deception. The onus is on the person pleading *non est factum* to establish that the document was radically different from what he intended to sign, and that he signed it without negligence. The following cases illustrate the application of this principle:

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Thoroughgood's Case [1582] 2 Co Rep 9a – A tenant who was in arrears of rent deceived his illiterate landlord, the claimant, into signing a document which relieved the tenant of "all demands whatsoever" from the landlord. Subsequently, the tenant sold the property to an innocent purchaser. It was held that the claimant was entitled to recover his property since he had been deceived into signing away his right.

Foster v Mackinnon [1869] LR 4 CP 704 – The defendant signed a bill of exchange for £30,001 after being fraudulently made to believe that it was a guarantee. Upon being sued by the holder, bona fide and for value, of the bill of exchange, the court directed the jury as follows:

> If the defendant's signature to the document was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

Lewis v Clay [1897] 67 LJQB 224 – The defendant was made to sign documents which showed nothing but the signature spaces. He was told that the documents concerned a family matter and that he was only signing as a witness. In truth, the documents were promissory notes in favour of a third party. It was held that the defendant was not bound by these documents.

The doctrine of *non est factum* is however applied strictly. If the *object* of the document signed was not different from what the signer intended, the document would be binding, even if what he signed was not exactly what he had in mind. Thus, it remains the responsibility of parties to be careful about what they sign.

Saunders v Anglia Building Society [1971] AC 1004 – The claimant, a 78 year-old widow intended to make a gift of her house to her Nephew in order for the nephew to use it to raise money from a bank through the help of one Mr Lee. She was however, made to sign a deed of sale of the property in favour of Lee who paid nothing for it. She could not read the document due to poor eyesight and the fact that her reading glasses had broken. Lee however assured her that the document was a deed of gift in favour of her nephew. Lee mortgaged the property to Anglia Building Society for £2,000 but failed to make the mortgage repayments. In an action to recover the property from the building society, it was held that the sale was valid since the object of the document (relinquishing ownership in order to raise money) was the same, whether it was a gift or a sale.

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9.4 ILLEGALITY

There will be no enforceable contract if the subject matter or purpose of the agreement is illegal, immoral or against public policy. For good reasons, the courts will not assist anybody in the enforcement of a contract in breach of the law, public policy or public morality. The court will not wittingly facilitate, encourage or condone such agreements, which are capable of making a mockery of the law or throwing it into disrepute. As Lord Mansfield observed in *Holman v Johnson* [1775] 1 Cowp 341:

> No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa (i.e. out of an evil cause), or the transgression of a positive law of this country, there the courts say he has no right to be assisted.

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Illegality may arise because the subject matter or purpose of the contract is illegal or against public policy, or because an otherwise legal agreement is to be performed in an illegal manner or used in furtherance of an illegal purpose. Thus, a contract to commit a crime for money; to supply illegal substances; to traffic people for slave labour or sex; for the services of a prostitute; to corrupt law enforcement agencies or public officials; or to undermine the justice system would be unenforceable. Also void on these grounds would be contracts with enemy nationals, those to defraud the inland revenue, or contracts prohibited by statute.

9.4.1 CONTRACTS ILLEGAL BY STATUTE

If a statute expressly or impliedly prohibits any activity or transaction, any contract in respect or furtherance of that activity or transaction would be illegal and void. Similarly, where parties agree to perform a contract by doing something prohibited by statute, that contract would also be illegal and void. Thus in *Cope v Rowlands* [1836] 2 M & W 149, where the claimant, an unlicensed stockbroker worked for the defendant who failed to pay, it was held that the stockbroker could not enforce the contract since working without a license was against the law. According to Parke B, the judge:

> It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect.

9.4.2 CONTRACTS ILLEGAL UNDER THE COMMON LAW

Under the common law, it is illegal or against public policy to enter into certain types of contracts. If entered into, such contracts would be unenforceable. Below are examples of such contracts:

9.4.2.1 Contracts to commit a crime or civil wrong

Contracts to commit a crime or civil wrong would be illegal and unenforceable.

> *Everet v Williams* [1725] 9 LQR 197 (The Highwaymen's Case) – two men robbed a stagecoach under an agreement to share the loot. At the end of the robbery, one of the robbers refused to share the loot, and the other sued him. The court not only dismissed the case as preposterous, but also ordered the arrest of the robbers and fined the solicitors.

The courts have held as illegal under the common law and therefore unenforceable, a contract to defraud the public revenue (*Miller v Karlinski* [1945] 62 TLR 85); a contract to defraud the rating authority (*Alexander v Rayson* [1936] 1 KB 169); and a contract in breach of the exchange control regulations.

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9.4.2.2 Contracts for an immoral act

Contracts to commit an immoral act would be unlawful and unenforceable.

> In *Pearce v Brooks* [*1866*] *LR 1 Ex 213*, there was a contract to supply a brougham (a horse-drawn carriage) to a prostitute 'as part of her display'. The owner sued when the prostitute failed to pay. It was held that the contract was for an unlawful purpose and unenforceable.

The above case may be contrasted with *Armhouse Lee v Chappell, Times, 7 August 199*:

> The defendant (pornographers) entered into a contract with the claimant (advertising agents) for the advertisement of telephone sex chat services in a magazine. The defendant failed to pay for the advertisement arguing that the contract was immoral and unenforceable. The Court of Appeal held that the contract was not immoral and therefore enforceable since such chats in return for money are not tantamount to prostitution.

9.4.2.3 Contract with an enemy country or national

A country with which the UK is at war is an enemy. Contracts with such countries or its nationals would be contrary to public policy and might not be enforced by the courts.

> *Daimler Co Ltd v Continental Tyre & Rubber Co Ltd* [1916] 2 AC 307 – Continental supplied tyres to Daimler at the time of World War 1. Although both companies were registered in the UK, all but one of the shareholders of continental, and all its directors were German nationals. Daimler refused to pay fearing that payment would contravene the provisions of the common law and statute prohibiting trading with enemies. It was held that the contract was unlawful and unenforceable.

9.4.2.4 Contracts to corrupt public life

A contract whose purpose, wholly or partly, was to corrupt or compromise public officials by the payment of bribes or the granting of other benefits would be unlawful and unenforceable.

> *Parkinson v College Ambulance Ltd & Harrison* [1925] 2 KB 1 – The claimant gave money to a charity on the understanding that its secretary would help him secure a knighthood. When he did not receive the knighthood, the claimant sued to recover the money. It was held that the contract was that the contract was unenforceable, being a corrupt and indecent transaction.

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9.4.2.5 Contracts prejudicial to the administration of justice

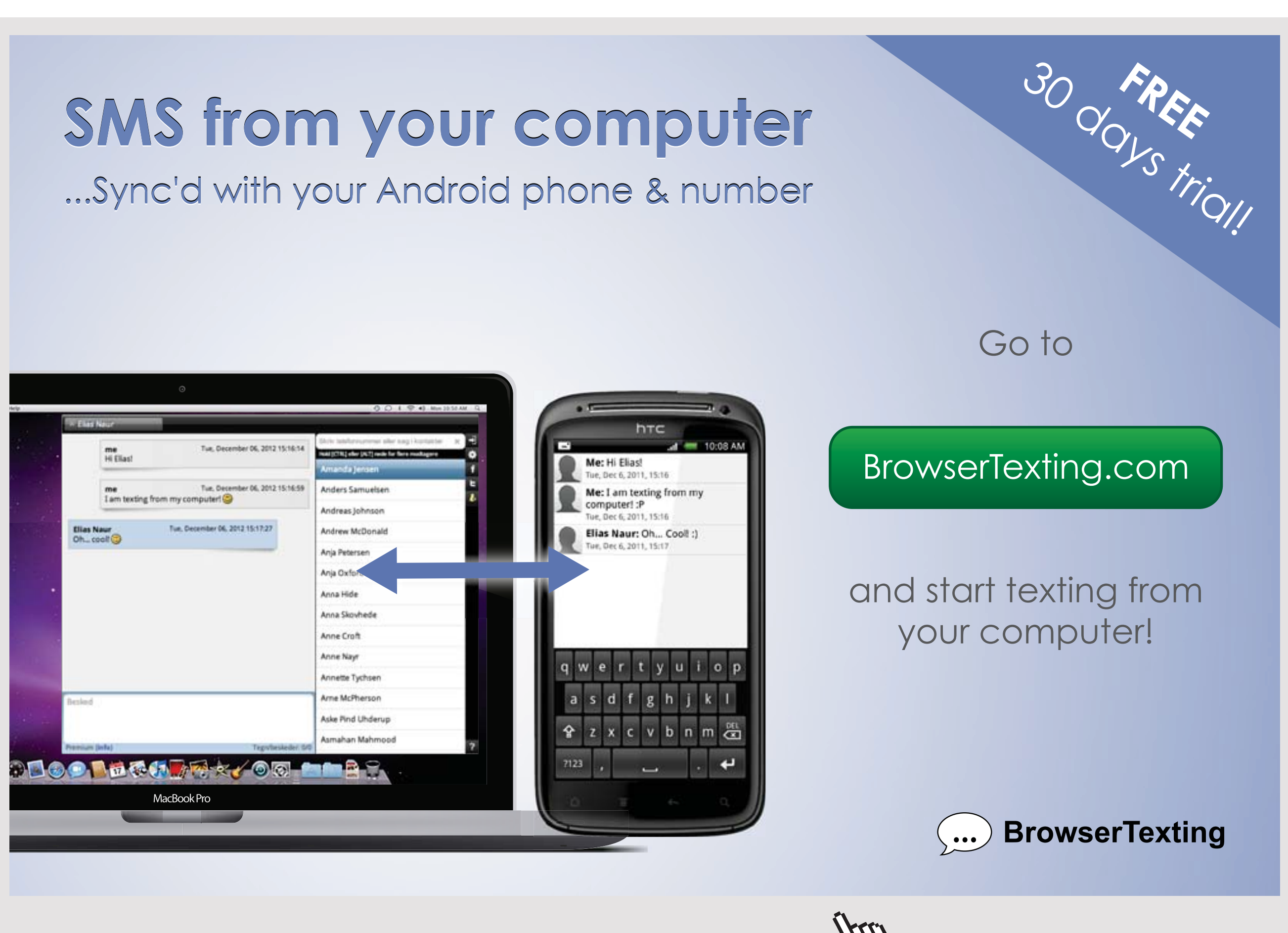
A contract whose object, wholly or partly, is to prejudice or undermine the administration of justice would be unlawful and unenforceable. Examples of this would be contracts to obstruct the prosecution of suspects, contracts to hinder the production of evidence or witnesses, or contract to give false or misleading evidence in court (*John v Mendoza* [1939] 1 KB 141).

9.4.2.5 Contract ousting courts' jurisdiction

It would be against public policy for a contract to attempt to remove the power of the courts to adjudicate over disputes. Such a contract would unenforceable.

> *Hyman v Hyman* [*1929*] AC 601 – Upon separation, a husband and wife agreed that the husband would pay the wife a certain regular amount as maintenance. The agreement stipulated that the wife would not be able to sue for more than the agreed amount. It was held that the agreement was contrary to public policy and void.

However, contracts providing that parties thereto must seek alternative dispute resolution mechanisms, such as arbitration, before resorting to litigation are not included in this rule (*Scott v Avery* [1855] 5 HLC 811).



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9.4.2.6 Contracts to defraud public revenue

A contract to deprive Her Majesty's Revenue Service of due taxes and other revenues would be unlawful and unenforceable.

> *Napier v National Business Agency* [1951] 2 All ER 264 – Under the claimant's employment contract with the defendant, he was to be paid a salary of £13 per week plus expenses of £6. In fact, however, the claimant's expenses was not more than £1. Upon an action for wrongful dismissal, it was held that the expense payment was a sham and the employment contract designed to defeat the legitimate tax claims of the Revenue. The contract was therefore against public policy and unenforceable.

9.4.2.7 Contracts illegal by the law of a friendly country

In order to maintain friendly international relations, a contract which might not be illegal under English law might be declared unlawful and unenforceable by English courts if its purpose was to breach the laws of a friendly country.

> *De Wutz v Hendrick [1824] 2 Bing 314* – A contract to raise money to facilitate a rebellion by Greek citizens against the Greek government (a friendly State) was held to be illegal and unenforceable.

> *Foster v Driscoll* [1929] 1 KB 470 – Certain English businessman had contracted to ship to the USA 7,500 cases of whiskey during the period of prohibition. It was held that the contract was invalid since it involved the performance of an illegal act in a foreign and friendly country.

> *Regazzoni v Sethia* [1958] AC 301, [1957] 3 All ER 286 – The claimant contracted to buy jute from the defendant in India with the aim of selling them to South Africa, but the defendant ultimately failed to supply them. At the time, Indian law prohibited the sale of goods to South Africa. Upon the claimant's action for breach of contract, it was held that the contract was unenforceable. Although not illegal in the UK, the contract, with the knowledge of the defendant, was designed to contravene the law of India. Its enforcement could damage the friendly relations between the UK and India.

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9.4.2.7 Contracts in restraint of trade

A contract which restricts the right of one of the parties to trade or use his professional skill in a particular area for a particular length of time may be illegal and void unless it is reasonable (as between the parties and in the public interest) or falls within the exceptions recognised in law. The court has to balance the interest of individuals to freely do business or employ their skills to earn a living, the interest of the public in that freedom, and the need for free-market competition against the interest of employers and businesses to protect legitimate business and trade interests and maintain a stable workforce.

What is reasonable is a question of fact, depending on the circumstances of each case. Generally, however, the duration and geographical limits of the restraint, and whether there is a legitimate business interest worthy of legal protection, are essential considerations. As the court observed in *Morris Ltd v Saxelby* [1916] 1 AC 688, any restraint of trade must provide no more protection than is adequate for the benefit of the party for whose interest it is imposed (See also *Office Angels Ltd. v Reiner Thomas* [1991] ILRL 215). The onus of proof is on the person imposing and relying on the restrain to prove that it is necessary and reasonable.

Restraint of trade clauses which are unreasonable, too wide, or which are not for the protection of legitimate business interests of the other party would be contrary to public policy and void. The following cases illustrate this:

> *Morris Ltd v Saxelby* [1916] 1 AC 688 – A contract clause prevented an employee from using his engineering skills for another employer in the UK for a period of 7 years was held to be unreasonable and invalid.
>
> *Home Counties Diaries v Skilton* [1970] 1 WLR 526 – A contract clause restricted a milkman from selling dairy products to the customers of his former employers for 12 months. This was held to be excessive and unenforceable.
>
> *Strange v Mann* [1965] 1 All ER 1069 – An employee dealt with the employer's customers only through the telephone. However, there was a restraint of trade clause forbidding him from engaging in a business similar to the employers within a 12-mile radius on the termination of his employment. It was held that the restraint was invalid since the employee had no physical contact with the employer's customers.

Where a restraint of trade is too wide, but the invalid part could be separated from the rest, the court may strike out the invalid part and enforce the rest (*Goldsoll v Goldman* [1915] 1 Ch 292).

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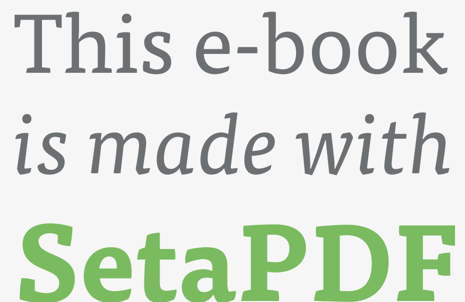
9.4.2.7.1 Exceptions to the restraint of trade rule

In some circumstances restraint of trade clauses would be lawful and enforceable. Common examples are restrictions on an employee against divulging trade secrets or setting up a rival business.

> In *Forster & Sons Ltd v Suggett* [1918] 35 TLR 87, a restraint on a manager from working in the manufacture of glass for 5 years anywhere in the UK after he left his employment was held to be valid. The company's glass-making business had a secret recipe to which the manager was privy.
>
> In *Fitch v Dewes* [1921] 2 AC 158 – a solicitor's managing clerk was restrained from working for another firm within a 7-mile radius of the town. It was held that the restrained was reasonable since the solicitor could work anywhere outside those 7 miles.
>
> Conversely, a restraint of trade clause was found to be reasonable in *Allan Janes LLP v Johal* [2006] EWHC 286.



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> A defendant solicitor's contract included a restrictive covenant that she would not for one year after leaving her employment work for another law firm within 6 miles of her employer's office or solicit any of her employer's clients. When she resigned, the defendant set up practice within 2 miles of her former employer's office and sent e-mails to some of their established clients asking for their patronage. It was held that the restraint clause was reasonable.

A similar decision was reached in *Thomas v Farr plc and Another* [2007] EWCA Civ 118, Times 27 Feb. 07.

> An insurance company restrained its former chairman from working in a rival company for 1 year after leaving its employment. It was held that the restraint was reasonable.

See also *Associated Foreign Exchange Ltd v International Foreign Exchange (UK) Ltd.* [2010] EWHC 1178 (Ch), [2010] IRLR 964).

Another common example is the exclusive dealing (Solus) and exclusive service agreements. In this type of agreement, a party would sell only products belonging to the other contractual party (*Esso Petroleum Ltd v Harper's Garage Ltd* [1968] AC 269) (see p. 142 above). In an exclusive service agreement, a party agrees to work only for a particular company or person for a period of time (See *Warner Bros Pictures Inc. v Nelson* [1937] 1 KB 209).

The final example involve restrictions for the protection of business goodwill. Where a business is sold, the buyer may require the inclusion in the contract of sale a term that the seller would not open the same type of business in the same locality (See *Nordenfelt v Maxim Nordenfelt* [1894] AC 535). However, the person inserting the restraint must have a goodwill to protect otherwise the restraint would be unreasonable and void (*Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181).

9.4.3 EFFECTS OF ILLEGALITY

As would have become apparent from the preceding discussions, the general rule is that an illegal contract or a contract against public policy is void and unenforceable and the parties involved will receive no remedy from the courts in respect thereto. As Pollock CB observed in *Pearce v Brooks* [1866] LR 1 Ex 213, "the rule which is applicable is *ex turpi causa non oritur actio*, and whether it is an immoral or an illegal purpose in which the Plaintiff has participated, it comes equally within the terms of the maxim, and the effect is the same." The operation of this rule, however, depends a lot on the nature of the illegality and the state of mind of the parties.

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9.4.3.1 Where both parties are guilty

Where the subject or purpose of the contract was at inception illegal or against public policy, the rule *ex turpi causa, non oritur actio* applies in full force. The contract would be treated as void ab initio; meaning that under the law, the contract never existed. The position is the same where the contract was lawful at inception but the parties intended to employ unlawful means to execute exploit it. None of the parties would be able to enforce the contract or claim remedies under it. Moreover, none of the parties is entitled to recover any money or property transferred pursuant thereto. In this situation the maxim, *in pari delicto portio, ext conditio defedentis* – where both parties are guilty, any benefit would lie where it had fallen, applies (see *Parkinson v College of Ambulance Ltd and Harrison [1925] 2 KB 1*). Ignorance of the law by one of the parties would not make a difference.

A party may only recover his property or goods:

a) If the illegality has come to an end or is not relevant to the claim (*Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65; *Amar Singh v Kulubya* [1964] AC 142; *Tinsley v Milligan* [1993] 3 All ER 65).
b) If he had repented of the illegality and taken action before the contract was due to be performed (this is known as *locus poenitentiae*) (*Taylor v Bowers* [1876] 1 QBD 742; *Kearley v Thomson* [1890] 24 QBD 742; *Tribe v Tribe* [1995] 4 All ER 236).
c) If he is not in fact guilty of illegality in that his agreement was due to a mistake of fact, or procured by fraud, duress, misrepresentation, undue influence or oppression (*Smith v Cuff* [1817] 6 M & S 160). Also included is where the statute breached had been designed to protect persons in the class of the claimant (*Kasumu v Baba-Egbe* [1956] AC 539; *Kariri Cotton v Dewani* [1960] AC 192).

Furthermore, any subsequent or collateral (secondary) contract based on the illegal contract would also be illegal and void if the third party to that contract knew about the original illegality (*Cannan v Bryce* [1819] 3 B & Ald 179; *Spector v Ageda* [1973] Ch 30; [1971] 3 All ER 417).

9.4.3.2 Where one party is innocent

Where the contract or its subject matter or purpose was lawful at the beginning, but only one of the parties intended to and did exploit it for an unlawful purpose, the *ex turpi causa* rule might be relaxed in favour of the innocent party. Thus, while the guilty party would not be able to enforce the contract or recover money or properties under it, the innocent party could. The innocent party also retains all his remedies and rights under the law of contract.

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Oum v Bruce [1810] 12 East 225 – The claimant entered into an insurance contract in respect of a Russian vessel on behalf of its Russian owner oblivious of the fact that Russia had declared war on England. The Russian government seized the vessel. It was held that the claimant could recover the premium he had paid on the policy.

Strongman (1945) Ltd v Sincock [1955] 2 KB 348 – The claimant refurbished the defendant's house based on the latter's promise to obtain the necessary legal permissions. The permission was not obtained and the defendant refused to pay for the work. It was held that the claimant was entitled to recover the money for the work done based on the defendant's collateral warranty that he would obtain the permissions.

21st Century Logistic Solution Ltd (In Liquidation) v Madysen Ltd [2004] EWHC 231 QB – The claimant sold goods to the defendant who immediately sold them to a third party. The price of the goods included VAT. However, unknown to the defendant, the claimant neither accounted for nor intended to pay the VAT. Upon, going into liquidation, the claimant's liquidator claimed the contract sum plus VAT from the defendant. The defendant refused to pay on the ground of illegality due to the intended VAT fraud. It was held that the defendant was liable to pay and that the intended fraud was too remote to the contract of sale and did not render it illegal.

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9.5 INCAPACITY

There will be no enforceable contract if either party to it is legally incapacitated, e.g., because they are minors, of unsound mind (subject to some exceptions) or drunkards (subject to strict conditions). In addition, contracts entered into by corporate institutions or bodies outside their powers or authority could, in limited circumstances, be invalidated as being *ultra vires.*

9.5.1 MINORITY

Generally, a child – a person under the age of 18 – may not be sued on any contract he enters into. Such a contract would be voidable. Where the contract involves a permanent interest and continuing obligations, the minor would be free to repudiate or affirm it while still a minor or within a reasonable time after attaining adulthood. Thus, a football agency contract between a footballer under 18 with a management company was held unenforceable when the minor decided to repudiate it and appoint another management company (*Proform Sports Management Ltd Proactive Sports Management Ltd* [2007] 1 All ER 542). However, in *Edwards v Carter* [1893] AC 360, a delay of 4 years after adulthood before repudiation of a marriage contracted as minor was held to be too long. In other cases, the contract would not be valid or enforceable unless the minor affirms it after reaching adulthood.

The rationale for these rules is that a child is not capable of giving the agreement essential for a contract. Besides, a child could not be expected to negotiate a good bargain and would be more susceptible to contract to his own detriment. The general rule on the enforceability of contracts against minors is subject to some exceptions. If the contract is for "necessaries", education or beneficial employment, it may be enforced against the child. In addition, guarantees provided on a minor's contract is enforceable, while goods received by the minor under such a contract may be returned.

9.5.1.1 Contracts for necessaries

Necessaries are goods and services suitable for the condition and circumstances of a minor's life and to his actual needs at the time of the contract (See e.g., *s. 3 Sale of Goods Act 1979; s 7 Mental Incapacity Act 2005*). A minor is bound to pay for necessaries supplied to him provided the terms of the contract are not onerous or unfair.

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In determining whether goods or services supplied to a minor amount to necessaries, the court would have regard to the minor's status in life and his needs at the time of the contract. For example, rings, pins and a watch chain were held to be necessaries for the undergraduate child of rich parents (*Peters v Fleming* [1840] 6 M&W 42). Similarly, a contract for funeral services entered into by a widow in respect of her deceased husband was held that the contract was for a necessary and therefore enforceable (*Chapple v Cooper [1844] 3 M&W 252*). However, 11 fancy waistcoats supplied to an undergraduate minor were held not to be necessaries since it could not be proved that the child did actually need them (*Nash v Inman* [1908] 2 KB 1).

9.5.1.2 Contracts for education or employment

Employment and analogous contracts with minors or those for the provision of education or apprenticeship would be enforceable as long as they are largely beneficial to them. Thus, a boxing contract with a minor was held valid and enforceable even though it contained a term that the minor would lose his price money in the event of disqualification (*Doyle v White city Stadium [1935] 1 KB 110*). Similarly, a contract of employment as a porter that included an insurance cover for personal injuries was enforceable even though it contained a waiver of some statutory rights to compensation for such injuries (*Clements v London and NW Rly [1894] 2 QB 482*). *In Chaplin v Leslie Frewin [1966] Ch 71*, a contract for the publication of a minor's autobiography was held beneficial and enforceable even though the book contained some unsavoury materials about the minor. Conversely, a minor's dancing apprenticeship contract that provided for low wages, restraint on professional employment, and marriage was held invalid because it was not for the child's benefit (*De Francesco v Barnum [1889] 45 Ch D 430*). *See also Mercantile Union Guarantee v Ball [1937] 2 KB 498*).

9.5.1.3 Guarantees

Incapacity due to minority does not affect a guarantee provided for the minor by an adult. Thus, where a person had guaranteed a contract with a minor, the guarantor may remain liable under the guarantee (s 2, *Minors' Contracts Act 1987*).

9.5.1.4 Restitution

That a contract is void due to minority does not necessarily mean that the minor may keep the benefit he derived from it. Where a contract with a minor is held unenforceable, the court may order the minor to return any goods he received under the contract – s 3, *Minors' Contracts Act 1987*.

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9.5.2 INTOXICATION

The fact that a contract party entered into a contract under the influence of alcohol or drugs will not affect the validity or enforceability of the contract unless the person does not understand the nature of the contract and the other contracting party is aware of this situation. If however, the contract were for necessaries that have been supplied, it would be binding as long as the price is reasonable (s. 3 *Sale of Goods Act 1979*).

9.5.3 MENTAL INCAPACITY

Under the common law, a contract would not ordinarily be unenforceable or liable to be set aside due to mental incapacity of one of the parties unless the other party knew or ought to have known about it, or the contract is unconscionable or inequitable. Under *s. 7* of the *Mental Incapacity Act 2005*, a mentally incapacitated person would be bound to pay a reasonable price for necessaries supplied to him. Under s. 2, "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain." It is immaterial whether the impairment or disturbance is permanent or temporary.

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9.5.4 COMPANIES

Under s.31 *CA 2006*, unless it is otherwise stipulated in their Articles of Association, companies now enjoy unlimited contractual capacity. Even where a company has, by its articles, restricted its contractual capacity or the powers of its directors, those restrictions would not affect the validity of any contract entered into with third parties acting in good faith, even if they have knowledge of the restriction (*ss. 39–40 CA 2006*). Any limitation or restriction on a company's contractual capacity would now be effective only where the beneficiary is a director of the company or a person connected with him. Such a contract would be voidable at the instance of the company (*s. 41 CA 2006*). The effect of these provisions is that in respect of innocent third parties, a company has the unlimited contractual capacity of an adult natural person of a sound mind.

Where however the company is a charitable one, its capacity could be limited to the provisions of its articles except in respect of innocent third parties dealing with the company in good faith, for value and without notice to its limitations. Where the other party to the contract is the company's director or a person connected with him, the contract would not be enforceable unless it received the prior written affirmation of the Charities Commission – *s 42 CA 2006.* For a further discussion of companies contractual capacity, see chapter 21.4.

9.6 CHAPTER SUMMARY

A contract may be rendered void and unenforceable by the mistake of one or both of the parties to it; by illegality, mental incapacity or intoxication. It may also be rendered voidable by the minority of one of the parties or by the limitations to a company's capacity.

Mistake:

- Mistake affecting the validity of a contract might by common, mutual or unilateral; or in relation to signing the wrong document.
- Signing the wrong document may only invalidate a contract if the signer was not negligent and the document signed was radically from what he intended to sign.
- Common Mistake may relate to the existence or identity of the subject matter or the performance of the contract.
- For a unilateral mistake to invalidate a contract, it must relate to a fundamental term, must be known to the other party; and must not involve face-to-face transactions.
- Unilateral mistake may relate to a fundamental term or the identity of one of the parties.

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Illegality

- A contract which is against the provisions of statutes or rules of common law would be illegal and unenforceable.
- Examples of illegal contracts are those to commit a criminal or civil wrong; those to commit an immoral act; those to corrupt public officials; those to oust the jurisdiction of the courts; and those to prejudice the administration of justice. Others are contracts with enemy countries or nationals; to defraud the public revenue; to infringe the law of friendly nations; which could imperil international relations; or which are in restraint of trade (subject to exceptions).
- The exceptions to the rule on restraint of trade are reasonable restraints in employment contracts; exclusive trade agreements; and reasonable restraints in protection of business goodwill.
- Where both parties are guilty of the illegality, the contract (subject to exceptions) would be void and unenforceable and any benefits given may be irrecoverable.
- Where only one party is guilty of the illegality, the contract is void and unenforceable as far as the guilty party is concerned. The innocent party may be allowed to enforce the contract and recover any benefits he had given to the guilty party.

Minority

- Contracts with a child are voidable at the instance of the child. They cannot be enforced against the child unless he had affirmed them or unless the contract is in respect of necessaries, his education or beneficial employment.
- However, guarantees given by an adult in respect of a contract with a minor would be enforceable. Goods or property received by the child are also recoverable.

Mental illness and intoxication

- Intoxication may only invalidate a contract if the person affected by it did not understand the nature of the contract and the other party knew about his condition; or if the contract relates to necessaries.
- Mental incapacity may not invalidate a contract unless the person affected could not understand the nature of the contract or the contract is manifestly unconscionable or inequitable.

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Companies

- Companies, like adult human beings of sound mind, have unlimited capacity to enter into contracts.
- Any limitation on a company's capacity in its constitution will not affect the validity of any contract in respect of an innocent third party, even if it was in breach of that constitution.
- Contracts entered by a company contrary to its constitutional capacity would be voidable at the instance of the company if it involves the company's director or persons connected to him.
- The capacity of charitable companies could be limited by its constitution. Any contract in breach of that limitation would be unenforceable except in respect of persons contracting in good faith and without knowledge of the incapacity.

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9.7 PRACTICE QUESTIONS

1. Explain the concept of mistake and its implications on a contract
2. Distinguish between common, mutual and unilateral mistakes
3. In what circumstances would a contract with a minor be legally enforceable?
4. Discuss four circumstances which might make a contract unenforceable on the ground of illegality.
5. In what circumstances could a contract in restraint of trade be enforceable?
6. Explain the effects of illegality on a contract and the circumstances in which a contract in restraint of trade would be legally enforceable.
7. John was acting as an agent for his grandmother Mary who was 75 years in respect of the letting and management of Mary's two properties. Both parties had agreed that John's appointment would be for a period of 3 years subject to renewal by mutual agreement. However, the "agency" agreement prepared by a solicitor and signed by John and Mary was in fact an irrevocable power of attorney by which Mary gave John the power to deal with the property as he so wished. Following a falling out between the parties, Mary decided not to renew John's appointment. However, relying on the "power of attorney", John has decided to sell the properties and has put up advertisements to this effect.

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PART 3: TORT LAW

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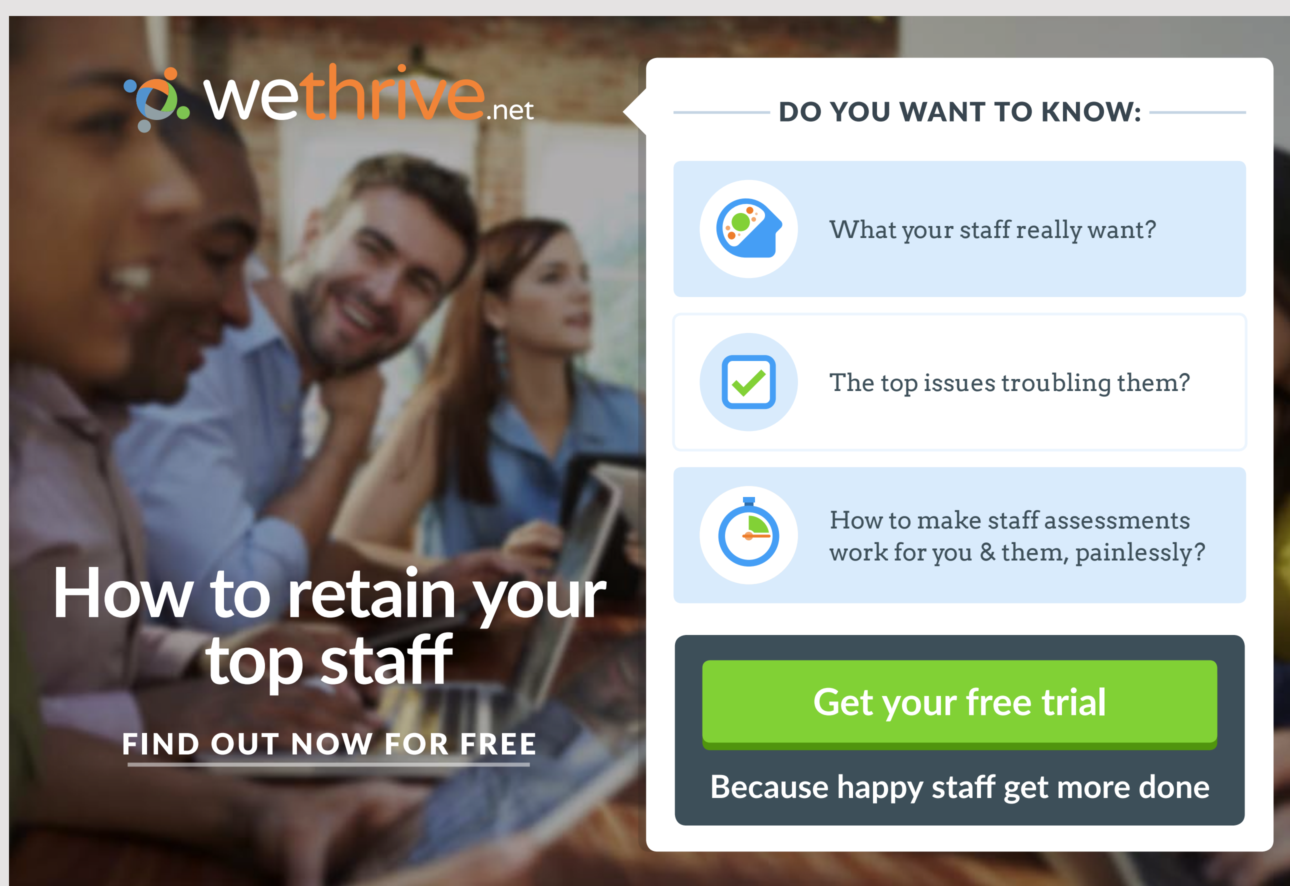
10 NEGLIGENCE

10.1 INTRODUCTION

Torts are civil wrongs against persons or members of the public. Tort Law may be described as a body of rules comprising different civil wrongs (torts). It covers legal obligations imposed by the law, as opposed to obligations willingly and voluntarily undertaken by those affected. There are many different torts with their own principles. Although some torts share some common elements, there is no singular principle or element underpinning all torts. This is because Tort law protects different human interests and endeavours. Tort law is a branch of common law in that the rules were developed through case law. However, parliament occasionally intervenes to modify, supplement or consolidate these rules. The aims of Tort Law are varied, but include:

- The promotion of harmonious co-existence in the society by regulation of civil conduct
- The protection of people's rights and interests in their persons, liberties, freedom, well-being, properties, businesses and reputation
- The provision of redress for wrongful conducts/omissions, usually in the form of damages, compensation, or injunction



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- Acting as a deterrence or discouragement for wrongful acts or omissions
- The allocation or distributing losses among competing interests
- Vindication of rights, especially where monetary compensation is not the main objective of claim

Because of the different types of tort with different characteristics, protected interests, losses and injuries, liability in tort could arise in different ways. Although most tortious liabilities stand alone, a few are dependent on prior legal wrongs; and although liability arises primarily from people's own wrongdoings, it may arise due to the wrongdoings of others. Thus, there is:

- Liability through negligence, in which fault is required. The wrongdoer would not intend to commit the wrongdoing, but would have been careless or reckless in acting or failing to act.
- Liability through intention, where the wrongdoer would do the wrongful act with intent, actual or imputed.
- Strict liability, where neither fault nor intention is required. The mere doing of the unlawful act would suffice.
- Liability for breach of duty imposed by Act of Parliament. In this situation, the nature and extent of liability would depend on the relevant statutory provisions.
- Primary liability of a person who directly commits a wrongdoing and vicarious liability for the wrongdoing of another.
- Accessory liability dependent on another legal liability.

Torts include:

- Intentional Interference with another, comprising primarily assault, battery, false imprisonment, harassment, intentional infliction of physical or mental harm.
- Negligence torts, comprising negligence, product liability and occupiers' liability
- Land Torts, including trespass to land, nuisance and the rule in Rylands v Fletcher
- Economic torts, comprising Inducing breach of contract, causing loss by unlawful means, unlawful means conspiracy and lawful means conspiracy.
- Liability for animals
- Defamation
- Breach of Statutory Duty
- Invasion of privacy

This section will consider the torts most prevalent in or relevant to businesses relationships, beginning with negligence.

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10.2 LEARNING OBJECTIVES

At the end of the chapter, the reader should clearly:

- Understand the meaning and nature of the tort of negligence
- Understand the conditions for the incurring of liability in negligence
- Appreciate the defences which a defendant may rely on to avoid or minimise liability in negligence
- Be able to identify incidents of negligence from given situations and scenarios

10.3 MEANING OF NEGLIGENCE

The tort of negligence involves unreasonable and careless or reckless acts or omissions, although not all such acts or omissions are actionable in the tort of negligence. Negligence would be committed when a person acts without care; or carelessly fails to act, towards another person in situations where he owes a duty of care to that other person; and consequently that other person suffers foreseeable harm or loss. Thus, negligence does not require intention or malice from the defendant. Claims in negligence may relate to different kinds of damage – physical/personal, property, economic and psychiatric. Claims in negligence may relate to careless acts or careless omissions. Negligence is perhaps the most important tort in that the careless act or omission may relate to any work of life. It is important to businesses who deal regularly with employees, customers and members of the public.

10.4 CONDITIONS FOR NEGLIGENCE LIABILITY

As earlier pointed out, careless behaviour alone will not give rise to an action in negligence. Indeed if carelessness alone could give rise to action in negligence, there potentially would be no limit to the scope of the tort. People could be liable to total strangers for failure to look after them. Accordingly, the courts have developed a set of principles to govern liability in as well as limit the scope of negligence. These are:

- The existence of a duty of care on the part of the defendant;
- A breach of that duty of care by the defendant;
- The suffering of consequential loss or damage by the claimant; and
- The requirement that the damage or loss must not be too remote.

10.4.1 DUTY OF CARE

No liability will arise in negligence unless the alleged wrongdoer is under a duty, both in law and in fact, to act carefully or not to carelessly fail to act in relation to the claimant when action is required.

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10.4.1.1 Duty of care in law

Duty of care in law refers to a legal obligation to take care in certain situations or towards certain persons. There cannot be liability in negligence unless there is a legal obligation on the defendant to exercise reasonable care in his relationship with the claimant or the category of persons or circumstances to which he belongs with respect to the harm that occurred. Where there is no legal duty, a person cannot be liable for acting carelessly or carelessly failing to act to the detriment of another person. As Bowen L.J. observed in *Thomas v Quartermaine [1887]18 QBD 685 at 694*, "the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody." The modern concept of legal duty of care was established in *Donoghue v Stevenson (1932) AC 562*.

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The claimant was given a bottle of ginger beer in a café by a friend. Having consumed some of the beer, she discovered that the bottle contained the remains of a decomposed snail. The claimant became ill with gastro-enteritis and nervous shock and sued the manufacturer of the ginger beer for negligence. The House of Lords held that the manufacturer of the ginger beer was liable in negligence to the claimant, the ultimate consumer of the product. The court also decided the principle to be applied in deciding when a legal duty of care will be owed by somebody to another. This is known as the "neighbour principle". According to Lord Atkin:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The neighbour principle established the concepts of proximity between a defendant and a claimant and foreseeability of harm or loss occurring if care was not taken as pre-conditions for the existence of duty of care.

The neighbour principle was later modified in *Caparo Industries v. Dickman* [1990] 2 AC 605 as it had become too wide in scope.

C who held shares in Fidelity plc, made took over the company on the strength of accounts audited by the defendant. C claimed that the accounts were inaccurate because they showed a profit when in fact the company had made a loss. C claimed that if he had known the true situation of the company's finances, he would not have made the takeover bid at the price he did, and may not even have bid at all. C argued that it was owed a duty of care by the auditor as a new investor and as an existing shareholder. The House of Lords decided that no duty of care was owed by auditors to shareholders or members of the public who might invest in a company in reliance on audited and published accounts. Although it was foreseeable that the accounts might be relied on by shareholders or members of the public who were thinking of investing in the company, foreseeability alone was not sufficient to create liability. According the court:

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> In addition to the *foreseeability of damage*, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of '*proximity*' or '*neighbourhood*' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

Therefore, for a duty of care to now exist, there must be proximity between the parties, foreseeability of harm, and it must be fair, just and reasonable to impose a duty of care on somebody for the benefit of another.

The requirement of proximity means that both the claimant and defendant have to be close to each other either physically, relationally, circumstantially or legally, such that carelessness by the later would likely affect the former in a negative way. The requirement of foreseeability follows from proximity. It means that a reasonable person in the defendant's position would have anticipated that carelessness on his part would be likely to cause harm to the claimant or to a category of persons to whom he belongs. The test is objective. No duty of care is owed in respect of claimants who, or harm which, is not reasonably foreseeable.

The notion of it being fair, just and reasonable to impose a duty of care means that in all the circumstances of the case, it must be right, justifiable and sensible to impose on the defendant a duty to take care. This involves the consideration of public policy, which means asking the question, what effect the imposition of duty of care in particular situations would have on public good or national interest. Some relevant questions would be whether the imposition of duty of care would promote or undermine the operations of the law or public confidence in it; whether it would enhance or hinder the effectiveness of public bodies; whether it would improve or frustrate the protection or safety of the public; and whether it would lead to an uncontrollable explosion of litigations or compensation culture. Others include whether the imposition of a duty of care would discourage people from taking care of their own safety; and whether it would create a remedy where one already exists in another branch of the law. The existence of legal duty of care has been established in numerous situations, including:

- Doctors, nurses and the National Health Service to patients
- Motor vehicle drivers to other drivers and road users
- Employers to their employees
- The ambulance service to persons to whose emergency call they have promised to attend
- Manufacturers to the ultimate consumers of their products

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- Builders to their clients and occupants of the building
- Occupiers of premises to persons who come to the premises
- Parents to their children
- Participants in sports to one another
- School authorities to pupils or students

10.4.1.2 Duty of care on the facts

If a legal duty is found to exist, it must next be established whether the particular claimant is himself owed a duty of care by the defendant on the facts of the particular case. This will be the case if it should be foreseeable to the defendant that failure to take care could result in harm being done to the claimant and not merely to a third party. Thus, to succeed in an action in negligence, the claimant must be a foreseeable victim of the defendant's carelessness. If the claimant and his injury are not reasonably foreseeable, a duty of care on the facts would not exist; consequently a claim in negligence cannot be sustained. For example, a medical doctor under a general legal duty of care would only be under a duty on the facts to patients who are likely to be affected by the careless performance of his duties, but not to a non-patients or strangers.

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10.4.2 BREACH OF DUTY

Once a duty of care has been established, the claimant must show that the defendant has breached that duty; that is to say he has not exercised sufficient care in his act or omission. The test used to determine whether or not the defendant was in breach of his duty of care is the standard of the "reasonable man": Has he behaved as a reasonable person in his situation would have behaved? The test is not whether the defendant had done the best he could, but whether his best is good enough. The test is objective, rather than subjective. It is impersonal and free from the idiosyncrasies of the defendant (*Glasgow Corp. v Muir* [1943] AC 448). The "reasonable man" is sometimes referred to as "the man on the street" or "the man on the Clapham omnibus" (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583).

> In *Blythe v Birmingham Waterworks* [1856] 11 Ex Ch 781, the plugs in the defendant's water mains burst causing the claimant's house to be flooded. However, the burst was due to unprecedented cold winter which froze the water plugs. It was held that the defendant was not in breach of duty since the accident was unforeseeable and therefore the defendant could not have taken precautions against it. The judge, Alderson B, stated that:
>
>> Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.

However, although the standard of care is always objective, what is reasonable might depend on the situation in which the defendant acted. As the court observed in *Daborn v Bath Tramways* [1946] 2 All ER 333, "in determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances." The factors/circumstances the court may consider include the likelihood and magnitude of harm, the utility of the defendant's activity, the relative cost of taking precautions, and the skill which the defendant possesses.

10.4.3 THE LIKELIHOOD OF HARM OCCURRING

As a general rule the amount of care required of a person would be proportionate to the probability of harm occurring to another. The more likely it is that harm will occur the higher will be the level of care demanded of the defendant. As Lord Macmillan stated in *Glasgow Corporation v Muir*, "the degree of care required varies directly with the risk involved".

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In *Bolton v Stone* [1951] AC 850, the claimant was injured by a cricket ball that was hit from the defendant's cricket ground. However, although the club had operated for over 90 years on the ground, cricket balls had only gone over the 7-foot high boundary fence 6 times in 30 years and nobody had ever been hurt. It was held that since the probability of harm was very low, the defendant was not in breach of duty for failing to make the fence higher. According to Lord Oaksey, "an ordinarily careful man does not take precautions against every foreseeable risk [...] Life would be almost impossible if he were to attempt to take precautions against every risk".

Conversely, in *Miller v Jackson* [*1977*] *3 WLR 20*, cricket balls had been hit from a cricket ground more frequently, and even after the fence had been raised, balls had been hit over the fence nine times in two years. There had been damage to nearby buildings by the cricket balls even though no personal injuries had been recorded. It was held that the likelihood of harm meant that the defendant had been in breach of duty.

10.4.4 THE MAGNITUDE OF THE HARM

The greater the harm that might occur as a result of the defendant's activity, the higher the level of care that would be expected. Where the risk (though small) is of serious injury it would be reasonable to expect that stronger steps should be taken to ensure safety.

Paris v Stepney Borough Council [1951] AC 367 – the risk to a one-eyed welder working without safety goggles was much greater than the risk to a fully sighted worker. A higher level of care was therefore required.

Similarly, in *Hayley v London Electricity Board* [1965] AC 778, a blind man tripped on one of the tools used by the defendant's workers to block a ditch they dug on a pavement and hit his head and became deaf. The defendant found in breach for failing to protect blind pedestrians.

10.4.5 THE UTILITY OF DEFENDANT'S CONDUCT

The fact that the defendant is performing a socially useful activity might help to lower the level of care. Some risk might be justified in an attempt to save a life or to perform a service beneficial to the wider community. It was held in *Daborn v Bath Tramways*, that "a relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that [...] The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk" (per Asquith LJ).

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In *Watt v Hertfordshire County Council* [1954] 2 All ER 368, the need to get speedily, even when carrying special lifting gear, to a seriously injured road accident victim nearby outweighed the duty to ensure that the lifting gear was properly secured to protect the safety of firemen travelling in the van with the equipment. According to Lord Denning:

> It is well settled that that in ensuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved […] The saving of life or limb justifies taking considerable risk […] (at p. 336).

S.1 of the *Compensation Act 2006* codifies this principle.

> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might:
>
> a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
> b) discourage persons from undertaking functions in connection with a desirable activity.

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Where the defendant is engaged in an activity beneficial to the community, the defendant would not be in breach unless his behaviour had been unreasonable even after its utility had been taken into account. Thus, in *Ward v London County Council* [1938] 2 All ER 341, a reckless failure of a fire engine driver to stop at a red light and therefore cause an accident was held to be a breach of duty. The need to attend a fire scene did not warrant a reckless disregard to the safety of road users.

10.4.6 THE RELATIVE COST OF TAKING PRECAUTIONS

The reasonable man will only be expected to go to certain lengths (in terms of personal expense, or action) in order to avoid an accident. If the expense is unreasonably high and the risk minor, it might be unreasonable to require the defendant to bear it. The law does not impose an absolute duty to take all possible precautions at all costs; it only imposes a duty to take reasonable. In *Bolton v Stone*, Lord Radcliffe noted that, "a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences."

> In *Latimer v AEC Ltd* [1953] AC 643, the claimant had slipped and fallen on the defendant's factory floor. The flood had become wet and slippery from floodwater. To make the floor almost completely safe, the defendant had spread sawdust thickly on it, except for the small portion on which the claimant slipped. To eliminate the risk of a slip, the defendant would have had to close the factory. The factory owners were held not in breach of duty for failure to close the factory. The cost of such a closure would have been excessive compared to the risk of an accident.

> In *Knight v Home Office* [1990] 3 All ER 237, it was held that failure to provide a round the clock watch on a prisoner who committed suicide between watches was not a breach of duty. Watching him at 15-minute intervals was enough.

10.4.7 EMERGENCIES

Generally, the courts will be sympathetic to the fact that one is reacting to, or acting in, an emergency situation. A person cannot reasonably be expected to be as calm and organised in an emergency as he would be under normal circumstances. The question would be whether the defendant had acted as a reasonable person would do in the emergency (see *Watt v Hertfordshire CC*; and *Ward v London County Council* above).

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10.4.8 THE DEFENDANT'S MINORITY

Children are subjected to the standard of care expected of reasonable children and not to the standard of the reasonable adult.

> In *Mullin v Richards* [1998] 1 WLR 1304 (CA), there was no liability for a 15 year-old boy who injured another boy of the same age in the eye with a ruler during a mock sword fight at school. According to Hutchinson L.J.:
>
> > The question for the judge is not whether the actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised gave rise to a risk of injury, it is whether an ordinarily prudent and reasonable 15 year-old schoolgirl in the defendant's situation would have realised as much.
>
> In *Orchard v Lee* [2009] ECWA Civ 295, it was held that a child of 13 did not breach his duty of care when he injured a supervisor while running backwards during a game of tag:
>
> > For a child to be held culpable the conduct must be careless to a very high degree and where a child of 13 is partaking in a game within a play area, not breaking any rules, and is not acting to any significant degree beyond the norms of that game, he or she will not be held culpable [...].

10.4.9 THE DEFENDANT'S SKILL OR PROFESSION

The skill or professional qualifications of a person is a relevant factor in determining what is expected of him in the discharge of his duty of care: the higher the skill of the defendant, the higher the level of care applicable. As in the case of children, professionals are not judged according to the standard appropriate to just any member of society; the appropriate standard of skill is that expected of the ordinary professional in that field. The following cases illustrate this principle.

> In *Philips v William Whitely Ltd* [1938] 1 ALL ER 566, a jeweller who pierced ears was held to be subject to the standard of care and hygiene expected of a reasonable jeweller, and not to the standard expected of a medical practitioner.
>
> In *Wilsher v Essex Area Health Authority* [1987] QB 730 (CA), the standard of care for medical practitioners was held to be the same for all practitioners in a particular field irrespective of the relative inexperience of the particular defendant.

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In *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 (SC), a medical doctor was held in breach of duty for not disclosing to a pregnant patient the risk to her relatively large baby of shoulder dystocia if born naturally. The child was born with serious disabilities due to complications during birth

10.4.10 PARTICIPATION IN SPORTING EVENTS

Where the parties are participating in a sporting activity – whether regular or irregular – and in games or horseplay, the level of care would be that of a reasonable participant playing according to the rules of the sport, game, etc. There would be breach of duty only where a defendant had gone beyond the risks necessarily incidental to the sport and showed a reckless disregard to the safety of fellow participants (*Wooldridge v Sumner* [1963] 2 QB 43 (CA)).

In *Condon v Basi* [1985] 1 WLR, a footballer was held liable in negligence for breaking the leg of an opponent with a tackle that showed a "reckless disregard" for his opponent's safety.

In *Blake v Galloway* [2004] EWCA Civ 814, teenagers were throwing barks and twigs at one another when one of them was injured in the eye. It was held that here was no breach of duty since the defendant had not gone outside the accepted 'rues' of the horseplay. Mere "error of judgment or lack of skill" was not enough to constitute a breach of duty.

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For sports referees, the standard of care would be what is expected of a reasonable official enforcing the rules of a sport in order to keep the participants reasonably safe within the rules of the sport.

> In *Smolden v Withworth* [1997] ELR 249, a rugby referee was held to have breached his duty of care to junior rugby players when he failed to enforce a rule against collapsing scrums as a consequence of which the claimant was seriously injured.

10.5 PROOF OF BREACH OF DUTY

The burden of proof is on the claimant to show that there has been a breach by the defendant of his duty of care. Breach of duty may be proved by the claimant in three ways: by evidence; by the plea of *res ipsa loquitor*; and by reference to criminal conviction.

10.5.1 PROOF BY EVIDENCE

The claimant would normally be required to produce evidence showing that the defendant had been careless. This proof is on a balance of probabilities. This means that the claimant's evidence must show that it was more probable than not the accident occurred due to the defendants carelessness. If the claimant failed to do this, he would lose the case.

10.5.2 RES IPSA LOQUITOR

The claimant may plead *Res ipsa loquitur*, which translates into: "the facts speaks for themselves". This plea may be used where:

- The "thing" that caused the injury was under the defendant's effective control;
- The incident would not normally have happened without negligence on the defendant's part; and
- The defendant has no plausible explanation for the accident (*Scott v St Katherine Docks* (1865) 159 ER 665).

Where the claimant successfully pleads *res ipsa loquitor*, there would be a presumption that the accident was due to the defendant's negligence. At that point, the evidential burden would be transferred from the claimant to the defendant to prove that he was not negligent. If no such evidence is produced, the defendant would be held to be in breach.

> In *Mahon v Osborne* (1939) 2 KB 14, the defendant, a surgeon, left a swab in the stomach of the claimant (patient). The claimant pleaded *res ipsa loquitor*. This was prima facie proof of negligence as the incident would not normally happen without negligence.

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In *Ward v Tesco Stores Ltd* [1976] 1 All ER 219, yoghurt spill on the defendant's premises on which the claimant slipped, was prima facie evidence of negligence by the defendant.

Similarly, in *Gee v Metropolitan Railway Co* [1873] LR QB 161, where a moving train's door opened when a passenger leaned on it, this was held to be prima facie evidence of negligence.

In *Cassidy v Ministry of Health* [1951] 2 KB 343, the development by the claimant of four stiff fingers following radiography was prima facie proof of negligence by the hospital.

If however, the defendant adduces cogent evidence to explain that the accident was not due to fault on his part, he would not be in breach of duty (*Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298).

10.5.3 EVIDENCE OF CRIMINAL CONVICTION

The claimant may also prove a defendant's breach of duty by reference to his criminal conviction for a crime arising from the same facts – s. 11 *Civil Evidence Act 1968*. Such a reference would suffice to discharge the claimant's burden of proof and establish the civil liability of the defendant.

10.6 FACTUAL CAUSATION

Even if a duty of care exists and has been breached by a person, there will be no liability unless the claimant has suffered actual harm or loss as a result of the defendant's breach of duty. If the claimant suffered no harm or loss, there will be no liability for any careless act or omission.

Rothwell v Chemical & Insulating Co. Ltd [2007] UKHL 39, [2008] 1 AC 281 – The claimant had pleural plaques (thickening of the walls of the lungs due to long exposure to asbestos) due to careless exposure to asbestos dust in the defendant's factory and sued for damages in negligence. Although the plaques could lead to the development of asbestosis, it was painless and symptomless. It was held that the plaques did not constitute a disease and therefore could not give rise to liability for physical injury.

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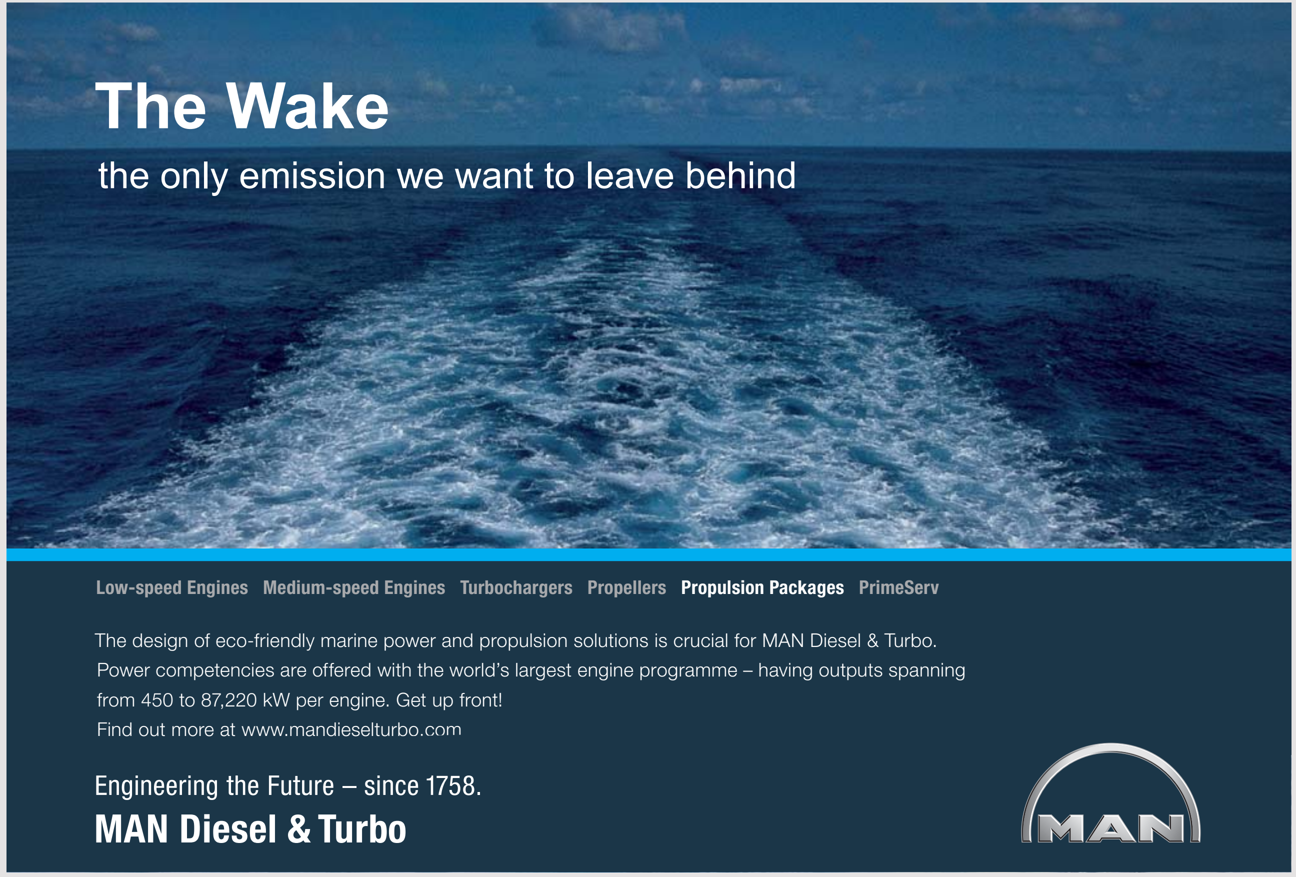
In addition, the harm or loss suffered by the claimant must have been caused by the defendant's breach of duty. Whether the breach of duty of care by the defendant actually caused the harm or loss to the claimant is a question of fact normally determined by the *"but for"* test. This means that the defendant would be liable only if the harm or loss suffered by the claimant would not have occurred "but for" his breach of duty of care. If the harm or loss would have occurred irrespective of the breach, the defendant would not be liable. This principle is demonstrated in the following cases.

> *Barnet v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428 – Mr Barnet was poisoned with arsenic and went to the accident and emergency department of the defendant hospital for medical attention. There was no doctor on duty. The duty nurse telephoned the doctor who declined to come and advised Mr Barnet to go and see his own doctor. Mr Barnet died shortly after, and his widow sued the hospital for negligence. It was held that although the defendant had breached its duty of care to the deceased, the breach did not cause his death as he would have died anyway since there was no effective antidote for arsenic.



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Wilsher v Essex Area Health Authority [1988] AC 1075 – The claimant, a prematurely born infant, became blind while in the defendant hospital. It had been given excess oxygen in the hospital. It was however proved that the blindness could have been caused by four different non-negligent conditions suffered by the baby, as well as the negligently administered excess oxygen. It was held that the defendant had not caused the blindness and was therefore not liable.

But in *McGhee v National Coal Board* [1972] 3 All ER 1008, the failure by an employer to provide shower facilities for employees exposed to kiln dust at work was held to have caused the claimant's dermatitis.

The "but for" test is however suitable where there is only one cause and one defendant. Where there are multiple defendants or multiple causes from the same or different persons, it would not be suitable since it would mean that nobody would be held responsible.

10.6.1 MULTIPLE CAUSES OR DEFENDANTS

Where there are multiple causes or persons, the proper test would be whether any of the causes or defendants had made a material contribution to the claimants harm or loss. If they had, the persons responsible would share liability jointly and severally. The following cases illustrate this rule.

Bonnington Castings v Wardlaw [1956] AC 613 – In the course of the claimant's employment in the defendant company, he contracted pneumoconiosis due to the inhalation of invisible silica particles from two sources. One of the sources of silica was not attributable to the defendant's negligence, while the other (from swing grinders) arose due to the defendant's breach of its statutory duty. It was held that factual causation had been proved since the swing grinders made a material contribution to the claimant's ailment

Fitzgerald v Lane [1989] AC 328 – The claimant was on a pelican crossing when it was showing red for pedestrians. He was negligently knocked down by the 1st defendant's car and unto the path of the 2nd defendant's car. He suffered from tetraplegia (paralysis of the limbs and torso). It could not be determined which of the cars actually caused his condition. Both defendants were held jointly liable for the injuries (subject to deductions for the claimant's contributory negligence).

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> *Fairchild v Glenhaven Funeral Services* [2002] 2 All ER 305 – The claimants were exposed to asbestos while working for different companies. They eventually developed mesothelioma (lung cancer). There was no way of knowing which particular exposure gave rise to the disease. It was held that since all the employers contributed to the disease or the risk thereof, they bore joint and several liability to the claimants.

S. 3 Compensation Act 2006 codifies the *Fairchild* decision. It provides that where:

> a person exposes another to asbestos and the victim contracts mesothelioma, but it is not possible to determine which exposure caused the disease, that person would be liable, jointly and severally, for it with any other person who might have materially contributed to the risk.

10.7 LEGAL CAUSATION

Even after the above three conditions have been satisfied, a defendant would still not be liable in negligence if the damage, harm or loss caused was too remote or unforeseeable. The question to ask here is whether the damage is "too remote to be compensated in law?" If the damage caused was not reasonably foreseeable, the law will refrain from imposing liability on the defendant, as it would be unfair to do so. The rule on remoteness of damage was formulated in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* (*The Wagon Mound No.1*) [1961] AC 388.

> The defendant negligently spilled large quantities of fuel oil into Sydney Harbour. Oil spread over the surface of the water to the claimant's wharf where two ships were being repaired. The repair involved welding operations. Expert advice had been given to the wharf owners that sparks from welding could not ignite the oil. In fact, sparks from the welding ignited some waste materials in water and these in turn ignited the oil. The resulting fire damaged the claimant's wharf and the vessels berthed there. It was held that, the defendant was not liable in negligence because the damage caused was not a reasonably foreseeable consequence of the breach of duty.

However, under the principle of remoteness, the precise nature of the injury suffered need not be foreseeable as long as it was of a kind that was foreseeable. The following cases illustrate.

> *Hughes v Lord Advocate* (1963) AC 837 – The claimant was burned by an unusual explosion of a paraffin lamp left negligently by the defendant's employees alongside an uncovered manhole. It was held that the defendant was liable even though the cause of the injury was unusual, since injury by normal burning would have been foreseeable.

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Bradford v Robinson Rentals Ltd [1967] 1 All ER 267 – The claimant, a van driver, suffered from frostbite as a result of being negligently exposed to very cold weather in the course of his employment. Although frostbite was rare, it was held that the defendant was liable since cold-related injury was foreseeable.

Jolley v Sutton LBC [2000] 1 WLR 1082 (HL) – The claimant, a 14 year-old boy and his friend, in an attempt to repair a disused boat on the defendant's land, raised it on a jack. The jack subsequently gave way causing the boat to collapse and injure the claimant under it. It was held (overruling the Court of Appeal) that the defendant was liable since the damage was of the foreseeable kind. It was consistent with the kind of injuries that might occur as a result of children playing on a disused boat.

Meah v McCreamer (No. 2) [1986] 1 All ER 943 – The defendant, an accident victim, suffered personality change following the accident and subsequently assaulted some women. Damages were awarded to the women against defendant, but the defendant was unable to recover the money from the person who caused the original accident as it was considered too remote.

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If the kind of damage was foreseeable, it would not matter that the damage which occurred was much bigger than what was foreseeable.

> In *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 11, the defendant supplied to the claimants chemicals which were liable to cause an explosion when they come into contact with water. The defendant gave no warning of this likelihood to the claimant. When the chemical was put in a sink by the plaintiff's servant, a massive explosion occurred and caused an extensive damage to the claimant's premises. It was held that the defendant was liable. Although the explosion was bigger than foreseeable, it was foreseeable that an explosion could happen when the chemical came into contact with water.

10.7.1 THE EGG-SHELL SKULL RULE

The defendant must take his victim as he finds him and would be liable for his injury even if this was more severe on account of his sensitivity or vulnerability. Thus, where the victim has some unusual characteristic that renders him more susceptible to harm than other people, that vulnerability would not defeat his claim. Kennedy J explained this rule in *Dulieu v White* [1901] 2 K.B. 669 as follows: "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart (at 679)."

> In *Smith v Leech Brain* (1962) 2 QB 405, the claimant's husband suffered a burn on his lip from a splash of molten metal as a result of his employer's negligence. He died from cancer that developed from the burn. Medical evidence showed that the dead man had a pre-disposition to cancer. It was held that since the burn was foreseeable, the consequence was not remote. The claimant was allowed to rely on the "egg-shell skull" rule.

> In *Robinson v Post Office* [1974] 2 All ER 737, the claimant's leg was lacerated by a ladder due to the defendant's negligence. The claimant was subsequently given an anti-tetanus injunction. The claimant suffered from encephalitis due to his allergy to the injected serum. It was held that the defendant was liable for the whole damage.

10.7.2 DAMAGE FROM INTERVENING ACTS

A person would, however, not be held liable in negligence if another person's act or omission intervenes between his breach of duty and the damage to the claimant to cause more harm. This is known as *novus actus intervienens*. The intervening act may be a natural event (act of God), the act of a third party or the act of the claimant. If an intervening act had occurred, the defendant would only be liable for the losses directly caused by his own negligence. The subsequent damage would be unforeseeable or remote.

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10.7.2.1 Act of the claimant

Where the claimant does something reckless to worsen or add to his injury after another person's negligence, that other person would not be liable for that additional harm. This is because persons are required to take care to mitigate their injury or loss. Thus, where a person whose leg is injured in an accident refuses to take treatment and the wound becomes infected and the leg amputated, he would not be able to claim damages for the amputation.

> In *McKew v Holland and Hannen and Cubitts* [1969] 3 All ER 1621, the claimant had been negligently injured while working for the defendant. As a result, his left leg was weakened and liable to give way. A few days later, he was descending a step flight of stairs without a handrail when his leg gave way. He jumped, landed heavily, and broke an ankle. It was held that the defendant was not liable for this latest injury as the claimant's reckless and unreasonable action had broken the chain of causation. A person with such injury would be expected to be more careful in his movement.

Similarly, in *Wieland v Cyril Lord* [1969] 3 All ER 1006, the claimant fell down stairs in her house due to poor sight. She was unable to move her neck freely due to injuries sustained in the hands of the defendant and the neck brace she had to wear. It was held that the chain of causation had not been broken, so the defendant remained liable for the latest injury.

However, the claimant would not have broken the chain of causation if his action was a reasonable and foreseeable consequence of the defendant's breach of duty. An example would be where the claimant had taken an instinctive and evasive action to escape from harm occasioned by the defendant's negligence (*The Oropesa* [1943] AC 32 p. 32).

> In *Corr v IBC Vehicles Ltd* [*2008*] UKHL 13 (HL), the claimant was seriously injured and suffered from clinical depression due to a serious accident at work. The accident was due to the defendant's negligence. The depression led the claimant to commit suicide. It was held that the suicide was not a *novus actus interveniens* since it was attributable to the defendant's initial breach of duty.

10.7.2.2 Act of a third party

If another person does something to worsen or add to the injury suffered by a claimant in the hands of a defendant, that person may break the chain of causation and take over liability from that point unless his action was a foreseeable and necessary consequence of the defendant's negligence. Thus, if a third party reasonably attempts to rescue the victim of a person's negligence and causes additional harm to that victim, this would not be classified as a break in causation.

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Stansbie v Troman [1948] 2 All ER 48 – Thieves entered the claimant's house through an unlocked door and stole his money. The house was under the control of the defendant who had been engaged to decorate it. Although the defendant had been warned against leaving the door unlocked while out of the premises, he left the house without locking the door. The defendant was held liable since the intervening act of the thieves was foreseeable.

Rouse v Squires [1973] QB 889 – Two lanes of a motorway were obstructed due to an accident caused by the defendant's negligent driving of his lorry. Another lorry driver negligently ploughed into the scene and killed the claimant. The defendant was liable since the second accident was a foreseeable consequence of the first one. The second accident was not a *novus actus interveniens.*

Knightley v Johns [1982] 1 All ER 851 – Johns had negligently caused an accident which blocked a tunnel. A senior police officer on the scene instructed two junior officers on motorbikes, including the claimant, to go and close off the tunnel at the other end. The officers rode their bikes against the flow of traffic, and the claimant collided head-on with an on-coming car and sustained serious injuries. In an action against Johns, the senior police officer and West Midlands Police for negligence, it was held that the police, and not Johns, was liable. The officer had broken the chain of causation.

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10.7.2.3 Act of nature

Where an act of nature occurs to add more harm to the one caused by the defendant, it may break the chain of causation if it was reasonably unforeseeable.

> In *Jobling v Associated Dairies* [1982] AC 794, the defendant was not liable to the claimant for extra damage caused by a subsequent back condition (myelopathy) which had nothing to do with the defendant's earlier breach of duty that damaged the claimant's back.

> In *Carslogie Steamship Co v Royal Norwegian Government* [1952] AC 292, the claimant's ship was damaged due to the defendant's negligence. The ship needed repair and had to delay its voyage to the USA. When it eventually embarked on the voyage, the ship was damaged by storm and required further repairs. The claimant claimed damages on the ground that the storm damage would have been avoided but for the initial delay due to the defendant's negligence. The defendants were held not liable for the storm damage since it was unforeseeable and unconnected to the defendant's negligence.

10.8 NEGLIGENCE DEFENCES

The defences that may be available in negligence are consent, contributory negligence and illegality. A person may also expressly exclude liability for negligence.

10.8.1 CONSENT

The defence of consent is also referred to as *volenti non fit injuria*. If a person consents to suffer damage or to run the risk of it, he cannot later bring an action in negligence. The risk may be assumed by express agreement e.g. consenting to an operation, or implied from the circumstances, e.g. participating in a vigorous sport or activity. Consent is an absolute defence because once established, the defendant would escape from all liability in negligence.

> In *Morris v Murray* [1990] 3 All ER 801**,** the claimant agreed to take a flight in a small plane flown by its owner (under the supervision of the defendant). Although, all three of them had been drinking very heavily, the claimant agreed to go on the flight. The plane crashed, killing the owner/pilot and severely injuring the claimant. The claimant then sued the defendant for negligence. The defendant was allowed to plead the defence of volenti. It was highly foreseeable that such a flight would end in disaster; therefore, by getting on the plane the claimant consented to the risk of injury.

However, it is not sufficient merely to show that the claimant knew of the risk; there must be evidence of a willingness to undertake it. In employer-worker relationships, for example, there must be evidence of positive consent as opposed to mere acquiescence.

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In *Smith v Baker* [1891] AC 325, the claimant was injured by a falling stone when he worked under an overhead crane. He had not objected to working under the crane, even though he must have known that it was dangerous. It was held that his silence was merely acquiescence, not necessarily consent.

The defence will also fail in 'rescue' cases where the claimant acted under a strong moral compulsion, if not a legal one, in order to save another person put in danger by the defendant. Moreover, consent cannot be a defence to an action for breach of a statutory duty. Therefore, an employer cannot persuade his employees to consent to abandoning their statutory protection, e.g. on health and safety. The defence of consent may also be excluded by statute on grounds of public policy. An example of this is the *Road Traffic Act 1998*, which prevents a motor vehicle driver from relying on the defence of consent against a passenger who has suffered injury by reason of his negligent driving. See *Pitts v Hunt* [1990] 3 All ER 344.

10.8.2 CONTRIBUTORY NEGLIGENCE

This defence, which only provides a partial relief from liability, arises when the damage suffered by the claimant is partly due to the fault of the defendant and partly due to the fault of the claimant. The defendant could reduce the damages awarded against him by proving that the claimant was partly responsible for the accident or injury. *The Law Reform (Contributory Negligence) Act 1945, s.1*, provides that in such cases the court shall reduce the damages by an amount proportionate to the claimant's share of responsibility. For this defence to apply, the claimant must have failed to exercise reasonable care for his or her own safety and this failure contributed to the claimant's injury or loss (*Jones v Livox Quarries Ltd* [1952] 2 QB 608).

In *Sayers v Harlow UDC* [1958] 1 WLR 623, the claimant became locked inside a public lavatory because of the defendant's negligence in failing to maintain the door lock. After failing to attract attention or assistance, she attempted to climb out over the top of the door and in doing so fell and got injured. It was held that the claimant had contributed to the risk of her own injury to the extent of 25%.

In *Froom v Butcher* [1976] QB 286, the claimant was a passenger in the defendant's car which was involved in an accident. The claimant had failed to wear his seatbelt. It was held that the claimant's failure to wear a seatbelt amounted to contributory negligence. The appropriate reduction in damages was 25% if the seatbelt would have prevented the injury altogether or 15% if it had merely reduced the extent of the injury. Since it was concluded that the seatbelt would have prevented the injury altogether the claimant therefore had his damages reduced by 25%.

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It is for the court to determine by what percentage the claimant's damages be would be reduced. However, it is unclear whether the court could hold that the claimant contributed 100% to his injuries. In *Jayes v IMI (Kynochi)* [1985] ICR 155, the Court of Appeal applied a 100% reduction. However, in *Pitts v Hunt* [1990] 3 All ER 344 (CA), the possibility of 100% contribution was rejected by another panel of the Court of Appeal. However, in *Reeves v Commissioner of Police for the Metropolis* [1999] UKHL 5, [2000] 1 AC 360, the House of Lords did not expressly consider the matter although the possibility of 100% contribution was not discountenanced. Nevertheless, being by nature a partial defence and since the defendant would have been found negligent in the first place, the better view would seem to be that a 100% blame on the claimant would be anomalous.

Very young children may however not be held to have been guilty of contributory negligent. A child could only be held to be negligent if, in the circumstances, he was old enough to take precautions for his own safety (*Gough v Thorne* (1966) 1 WLR 1387).

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10.8.3 ILLEGALITY

If the claimant who has been negligently injured was engaged in an illegal act or has suffered from the consequence of his own illegal conduct, he would not be able to recover damages. This is because a person cannot be allowed to benefit or receive compensation for an illegal act or the consequences thereof – *ex turpi causa, non oritur actio.*

> In *Pitts v Hunt* [1990] 3 All ER 344, P was injured when he was given a lift by H in his motorbike. It was illegal for H to ride a motorbike of that capacity. He was also drunk and travelling dangerously, over the speed limit and on the wrong side of the road. H was encouraged by P who was also drunk. The motorbike collided with a car and the claimant was paralysed. H died in the accident. In action against H's estate in negligence, it was held, among other things, that the claimant's action must fail due to illegality.

10.8.4 EXCLUSION OF LIABILITY

A valid exclusion clause or limitation clause in a contract or notice could remove or reduce liability for negligence. In contractual cases, any such provision would be subject to the rules on the protection of consumers and fairness generally (see chapter 6.5.3). In any event, any exclusion of liability for negligence must be explicit. If this exclusion is known to and accepted by the claimant, he may not be able to recover damages for the kind of injury or loss excluded.

10.9 CHAPTER SUMMARY

- Negligence liability arises where a duty of care exists and has been breached and this breach has resulted in a foreseeable harm to another.
- The existence of duty of care rests on three principles – foreseeability of harm, proximity of the parties, and it being fair, just and reasonable to impose a duty of care.
- Breach of duty is the failure of a person under a duty of care to act in a manner in which a reasonable person in his situation would have acted.
- In determining whether the defendant had acted reasonably, factors such as the probability and magnitude of harm, the social utility of the defendant's conduct, the relative cost of taking necessary precautions, the skill and age of the defendant, and the circumstances in which the defendant acted, would be taken into account.
- The onus is on the claimant to prove that the defendant had breached his duty of care. This could be discharged by evidence, the principle of *res ipsa loquitor*, or previous conviction.
- Factual causation is the requirement not only that the claimant should suffer harm or loss, but also that they should be due to the defendant's breach of duty.

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- Causation is normally established by the "but for" test except in cases involving multiple causes or defendants in which case the test would be that of material contribution to the harm or the risk thereof.
- Legal causation requires that any harm or loss suffered by a claimant as a result of a defendant's breach of duty should not be unforeseeable or remote. If these were to be the case, the defendant would not be liable to pay damages for it.
- The defences available to a negligence claim are consent, contributory negligence, illegality and the use of exclusion clauses.

10.10 PRACTICE QUESTIONS

1. What do you understand by the law of torts?
2. State three differences between tort law and criminal law
3. State and explain the conditions necessary for liability in negligence
4. Explain the difference between an act and an omission in the context of the tort of negligence
5. State and explain the three *Caparo* criteria for the imposition of duty of care where none already exists
6. What is the test for breach of duty in negligence and what factors could affect this test?
7. Explain the main test for factual causation and when it would not be suitable
8. Explain the test for remoteness of damage, the principle of *novus actus interveniens* and the eggshell skull rule.
9. Explain the defences available for negligence and the effect of their successful plea.
10. In the middle of a lecture, fire had broken out in an auditorium of Donchester University. The fire was caused by an overload of the electricity circuit. Because the fire alarm system was out of order, the fire was not noticed on time. As students rushed towards the exit, Daniela was pushed down and trampled upon. She sustained a broken leg and a broken arm. She was taken to Donchester General Hospital for an operation, but Joan the anesthetist, administered an overdose of an anesthetic that caused her to be paralysed.

    Advise Daniela and the university on their potential claim and liability in negligence.

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11 NEGLIGENCE: SPECIAL DUTY SITUATIONS

11.1 INTRODUCTION

The standard principles of duty of care discussed in the previous chapter apply to situations that could be described as ordinary – i.e., those involving physical injuries and damage to property. In some special situations, duty of care may be deemed not to exist or its existence would be governed by special principles. These situations include those involving public bodies like the police force, the military and local authorities; and those involving the emergency services like the fire service, the coast guard and the ambulance services. The situations also include those involving pure economic losses and psychiatric injury. The main reasons for the different treatment in these cases are public policy and the availability of remedies in other branches of the law. This chapter discusses the principle of duty of care in relation to these special situations.

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11.2 LEARNING OBJECTIVES

The objectives of this chapter are to help the reader:

- To understand the application of the principle of duty of care to special situations, especially those involving public bodies and emergency services
- To understand the application of the principle of duty of care to situations involving pure economic losses
- To understand the application of the principle of duty of care to situations involving psychiatric injuries.
- To understand the rationale for these special rules
- To apply the special rules on duty of care to given scenarios.

11.3 EMERGENCY SERVICES AND PUBLIC BODIES

On the ground of public policy, the existence of duty of care has been denied in situations involving emergency services, such as the police, the Fire Service, the Coast Guard, and other public bodies. Such bodies will not be under a duty to individual members of the public to attend to their needs. Since they have limited capacity and resources and have to contend with many competing demands, there is no duty on them to respond to the needs of individuals at all or on time. This principle was clearly laid down by the House of Lords in *Hill v chief constable of West Yorkshire Police* [1989] AC 53.

> In *Hill v chief constable of West Yorkshire Police* [1989] AC 53, it was held that the South Yorkshire police was not under a duty of care to prevent the killing of the 13th and last victim of Peter Sutcliffe (the "Yorkshire Ripper"). Although, Mr. Sutcliff was under suspicion at that time, the police force was not in breach of duty for failing to arrest him before he murdered Miss Hill.

The principle of *Hill v chief constable of West Yorkshire Police* has been followed in numerous cases involving the police and other emergency services and public bodies. As the House of Lords (per Lord Steyn) observed in *Marc Rich & Co AG v. Bishop Rock Marine Co* [1996] AC 211, "the fact that a defendant acts for the collective welfare is a matter to be taken into consideration when considering whether it is fair, just and reasonable to impose a duty of care." For public bodies, a duty of care will only arise where:

- there is a special relationship between the organisation and the claimant; or
- the organisation had assumed responsibility for the safety or well-being of the claimant; or
- the claimant has acted in furtherance of negligent instructions by the organisation to his detriment.

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Thus, in *Home Office v Dorset Yacht Co* [1970] AC 1104, it was held that the Home Office was under a duty of care to the claimant in respect of damages and losses caused to it by boys who had escaped from its detention facility. Moreover, where a response or intervention has been made, a public body would be under a duty to act with care and in a manner not to cause harm to the persons they have come to assist (*John Munroe v London Fire and Civil Defence Authority* [1997] 2 All ER 865.

For the same public policy reasons, the armed forces and the Ministry of Defence (MoD) are not under a duty of care to their military employees in respect of death or injury sustained in the course or heat of combat. A duty of care only exists in respect of injuries or death sustained outside combat situations – due, for example, to poor planning, organisation and equipment (*Smith (Ellis) v The Ministry of Defence* [2013] UKSC 41; *Birch v MoD* [2013] EWCA Civ 676).

Unlike other emergency services and public bodies, the ambulance service is under a duty, as part of the National Health Service, to respond timeously and with due care to emergency calls by members of the public.

> In *Kent v Griffiths* [2000] 2 All ER 474 (CA), the claimant had suffered an asthma attack at home and an ambulance was summoned by her doctor. It took the ambulance 38 minutes to arrive, when the national standard was 14 minutes and the distance was only six and a half miles. The claimant suffered a respiratory arrest. The Court of Appeal held that the ambulance service had accepted the call to provide an ambulance for this specific individual at a specific address and therefore a duty of care existed.

11.4 PURE ECONOMIC LOSS

Pure economic losses are financial losses which are not a consequence of personal injury or damage to property. Examples of pure economic loss would include, low building value as a result of poor survey or construction, financial loss sustained as a result of poor legal or financial advice, and financial loss sustained due to loss of employment or damage to reputation. Generally, no duty of care is owed by persons to avoid causing pure economic losses to others through negligence. This rule of law has been rationalised in *Spartan Steel and Alloys Ltd v Martin and Co (Contractors Ltd)* [1973] QB 73) as follows:

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> For strong policy reasons, when such loss is caused by the defendant's negligent act no duty of care is owed by the defendant. The policy factors include (a) the fear of opening the floodgates to large claims to a wide range of people over a potentially unlimited time, (b) loss spreading and (c) the courts' reluctance to interfere with contractual arrangements made by parties.

In that case, the claimant was unable to recover damages for losses it suffered due to its inability to make its product (melts) following the negligent cutting by the defendant of its power cables.

> In *Weller v Foot & Mouth Research Institute* [1966] 1 QB 569, the foot and mouth disease virus had escaped from the defendant's facility and infected cows in the area. This meant that the claimant who were cattle auctioneers could not do business and therefore lost substantial income. It was held that since the loss of the claimant was purely economic, it could not recover it in negligence or under the rule in *Rylands v Fletcher*.

The decision in *Weller* was followed in *D Pride & Partners (a Frim) v Institute of Animal Health & Ors* [2009] EWHC 685 (QB).

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However, in limited circumstances, there might be a duty of care in respect of pure economic losses. This would be the case if the defendant had assumed responsibility for the claimant in respect of a defective building project or in respect of negligent advice.

11.4.1 DEFECTIVE STRUCTURES

Where a builder erects a defective building or structure but this has not caused any personal or physical injury no cause of action would ordinarily arise in negligence. However, if the builder had assumed responsibility to erect a sound structure, they would be under a duty to erect them with care and could be liable in negligence if they fail to do so.

> In *Murphy v Brentwood* [1991] 1 A.C. 398, it was held that a local council did not owe a duty of care to the claimant for pure economic losses arising from the defective foundation of the house he had bought and had to sell at a discount. The council had approved the building's foundation. According to the court, no duty would arise in respect of a defective building, which has not caused any physical damage, *unless there has been an assumption of responsibility to that effect*:
>
>> If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, here again, in the absence of a special relationship of proximity they are not recoverable in tort – Lord Bridge at 475.

A similar decision was reached in *Department of the Environment v Thomas Bates & Sons* [1990] 2 All ER 943 and by the Court of Appeal in *Robinson v Jones* [2011] EWCA Civ 9.

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11.4.2 NEGLIGENT MISSTATEMENTS

Generally, there is no duty of care in respect of financial losses suffered as a result of negligent advice. However, where a person's job involves the giving of professional advice (lawyers, accountants, auditors, engineers, surveyors, etc.) he owes a contractual duty to those who hire his services to act with care and could be liable in negligence if the client suffers losses as result of lack of care. In *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465, it was decided by the House of Lords that the professional person may also owe a duty of care to those who have not hired his services but to whom he gave professional advice if he had assumed responsibility to that effect and a *"special relationship"* existed between him and the claimant. A special relationship would exist where:

- The statement was made to the claimant in circumstances where it was intended to be relied upon (i.e. in professional capacity), and
- The maker of the statement knew the purpose for which the advice was sought; and
- The statement was relied upon by the claimant who suffers loss as a consequence.

In *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465 (HL), the defendant vouched for the creditworthiness of the claimant's prospective customer by stating that it was "a respectably constituted company considered good for its ordinary business engagements". The claimant gave a credit facility to this company on the basis of the defendant's statement. Shortly after, the company went into liquidation. It was held that there could be liability for negligent misstatement causing financial loss, even in the absence of a contractual or fiduciary relationship, provided the above conditions have been satisfied (although in this case, the defendant was not liable because of a disclaimer it had included in the advice). According to the court:

> It should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise […]. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise (Lord Morris).

The House of Lords observed that situations such as the above are "equivalent to contract" in that the circumstances are such that a contractual relationship would have arisen were there to be consideration.

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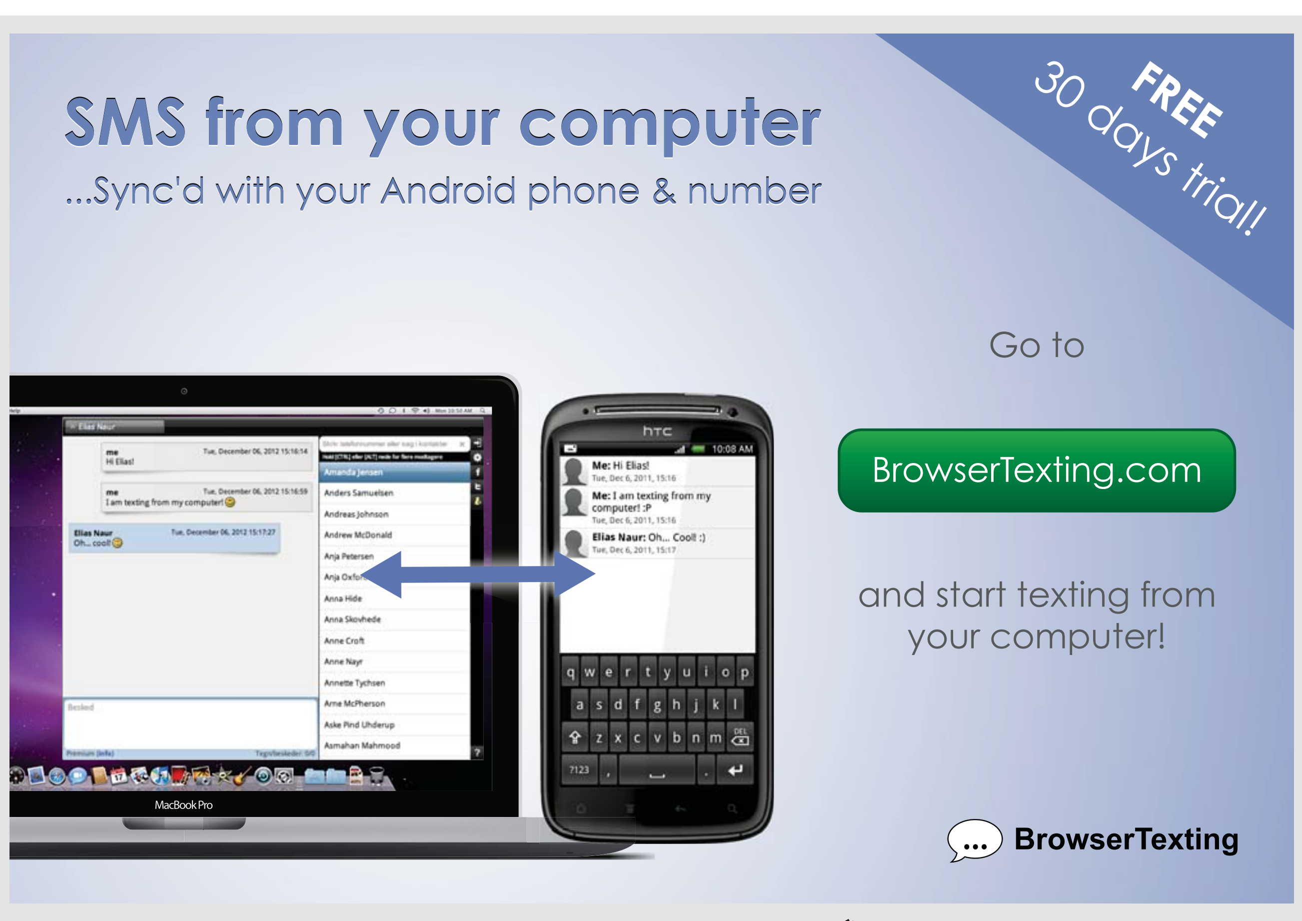
In *Morgan Crucible co plc v Hill Samuel Bank Ltd and Others* [1991] Ch 295, the claimant announced a proposed hostile takeover of a company. Subsequently, directors of the company forecast a 38% increase in pre-tax profits, which was confirmed by the company's bank. Persuaded by the forecast, the claimant increased the value of its bid, which was then accepted by the company's shareholders. It turned out that the profit forecast was wrong and negligently made. The claimant sued the company and the bank. It was held that the defendants were liable since they knew the purpose of the statement, and that the claimant would rely, and did rely on, it. There was a special relationship between the defendants and the claimant.

In *White v Jones* [1995] 2 AC 207, a solicitor negligently failed to amend a testator's will as instructed. Consequently, the testator's two daughters lost the money they would have received under the amended will. It was held that the solicitor had assumed responsibility to the daughters to amend the will promptly as instructed and was liable to them.

Similarly, in *Humblestone v Martin Tolhurst Partnership (A Firm)* [2004] EWHC 151, a solicitor was held to be under a duty to ensure that a client's will was properly executed.



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Where there was no special relationship and assumption of responsibility, no duty of care would exist and no liability would arise in respect of a negligent misstatement.

In *Caparo Industries plc v Dickman* [1990] 2 AC 605, no special relationship was found. The auditor did not owe a duty of care to individual shareholders or other potential investors with regard to their investment decisions.

Similarly, in *James McNaughton Paper Group v Hicks* [1991] 1 All ER 134, where the claimant relied on a draft and inaccurate account prepared by the defendant to take over a company, the Court of Appeal held that no duty of care existed in respect of that account. It was not expected that the claimant would rely on it for its investment decision.

Finally, in *Customs and Excise v. Barclays Bank* [2006] UKHL 28, there was no assumption of responsibility by a bank to comply with a freezing order request by the HMRC. It would therefore not be fair, just or reasonable to impose a duty to that effect.

See also *Yorkshire Enterprise Ltd v Rhodes* (Unreported) [1998] QBD; *West Bromwich Albion v El-Safty* [2006] EWCA Civ 1299.

11.4.2.1 Avoiding liability for negligent misstatement

Negligence liability for misstatements may be avoided or limited in a numbers of ways. Perhaps, the best thing for professionals to do is to follow the recommendations of their professional bodies. If there is evidence that the advice or procedure was the standard practice of professional colleagues, a professional is likely to avoid liability in negligence. Another means of avoiding liability would be the use of disclaimers or exclusions clauses. This would outline the purposes of the advice, the person or persons it was meant for, and the extent of liability, if any, the maker would be willing to assume. There would be no liability in relation to things or persons excluded. In *Hedley Byrne,* the auditing firm was held not liable to the claimant because the firm had included a disclaimer/exclusion clause in its advice. Finally, insurance policies may be purchased to cover liability for negligent misstatements to clients through breach of contract and to non-clients through negligence.

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11.5 PSYCHIATRIC INJURY

Generally, there is no duty of care no to inflict psychiatric injury on others. Where a negligence claim relates to a psychiatric injury, some additional requirements must be satisfied by the claimant before a duty could arise and the victim could recover damages. Psychiatric injuries are non-physical injuries arising suddenly from shock to the nervous system. "Shock" in the context of psychiatric injury, "involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind." Illnesses arising gradually from grief, sorrow, sadness occasioned by an accident, as well as anxiety, stress and other negative human emotions would not normally qualify as psychiatric injury (*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310). In order therefore to succeed, the claimant must have suffered from a medically recognised condition due to shock arising from being involved in or witnessing a horrifying event. As Lord Ackner observed in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310:

> Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as from the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages.

> In *Ward v Leeds Teaching Hospitals NHS Trust* [2004] EWHC 2106, W's daughter died in hospital due to a negligent tooth operation. W sued the hospital for damages for PTSD on account of the time she spent in the hospital before her daughter's death and seeing her daughter's body in the mortuary. It was held that PTSD had not been established and the death of a loved was not a shocking and horrific event since it was within the range of human experience.

> A similar decision was reached in *Taylor v A Novo UK* Ltd [2013] EWCA Civ 194.

> The claimant had watched her mother collapse and die in her home following an accident at work due to the employer's negligence. She suffered from PTSD as a result. It was held that she could not recover damages from the company as her condition was not due to witnessing the accident.

Examples of medically (and legally) recognised psychiatric harm include Post-traumatic Stress Disorder (PTSD), heart attack, miscarriage, anxiety neurosis, clinical or morbid depression, Chronic Fatigue Syndrome, personality change, and Pathological Grief Disorder.

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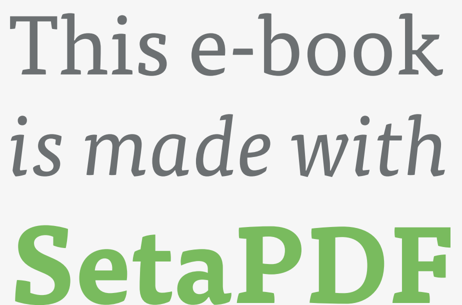
> In *Hinz v Berry* [1970] 1 AER 1070, a pregnant woman saw her husband killed and her children badly injured when a car negligently driven by the defendant smashed into their caravan. She became morbidly depressed. It was held that she could recover damages. Her illness was a medically recognised condition arising from her witnessing a horrific accident.

Claimants for psychiatric injury are divided into two categories – primary victims and secondary victims.

11.5.1 CLAIMS BY PRIMARY VICTIMS

Primary victim are persons in the "zone of danger" and who were "participants" in the physical event which led to the psychiatric harm. They would normally be in danger of personal injury, or, believe reasonably that they are in such danger because of the event. Primary victims would be able to recover damages for psychiatric harm arising from an accident whether or not they also suffer physical injuries. As long as their injuries are medically recognised psychiatric injuries, they would be treated in the same way as physical injury and do not need to be foreseeable (*White v Chief Constable of South Yorkshire* [1999] 2 AC 455). It would not matter that the victims were more prone to psychiatric injury due to inherent weaknesses.



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In *Page v Smith* [1996] 1 AC 155, the claimant who was recovering from Chronic Fatigue Syndrome, had an accident when the defendant drove into his path. Although both parties suffered no physical injuries, the claimant's condition returned and became permanent and caused him to stop working. The court found the defendant liable for the psychiatric injury, even though it was not foreseeable from a relatively minor accident. The court made it clear that such an injury did not have to be foreseeable, as long physical harm was.

11.5.2 CLAIMS BY SECONDARY VICTIMS

Secondary victims are persons who were not in the zone of danger at the time of the accident, did not participate in the accident, were not in danger of physical injury, and did not fear for their own safety. Their psychiatric illness only arose due to witnessing what had happened to other people. In order for a secondary victim to succeed in a claim for psychiatric harm, some additional conditions, which help to control the number of people who may be able to sue, must be fulfilled. These are the foreseeability of psychiatric harm to a normal person, proximity of relationship between the victim and the defendant, proximity in time and space between the claimant and the accident, and perception of the event by the claimant with his or her own unaided senses.

11.5.2.1 Foreseeability of psychiatric harm

The claimant must prove that a reasonable person in the position of the defendant would foresee psychiatric harm to a person of normal fortitude. In the absence of foreseeability, there would be no duty not to cause the claimant psychiatric harm.

In *Hambrook v Stokes* [1925] 1 KB 141, the claimant who suffered psychiatric harm and premature birth due to a reasonable fear of personal injury to her children was able to recover damages.

Conversely, in *Bourhill v Young* [1942] 2 All ER 396, there was no award of damages for a woman who suffered miscarriage and psychiatric harm after seeing the scene of a car crash involving strangers. There was no reasonable fear of injury to her.

Likewise, in *King v Phillips* [1953] 1 QB 429, there was no award of damages for psychiatric illness to a mother who erroneously thought that her son had been run over by a reversing car; there was no danger of a physical injury to her.

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In *Brice v Brown* [1984] 1 All ER 997, the claimant suffered from Hysterical Personality Disorder from childhood. After she was involved in a minor motor accident, she developed a major psychiatric illness leading to suicide attempts and bizarre behaviour, including asking people to cut off her head. It was held that she was of normal fortitude and that there would be no claim for psychiatric harm unless a claimant suffers from a psychiatric injury as a result of a defendant's breach of duty. Only then would the defendant have to take his victim as he finds him.

11.5.2.2 Proximity of relationship with immediate victim

The claimant must have a relationship of love and affection with the person physically involved in and affected by the accident. This relationship is presumed to exist between a parent and child; a husband and wife; and a fiancé and fiancée (although the presumptions could be rebutted by contrary evidence). For other family members and individuals, such a relationship must be proved to exist. In *Vernon v Bosley* [1997] 1 A11 ER 577 (CA), the claimant was able to recover damages for psychiatric injury he suffered after watching his two children drown due to the defendant's negligence. However, in *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, police officers involved in the rescue and salvage operations after the Hillsborough Stadium tragedy were unable to recover damages. They could not prove the existence of a relationship of love and affection between them and the immediate victims.

11.5.2.3 Proximity in time and space with the accident

The claimant must have been close to the scene of the accident or its immediate aftermath to observe it. Immediate aftermath refers to the scene of the accident shortly after it happened, while the accident is still unfolding and the scene is yet to be cleaned up. What amounts to immediate aftermath is a question of fact depending on the circumstances of the case, especially the nature and effects of the accident.

In *Mcloughlin v O'Brien* [1992] 1 AC 310, about one hour after a horrific accident involving her family members, the claimant went to the hospital to see her husband and two children. At the hospital, she was informed that her third and youngest child had died in the accident. Most of the accident victims were still covered in dirt and oil and had not been cleaned up or treated. One of the children was screaming and lapsed into unconsciousness upon seeing the mother. The husband also began to sob when she saw the claimant. As a result of what she had witnessed, the claimant suffered severe shock, organic depression and personality change. It was held that her condition was due to shock and not mere grief or sorrow and that she was entitled to succeed as a secondary victim.

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11.5.2.4 Perception of event with own senses

The claimant must perceive the shocking event through his or her own unaided senses – by sight or hearing. Watching or hearing the recorded or live broadcast of an accident will not suffice. The only exception would be were the live broadcast showed a close up of the suffering victims, such that they could be clearly identified by the claimant. Being informed about the accident by a third party will also not suffice. As Denning LJ explained in *King v Phillips* [1953] 1 QB 429, "there can be no doubt […] that the test of liability for shock is foreseeability of injury by shock. A person who suffers shock on being told of an accident to a loved one cannot recover damages from the negligent party on that account."

> In *Ravenscroft v Rederiktiebolaget Translantic* [1992] 3 All ER 73, a mother suffered from nervous shock after being told of her son's death in an accident at work. She did not witness the accident or the immediate aftermath. The Court of Appeal held that a claim for damages for psychiatric illness was not sustainable in law unless the shock had arisen from the sight or hearing of the relevant event or its immediate aftermath.

> In *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, most of the claimants had not witnessed the accident or its immediate aftermath with their own unaided senses, having watched it on live TV. They were unable to recover damages.

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11.6 CHAPTER SUMMARY

- The general principles of duty of care have been modified in cases involving emergency and public services, and those involving pure economic loss and psychiatric injury.
- For a duty of care to arise in cases involving public bodies and emergency services, apart from the ambulance service, it must be shown that a relationship of proximity exists between the claimant and the service or authority concerned such that it must be taken to have assumed responsibility for the wellbeing of the claimant.
- The reason for the general denial of duty of care in the above situations is public policy, in that it would be contrary to the interest of the public to impose a duty of care on these bodies in favour of individual members of society who would then be able to sue them for breach and claim damages at public expense.
- Where a claimant had sustained pure economic losses, it could only sue in negligence if there was a positive undertaking by the defendant in respect of a defective structure or where there has been an assumption of responsibility in respect of a negligent misstatement.
- With respect to claims involving psychiatric injuries, it must be shown that the claimant suffered from a medically recognised psychiatric injury due to shock and that the defendant owes him a duty of care in respect of such injuries.
- Where the claimant was actually exposed to physical harm from the accident, he would be regarded as a primary victim and a duty of care in respect of psychiatric harm would be presumed to exist.
- Where the claimant was not exposed to physical injury but only suffered psychiatric harm due to what happened to another person, he would be a secondary victim and must satisfy further conditions.
- The further conditions to be satisfied by secondary victims are the foreseeability of psychiatric harm to a person of normal fortitude such as to create a duty of care, the existence of proximities in time, space and relationship between the claimant and the accident, and the perception of the accident with one's unaided senses.

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11.7 PRACTICE QUESTIONS

1. Explain the relevance and importance of public policy on the imposition of duty of care.
2. Explain the circumstances in which emergency services and public authorities would be under a duty of care to individuals.
3. Explain the rules concerning the imposition of duty of care in respect of pure economic losses.
4. In respect of claims for negligently inflicted psychiatric injury, explain the circumstances in which a duty of care would be held to exist.
5. In respect of negligently inflicted psychiatric harm explain the concepts of primary and secondary victims.
6. In the middle of a lecture, fire had broken out in the auditorium of Donchester University. The fire was caused by an overload of the electricity circuit, and because the fire alarm system was out of order, the fire was not noticed on time. As students rushed towards the exits, Daniela was pushed down and trampled upon. Another student, Miriam was Daniela's best friend. She was pregnant and was sitting in the back row. Although she was not physically injured, she so feared for the safety of her friend that she passed out and suffered a miscarriage.

   Advise Miriam and the Donchester University on their potential claim and liability in respect of the miscarriage.

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12 OCCUPIERS' LIABILITY

12.1 INTRODUCTION

The occupier of any premises may be liable to the people who enter the premises for injuries or losses they sustain due to his negligence. This is because the occupier owes a duty of care to persons in his premises to protect them from harm arising from the premises. This is particularly important to companies and other businesses whose premises are open to members of the public and who therefor have many people entering them regularly. However, the duty of the occupier depends on whether those entering his premises are visitors or non-visitors. If they are visitors, the extent of their duty of care may vary, depending on whether they are ordinary adults or children or professionals. Although the duty of occupiers is analogous to the duty under the common law tort of negligence, liability is governed by statutes, namely, the *Occupiers' Liability Act (OLA) of 1957* and *1984*.

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12.2 LEARNING OBJECTIVES

At the end of the chapter, the reader should understand clearly:

- The statutory bases for occupiers' liability and its relationship with the common law of negligence
- The notion of premises and of occupation as the basis for liability
- The different types of visitors to premises and the nature of occupiers' duty to them
- The consequences to occupiers of breach of their duty to visitors
- How an occupier may discharge the duty to visitors and how they may avoid liability for breach
- The defences available to an occupier for breach of duty to visitors
- The meaning of non-visitors and the circumstances in which occupiers would owe them a duty of care
- The extent of the duty to non-visitors and how this may be discharged or how any liability may be avoided
- The defences available to occupiers in action by non-visitors
- How to tackle questions and problems arising from the topic

12.3 MEANING OF PREMISES

Under the Occupiers' Liability Acts, premises have a wide definition. They mean "any fixed or moveable structures, including any vessel or aircraft" – s. 1(3) OLA 1957. Accordingly, the term includes land, anything erected on land, house, ship, aircraft, lifts, pylons, grandstands, tunnels and ladder. In short, premises may be said to include anything or structure capable of being under someone's occupation.

12.4 MEANING OF OCCUPIER

For the purposes of liability, an occupier is any person in control of the premises in question. This may be as either owner, tenant, or independent contractor. Ownership of the premises is not essential; the important thing is that the person is sufficiently in control of the premises even if they do not physically stay in it. In *Harris v Birkenhead Corp.* [1976] 1 All ER 341, the owners of disused and empty premises on which small children were injured were held liable as occupiers. In *Hartwell v Grayson, Rollo and Clover Docks Ltd* [1947] KB 901, an independent contractor working on a ship was held to be the occupier of the ship. Where more than one person is in control of premises all of them would be the occupiers; occupation need not be exclusive. In *Wheat v Lacon & Co Ltd* [1966] AC 552, the owner of a pub and the managers of the pub who lived in the premises were held to be the occupiers of the premises; while in *Stone v Taffe* [1974] 1 WLR 1575, the owner and manager of a hotel were both held to be the occupiers.

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12.5 MEANING OF VISITORS

A visitor is a person who enters premises at the invitation or with the permission or consent, of the occupier, or under a contractual or statutory authority – s. 1(2) and s. 5 OLA 1957. Thus, an invited guest, a friend who usually visits, a tenant, and a policeman are all visitors. A shopper who enters a store or shopping mall would be a visitor even if he went there only for sightseeing. A member of the public who enters a public park would also be a visitor.

Moreover, where a person or business allows members of the public to use private land as a thoroughfare or shortcut, members of the public who so use it would be visitors.

> In *Lowery v Walker* [1911] AC 10, members of the public were for decades allowed by the defendant to use his land as a short cut to the train station. The defendant was held liable to the claimant (a member of the public) who was injured on the land by a wild horse.

A visitor injured or harmed in a premises may sue the occupier for damages covering personal injuries, damage to property, or and financial losses arising from personal injury or damage to property. Pure economic losses usually not recoverable.

12.6 DUTY TO VISITORS

An occupier's duty to visitors is only "in respect of dangers due to the state of the premises or to things done or omitted to be done on them" by the occupier – s.1(1) OLA 1957. It does not extend to injuries or losses suffered by the visitor due to his own conduct or carelessness. In respect of such dangers as indicated above, an occupier owes his visitors the "common duty of care". This is a duty 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 by the occupier to be there" (s. 2(2) OLA 1957. This means:

- The occupier must act with reasonable care (i.e., without negligence) towards the safety of his visitors.
- The occupier must do such things or take such steps necessary to keep the visitors reasonably safe in the premises.
- The occupier does not have a duty to make the premises itself safe; he should shield the visitors from, or warn them about any danger in the premises.
- The occupier's liability is conditional on visitors using the premises for the purpose for which they were invited, permitted, or authorized to be on the premises.

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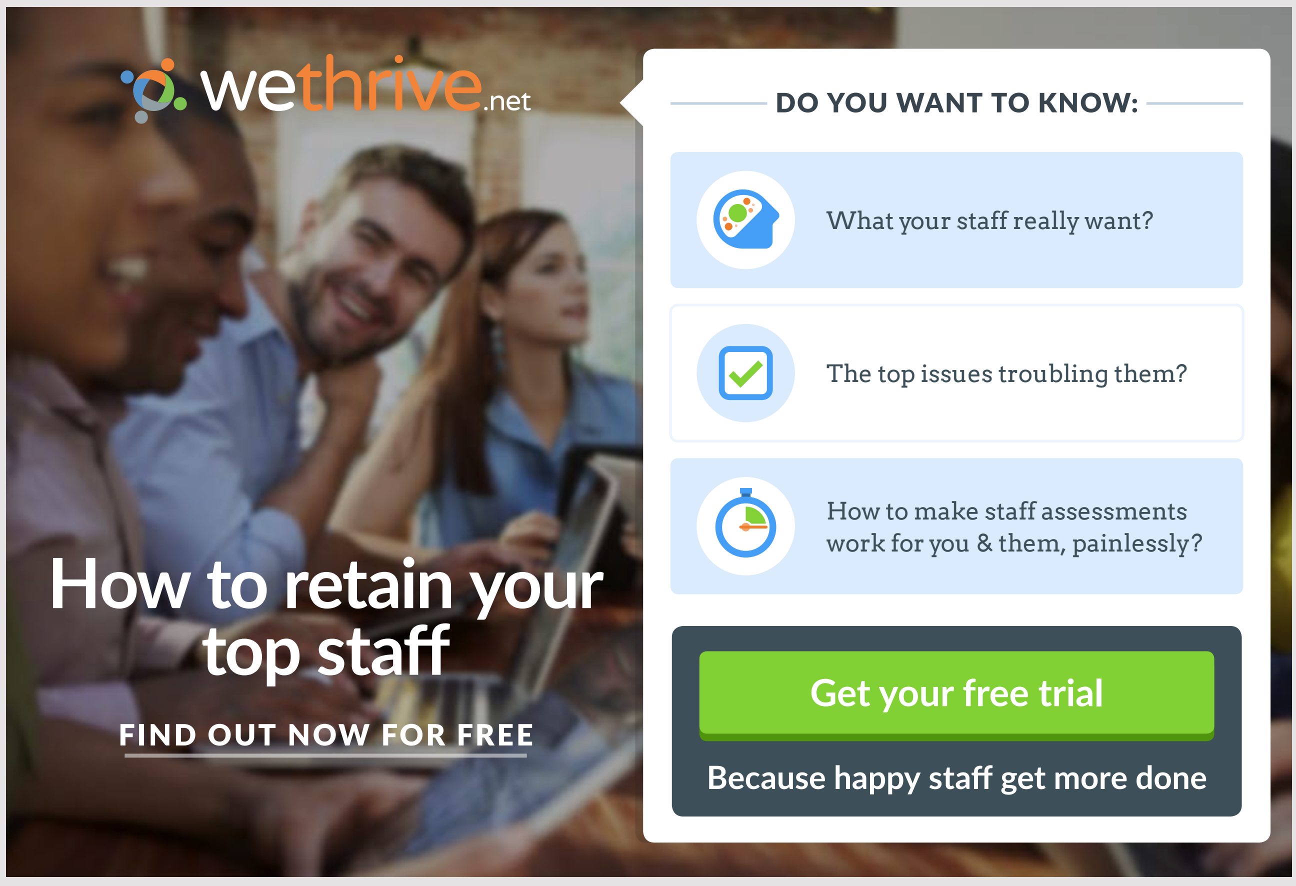
In *Roles v Nathan* [1963] 1 WLR 1117, two brothers who were chimney sweeps went into the defendant's chimney to clean it. The defendant had warned and restrained them from going in there at the particular time and when the fire was lit because of the high risk of carbon monoxide poisoning. However, without the knowledge of the defendant, the brothers sneaked into the chimney while the fire was on and were killed by carbon monoxide poisoning. In an action by the family against the defendant-occupier, it was held that there was no liability. The occupier had not been careless; the deceased were professionals who should be able to look after themselves; and the deceased were warned about the danger in the chimneys.

In *Laverton v Kiapasha* [2002] ECWA Civ 1656, a kebab shop owner was held not liable to a woman who tripped on the shop floor on 2-inch high heel shoes. Customers coming from the rainfall outside had made the shop floor wet. It was held that the defendant was not liable. The duty to make visitors reasonably safe was not absolute; the only thing the defendant could have done to make the shop safer than it was would have been to close it.



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12.6.1 PROFESSIONAL VISITORS

In the case of a professional visitor or independent contractor who comes into premises in exercise of his calling, an occupier is entitled to expect that he "will appreciate and guard against any special risks ordinarily incident" to that calling "so far as the occupier leaves him free to do so" – s. 2(3) OLA 1957. An occupier will not be liable for harm sustained by a professional visitor if the risk is such as is normally associated with his work (*Roles v Nathan* [1963] 1 WLR 1117).

However, if the risk is unusual and not normally associated with the line of work concerned, the occupier could be liable.

> In *Eden v West & Co* [2002] EWCA Civ 991, bricks above a window collapsed on a carpenter when he removed the window in the defendant's house. The defendant was liable because it was very unusual that brickwork would collapse in that manner in a modern house. Moreover, the claimant was a carpenter, not a bricklayer.

12.6.2 CHILD VISITORS

The law demands more care from the occupier where the visitor is a child and would be expected to take more precautions. Under s. 2(3) OLA 1957, "an occupier must be prepared for children to be less careful than others". An occupier should not visibly leave on his premises things likely to allure or attract children. Where such allurements or attractions are left, they would be taken as an implied invitation or license to children to enter; and if they do enter and are injured, the occupier would be liable.

> In *Glasgow Corporation v Taylor* [1922] 1 AC 44, a 7 year old boy ate poisonous berries in a public park and died. The council was held liable because the dangerous berries were attractive to children and the council did nothing to protect children from them.

However, where very young children are concerned, it is expected that they would be accompanied and supervised by adults. In such situations, the occupier's duty will be to take such care as is reasonable to keep children safe when under the supervision of an adult.

> In *Phipps v Rochester Corporation* [1955] 1 QB 450, a 5 year old child fell into a deep trench in a field and broke his leg. She had had come there in the company of her 7 year old sister. The council was not liable because it was reasonable to expect that the children would be accompanied by an adult; it is not the duty of the occupier to take over the upbringing of children from their parents.

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12.6.3 DISCHARGING THE DUTY OF CARE

An occupier would avoid liability if he had done all that he reasonably could to keep the visitors safe. There would be no liability in the absence of negligence. In addition, an occupier would escape liability by providing sufficient warning to the visitors about any dangers in the premises. To be sufficient, the warning must be clear as to the danger, and must enable the visitor to be safe – s. 2(4)(a) OLA 1957. Accordingly, warnings such as, "visitors enter this premises at their own risk", or that "the owners are not liable for any damage or harm to visitors" are not sufficient since they do not warn of the danger, nor enable the visitors to be reasonably safe.

> In *Roles v Nathan* [*1963*] 1 WLR 1117, as we have seen, the chimney sweeps were warned of the danger of carbon monoxide poisoning inherent in cleaning the flue while the fire was on. The occupier was not liable when they ignored this warning and died of carbon monoxide poisoning.

Where the risk or danger is obvious, the occupier is not required to give any warnings since the visitors could and should appreciate the risk or danger (provided of course, that they could perceive it). However, in the case of children who cannot read or appreciate written warnings, something more might be required. A physical barrier might be necessary.

12.6.4 DEFENCES

Where a visitor has been injured in an occupier's premises due to negligence, the occupier may still rely on a number of defences, namely act of an independent contractor, consent of the claimant and contributory negligence by the claimant.

12.6.4.1 Fault of independent contractor

Where the harm to the visitor was caused by a faulty execution, maintenance or repair by an independent contractor to whom work had been entrusted, the contractor rather than the occupier would be liable. This is however subject to the proviso that it was reasonable to entrust the work to the contractor; that the occupier took reasonable steps to satisfy himself that the contractor was competent; and that the occupier took reasonable steps to satisfy himself that the work had been properly done – *s. 2(4)(b) OLA 1957.*

> In *Haseldine v Daw* [1941] 2 KB 343, an occupier was not liable when a lift being repaired by an independent contractor fell down the shaft and fatally injured somebody.

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> Conversely, in *Woodward v Mayor of Hastings* [1945] 1 KB 174, a school pupil slipped on snow-covered steps in a school and was injured. The cleaning of the steps had been entrusted to the school cleaner who the defendant argued was an independent contractor. The defendant local authority was held liable because it was under a duty to ensure that the cleaning was properly done. The cleaner was held to be an agent of the local authority.

It is not clear whether the occupier is also required to ensure that the independent contractor he employs is properly insured against public liability. The Court of Appeal has given conflicting decisions on the point. In *Gwilliam v Westt Hertfordshire Hospitals NHS Trust* [2002] 3 WLR 1425 and in *Bottomley v Secretary & Members of Todmorden Cricket Club* [2003] EWCA Civ 1575, it was decided that the duty existed. However, in *Payling v Naylor* [2004] ECWA Civ 560, it was held that the defendant was not under a duty to ensure that an independent contractor employed as a door attendant was insured against liability since the door attendance was not a non-delegable duty.

12.6.4.2 Consent of the visitor

If the visitor willingly accepts the risk that led to the harm or damage, the occupier will not be liable – s. 2(5).

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12.6.4.3 Contributory negligence

If the visitor contributed to his own harm or damage due to his carelessness/negligence, the visitor will share in the liability to the extent of his contribution.

12.6.4.4 Visitor going beyond purpose of visit

The occupier's duty is conditional on the visitor being in the premises for the purpose for which was invited. If the visitor goes beyond the purpose of his visit, he would become a trespasser. The occupier would not be liable for any damage that results unless the trespassing was due to the fault of the occupier.

> In *Walker v Midland Railway* [1886] 55 LT 489, the occupier of a hotel was not liable to a hotel guest who wandered into a dark service room and fell down an unguarded lift shaft. The guest had gone outside the area where guests were reasonably expected to be and was therefore a trespasser in that area. Similarly, in *Clare v Perry* [2005] EWCA Civ 39, the defendant was not liable to a hotel guest who was seriously injured when she jumped down a high wall instead of going out through a normal exit.
>
> But in *Campbell v Shelbourne Hotel* [1939] 2 All ER 351, an occupier was liable to an injured hotel guest who, while looking for the lavatory in the dark, mistakenly strayed into the basement and fell down a flight of stairs. The occupier had failed in his duty to keep the passageway lighted.

12.6.4.5 Exclusion or limitation of liability

The occupier may restrict, limit, modify or exclude his liability to his visitors by agreement or otherwise – s. 2(1) OLA 1957.

> In *White v Blackmore* [1972] 2 QB 651, notice at the entrance of a racing club and in the programme notes stated as follows: "Warning to the public: Motor Racing is Dangerous"; and that the occupiers were not liable to "spectators or ticket holders" for accidents arising in the event. The notice was held to have excluded liability to the claimant who was injured at a racing event.

However, this provision is now subject to the provisions of the *Unfair Contracts Terms Act 1977* and the *Consumer Rights Act 2015*. Where premises are occupied for business purposes, liability for death or personal injury arising in the course of business to a consumer due to negligence cannot be excluded. Liability for damages other than death or personal injury resulting from negligence, or negligence liability to non-consumers may only be excluded if they are reasonable. For more on these, see chapter 6.

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12.7 NON-VISITORS

The duty of an occupier to non – visitors is different and lower than the duty to visitors. Since a non-visitor has not been invited to the premises; since his presence might not be expected; and since his presence, even if expected, might be unwelcome or detested, it will not be right to expect the occupier to make the non-visitor "reasonably safe" for the purposes for which he was in the premises. Moreover, since the occupier is not likely to know the purpose of a trespasser's entry unto his premises and since the purpose might be injurious to the interest of the occupier, the occupier cannot be expected to facilitate or encourage that entry. The duty to non-visitors is limited and is covered by the *Occupiers' Liability Act 1984*.

12.7.1 MEANING OF NON-VISITOR

A non-visitor to another's premises would be regarded as a trespasser. A trespasser is defined as "[…] one who goes on land without invitation of any sort and whose presence is either unknown to the proprietor, or if known, is practically objected to" (Lord Dunedin in *Addie v Dumbreck* [1929] A.C. 358). Thus, trespassers are not invited, permitted or welcomed by the occupier; and they have no contractual or legal authority to be on the land. In addition, a person who enters premises as a visitor may become a trespasser if he does on the premises something for which he was not invited, permitted, or authorised to be there.

> In *Hillen v ICI (Alcali) Limited* [1936] AC 65, stevedores who were lawfully on a barge in order to discharge it were held to have become trespassers when they knowingly went onto an unsafe and "out of bounds" area to unload cargo. Similarly, in *Tomlinson v Congleton* [2004] 1 AC 46, the claimant who entered the defendant's land initially as a licensee (visitor) was regarded as a trespasser when he swam on a lake against the warnings of the defendant.
>
> In *Harvey v Plymouth City Council* [2010] EWCA Civ 860, the claimant ran unto the defendant's land and tripped over a low link-wire fence and fell down 5.5 metres to the ground below. The defendant had allowed the land to be used by the public informally for recreational purposes. The claimant, and his friends, had consumed a lot of alcohol and had been escaping from a taxi without paying the fare. It was held that the council was not liable since the claimant could not be regarded as its licensee (visitor) when he fell. They could not be said to have consented to the claimant's activity on the land.

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12.7.2 DUTY TO NON-VISITORS

An occupier does not owe non-visitors or trespassers the common duty of care; he does not owe a duty to trespassers to make them reasonably safe for the purpose for which they entered the premises. However, an occupier has a duty to protect non-visitors from dangers arising due to the state of his premises or things done or omitted to be done on them only if:

a) He is aware of any danger in his premises or has good reason to believe the danger exists; and
b) He knows or has good reason to believe that the trespasser is in, or may come to, the vicinity of the danger; and
c) It is reasonable in the circumstances to expect the occupier to provide protection (See s. 1(3) OLA 1984).

The duty on the occupier in such a situation is to "take such care as is reasonable in all the circumstances to see that" the non-visitor "does not suffer injury on the premises due to the danger concerned". The nature and extent of occupiers' duty to non-visitors are illustrated by the following cases:

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Maloney v Torfean CBC [2005] EWCA Civ 1762 – The claimant was taking a short court through the defendant council's land when he fell down a sloping grass bank onto a concrete pedestrian sub-way below. It was held that the defendant was not liable because it did not know about the danger on the land; did not have reason to believe it existed; and did not know or believe that the claimant might come unto the land. S. 1(3) was not fulfilled.

Rhind v Astbury Water Park [2004] EWHC Civ 756 – The defendant was not liable to a non-visitor for injury caused by a disused fiberglass container at the bottom of a lake since they did not know about its existence and were not expected to search the lake for hidden dangers. S. 1(3)(a) was therefore not fulfilled.

Donoghue v Folkestone Properties [2003] QB 1008 – In one mid-winter midnight, the claimant, a professional diver, took a dive from a slipway into the defendant's harbour. The claimant struck his head on an object under the water and suffered from tetraplegia. The court of Appeal held the defendant not liable since the conditions in s. 1(3) (b) had not been satisfied. Although the defendant knew that some people used the slipway in the summer, they did not know that the slipway would be used in the winter; there was therefore no duty to put up a warning.

An occupier would not be liable if the injury was caused by the (dangerous) activity of the claimant that is unconnected to the state of the premises or anything done or omitted to be done on it.

In *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953, the defendant hospital was not liable to an 11 year-old boy who seriously injured himself after falling down a fire escape. The child had been climbing the underside of the fire escape with crossbars. According to the court, the premises were not themselves dangerous; any danger in them arose from the activity of the claimant.

Unlike in the case of visitors, an occupier will not be liable if the non-visitor only loses or damages his property – S.1(8). The 1984 Act only covers personal injury and not damage to property.

12.7.3 DISCHARGING THE DUTY TO NON-VISITORS

The occupier may discharge his duty to trespassers by warnings or discouragement.

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12.7.3.1 Warning

The occupier will not be liable if he has taken steps reasonable in the circumstances to warn non-visitors of the danger on his premises or to discourage them from incurring the risk. There is however no duty to warn where the danger is obvious (*s1 (5) OLA 1984*).

> In *Tomlinson v Congleton BC* [2004] AC 46, the claimant (a boy of 18) was paralysed when he dived headlong into a lake under the control of the defendant and hit his head on the bottom of the lake. There was a warning by the council saying: "dangerous Water: No Swimming". It was held that the council was not liable for the injury since it had provided a reasonable warning of the danger.

> In *Ratcliff v McConnell* [1999] 1 WLR 670, the claimant (who was 19 years) was injured when he climbed over the fence of his school's swimming pool at night and dived into the pool. It was held that the defendant had no duty to warn adult trespassers of the obvious danger of diving into a pool ignorant of its depth.

However, if there is risk to children, action may need to be taken to protect them even from obvious dangers.

> In *Young v Kent County Council* [2005] EWHC 1342, the claimant, a 12 year-old child, was injured when he climbed a roof in a school building and jumped on a skylight. The claimant had been attending a youth club at the school and had gone on the roof to retrieve a football. It was known to the defendant that children occasionally climbed the roof. The defendant was held liable because it had not taken sufficient steps to prevent children from going on the roof when they knew of such adventures. The claimant's damages were however reduced by 50% due to his contributory negligence.

> This case may be contrasted with *Swain v Puri* [1996] QIPR 442.

>> An occupier was held not liable to a child who trespassed on a property and managed, despite serious difficulties, to climb unto the building's skylight from which he fell. The danger was not obvious and the occupier had no knowledge that the child would be there.

12.7.3.2 Discouragement

The occupier will not be liable if he has taken reasonable steps to discourage people from entering the premises or from incurring the risk in it. What amounts to reasonable steps is a question of fact depending on the circumstances of each case.

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In *White v St Albans Council*, The Times, March 12, 1990, the defendant council was not liable to the claimant who trespassed on its land, fell into a ditch, and injured himself. Not only did the council not know that the land was being used as a short cut, it had fenced it off against public access. The fencing was held to be a reasonable step to discourage trespassers.

12.7.3.4 Defences

The defences under this tort include consent, contributory, and acts of independent contractor.

12.7.3.4.1 Consent

There will be no liability if the non-visitor willingly accepts the risk in the premises – s. 1(6). This pre-supposes that the non-visitor is aware of the risk and has decided nevertheless to enter the premises. This would be the case where there is a warning about the danger.

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12.7.3.4.2 Contributory negligence

There will be reduced liability on the occupier if the non-visitor contributes to his injury by his own negligence – S. 1 (6). In *Revel v Newberry* [1996] 1 All ER 291, an intruder who was shot by an occupier was held to be two-third responsible for his shooting and his damages was reduced accordingly.

12.7.3.4.3 Act of independent contractors

An occupier may not be liable to an injured non-visitor if the injury was due to the fault of an independent contractor. Although there is no express provision for this defence in the *OLA 1984*, if the fault was created by a competent contractor employed by the occupier and the danger is not such as would be discovered from reasonable inspection, the occupier could not be said to know about it. Consequently, it would not be considered reasonable to expect the occupier to provide protection from the danger.

12.8 CHAPTER SUMMARY

- The liability of occupiers of premises to person who come unto them which were originally governed by the common law are now governed by the *Occupiers Liability Act 1957* in respect of visitors and the *Occupiers Liability Act 1984* in respect of non-visitors.
- Occupier owe a duty of care to their to keep them reasonably safe from dangers arising from the state of the premises or things done on them, provided they remained in the premises for the purpose for which they were invited.
- However, the extent of the duty varies with that status of the visitors with the scale rising upward from professional visitors, through ordinary adults, to child visitors.
- The duty to visitors could be discharged by the exercise of due care, the provision of adequate warnings and discouragement.
- Non-visitors are equivalent to trespassers in that they are neither invited, wanted or welcome by the occupier.
- The duty of an occupier to a non-visitor is conditional upon his knowledge of the existence of the danger, the presence of the non-visitor in its vicinity and it being reasonable to expect the occupier to protect the non-visitor from the danger.
- The occupier's duty to a non-visitor could be discharged by a warning of the danger and discouragement from entering the premises.
- The defences available to an occupier are consent, contributory negligence, the act of an independent contractor, exclusion of liability and the fact that a person had gone beyond the purpose for which they visited the premises.

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12.9 PRACTICE QUESTIONS

1. Explain the differences between the duty of care an occupier owes to visitors and non-visitors.
2. Explain how an occupier may discharge the duty to visitors and non-visitors
3. Discuss the defences which may be available to an occupier in respect of injuries or losses suffered by a visitor to his premises.
4. Manford City Council owns and operates Blooms Leisure Park for the use and enjoyment of local residents. The facilities in the park include children's outdoor playing equipment, a forest reserve, and a lake. The following events had taken place at the park:
    - Melanie, aged 7, came to the park with her mother. While walking around the forest she plucked and ate poisonous red berries from a low tree and died. She did not know that the berries were poisonous.
    - Marcus aged 18 years was paralysed when he dived headlong into the lake and hit his head on the lake floor. There were warning signs around the lake by the council saying: "Dangerous and Shallow Water: No Swimming".
    - Adam and Scott were racing their motorcycles in the park when Adam fell down a sloping grass bank onto a concrete pedestrian sub-way below and fractured his skull. There are notices in the park that "the use of motor vehicles and all forms of motor racing are strictly prohibited".

    Melanie's parents, Marcus and Adam are considering legal action against the council for the above events under the rules on occupiers' liability.

    Advise the council on their potential liability under the Occupiers' Liability Acts.

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13 NUISANCES

13.1 INTRODUCTION

Nuisance is of three types – private, public and statutory. Private nuisance protects peoples' interest in the use and enjoyment of their land by forbidding unlawful and unreasonable interferences with them. The tort of public nuisance protects members of the public at large in public places or amenities, rather than individual neighbours in their own properties. The kind of activity or state of affairs that would amount the public nuisance would often be similar to those that cause private nuisance. The difference between the two torts would largely be in the degree or spread of the interference. Moreover, while private nuisance affects people in their own premises, public nuisance protects the safety and convenience of the general public or sections thereof mostly in places other their own. Public nuisance is both a criminal offence and a tort. Statutory nuisance is the sort of nuisance prohibited by statute. However, what amounts to statutory nuisance may also often amount to private and/or public nuisance depending on the circumstances.

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Most cases of nuisance involve companies, businesses and institutions because they are most likely to engage in the type of activities that could give rise to a cause of action under these torts. These activities include manufacturing, quarrying, building construction, excavations, the handling of chemicals, gases, nuclear materials etc. It is therefore mostly in their own interest to take proper precautions against such activities. Private individuals, of course, may commit nuisance although to a lesser degree relative to companies. Individuals, companies and other businesses are expected to carry on their activities in such a way as not to cause public or statutory nuisance.

Liability in nuisance is strict in that it may be committed even though the defendant had used utmost care in doing the activity that caused it. As it was held in *The Wagon Mound (No 2)* [1967] 1 AC 617, "an occupier may incur liability for the emission of noxious fumes or noise although he has used the utmost care in building and using his premises…"

13.2 LEARNING OBJECTIVES

At the end of the chapter, the reader should clearly:

- Understand the meaning and purpose of the torts of private, public and statutory nuisances as well as the differences between them
- Understand how persons and companies may avoid committing nuisance
- Understand the things that must be proved before liability could arise under the different types of nuisance
- Know the persons entitled to sue and liable to be sued for nuisance and why
- Appreciate the defences available to persons sued in nuisance
- Be able to identify the occurrence of nuisances from given situations and answer questions arising from the topic.

13.3 PRIVATE NUISANCE

Private Nuisance may be defined as a state of affairs or an activity that causes an unreasonable interference with another person's land, interest in land, or enjoyment of land. Thus, it may be committed in any of the following ways: encroachments on a neighbour's land; physical injury to a neighbour's land; or interference with neighbours' quiet enjoyment of their land. However, many interferences with neighbour's property might not be serious or sustained enough to amount to actionable nuisance. Examples of things that could amount to private nuisance include vibrations resulting in structural damage, destruction of plants by things like chemicals, gases and fire, excessive noise or smell, and air pollution by chemicals, gas or radiation. Other examples are contamination of soil by chemicals, blocking of a right of way, collapse of trees onto someone's house, and encroachment onto land by roots or branches from another's land.

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For liability to arise in private nuisance, the interference with the claimant's land or the use or enjoyment of it must be unreasonable, and the type of damage caused by the interference must be foreseeable.

13.3.1 UNREASONABLE INTERFERENCE

Neighbours are expected to be accommodating of one another in the use and enjoyment of their land. Accordingly, not every interference or disturbance would be actionable as private nuisance. For there to be actionable private nuisance, the interference by the defendant with the claimant's land, use, or enjoyment thereof, must be unreasonable. An unreasonable interference would be unlawful in that it has gone beyond the bounds of what is acceptable under the law and what the neighbour is expected to live with. Whether or not an interference is unreasonable will necessarily involve a consideration of many factors, including the seriousness, nature, extent and duration of the interference complained about, the location of the claimant's property, any unusual sensitivity on the part of the claimant. Other factors are the motive and utility of the defendant's use of his land and the practicality of avoiding or eliminating the offending activity or state of affairs.

13.3.1.1 The seriousness of the interference

Not every interference with land or the enjoyment of it can give rise to an action in private nuisance given that some element of "give and take" is expected of neighbours. The right of a neighbour not to be disturbed or interfered with has to be balanced against the right of the other neighbour to use and enjoy his own property. The interference has to be substantial or serious before it will be considered unreasonable and therefore a nuisance.

> In *St. Helen's Smelting Co. v Tipping* (1865) 11 HL 642, Lord Wensleydale observed that, "the law does not regard trifling and small inconveniences, but only regards sensible inconveniences which sensibly diminish the comfort…*of the property affected.*"
>
> In *Hunter v Canary Wharf Ltd* [1997] UKHL 14, an action was brought in private nuisance against the defendant by some residents of the London Docklands. These included home owners, tenants, licensee and family members or other persons living with them. The complaints were that the defendant interfered with their T.V. reception by building a skyscraper and generated a large amount of dust near the claimants' property by road construction. The House of Lords held that interference with TV reception caused by the mere presence of a building was not capable of constituting an actionable private nuisance, since a person is entitled to build on his land as long as he has planning permission to do so.

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13.3.1.2 The nature and extent of the interference

If the interference relates to the physical damage of the claimant's property, it is likely to be considered more unreasonable than if it were a mere inconvenience. Similarly, an interference that affects a large part of the claimant's premises is likely to be considered more unreasonable than one that affects only an insignificant part of it.

13.3.1.3 Duration of the interference

Private nuisance is usually concerned with a repeated or continuing state of affairs. The longer the interference lasts, the more likely it is that it would be unreasonable. A brief or transient interference would not normally be actionable unless it damages the property itself or is so serious as to be unreasonable.

> In *Crown River Cruises Ltd v Kimbolton Fireworks* [1996] 2 Lloyd's Rep. 533, substantial fire damage caused to the claimant's building by a fireworks display in the defendant's premises was held to be nuisance even though it lasted for only 20 minutes.

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13.3.1.4 The location of claimant's property

The location of the claimant's premises is relevant in considering whether the defendant's interference with the claimant's enjoyment of his land was unreasonable. What may be reasonable in an industrial or commercial neighbourhood may be unreasonable in a quiet residential area**.** Moreover, the degree of comfort, peace or quiet a person can legitimately expect may depend on the location of his property.

> *Sturges v Bridgman* (1879) 11 Ch D 852 – The defendant ran a confectionary business in his compound. He had in his kitchen two big mortars and pestles which he used to pound meat and other ingredients. The kitchen abutted the garden of the claimant's premises. The claimant, a physician, later built a consulting room in his garden against the defendant's kitchen wall. The claimant alleged that the pounding from the defendant's kitchen caused noise and vibration as well as great annoyance and inconvenience. The claimant argued that since he had used the pestle and mortar for over 26 years, he had acquired a prescriptive right to cause the nuisance.
>
> It was held (among other things) that in considering whether any act is a nuisance regard must be had not only to the thing done but to the surrounding circumstances since "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey."

Location is however not relevant in cases involving damage to the land itself.

> *St. Helens Smelting Co. v Tipping* (1865) 11 HL 642 – The claimant's trees and shrubs were damaged by fumes from the defendant's copper smelting works. Although the claimant's premises were located in an industrial area, it was held that the claimant's action in nuisance should succeed since there has been a material damage to his property.
>
> *Mckinnon Industries v Walker* [1951] 3 DLR 577 – The claimant grew plants and flowers for sale. Offensive, noxious and poisonous smoke, vapour and matter emanating from the defendant's foundry and forge works deposited on and killed the claimant's plants. It was held that the case was a proper one for the granting of an injunction and that damages would not be an adequate remedy.

13.3.1.5 Planning Permission

The implementation of a planning permission may be relevant in the consideration of whether the interference was reasonable. The interference or disturbance will be measured against what is reasonable under the permission.

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In *Watson & Ors v Croft Promo-Sport Ltd* [2009] EWCA Civ 15, it was held that the granting of planning permission for motor racing did not change the nature of the locality as a rural area. The level of noise generated by the defendant was unreasonable even when the planning permission was taken into account.

13.3.1.6 The defendant's motive

If the defendant engages in an unnecessary or unreasonable activity on his land, any interference he causes is likely to be more unreasonable than if it were caused by a necessary or useful activity. Therefore, if the defendant's use of his land is malicious, the use of land would be unreasonable and any interference he causes is more likely to be unreasonable. In *Christie v Davey* [1893] 1 Ch. 316, deliberate noise making (including shrieking and banging on walls and on empty metal containers was held to be nuisance since the defendant had not used his land in a legitimate manner. Similarly, in *Hollywood Silver Fox v Emmett* [1936] 2 KB 468, the deliberate firing of gunshots by the defendant in order to scare away the claimant's silver vixens was held to be a nuisance.

13.3.1.7 Utility of the defendant's activity

That the activity of the defendant is beneficial to the community would not normally exclude liability for nuisance. However, this would be relevant in determining whether the activity is unreasonable. The more beneficial the activity is, the more likely it is that it would be held not to be unreasonable.

13.3.1.8 Practicability of avoiding or abating the interference

If the defendant could easily have taken steps to prevent the interference but did not do so, the use of the land is more likely to be considered unreasonable. The same consideration applies if the defendant could reasonably and easily have removed the source of the interference but did not do so.

13.3.1.9 The claimant's sensitivity

The defendant would not be held liable if his interference would not have bothered a normal person or a person using his land normally; a person cannot impose his lifestyle on another.

In *Robinson v Kilvert* [1889] 41 Ch.D 88, normal heat from the defendant's operations discoloured and diminished the value of delicate paper stored in the claimant's premises. It was held that there was no nuisance since normal paper would not have been so affected.

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13.3.2 FORESEEABILITY DAMAGE

A person will not be liable to pay damages for private nuisance unless the kind of harm caused was foreseeable.

> In *Cambridge Water Co. v Eastern Counties Leather Plc* [1994] 1 All ER 1, the defendant, who owned a tannery, stored chlorinated solvent in its premises which was about a mile away from the claimant's borehole. The claimant used the borehole to abstract water for domestic use. Solvents from the tannery seeped into the ground below the defendant's premises and contaminated the claimant's borehole making the water unfit for domestic use. It was held that foreseeability of the type of harm was required in private nuisance, and that the defendant was not liable since the contamination of the claimant's borehole was not foreseeable.

However, although defendants may not be liable in damages for an unforeseeable damage, injunction may be granted against them to stop doing it if the activity amounts to a private nuisance.

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13.3.3 RIGHT OF ACTION IN PRIVATE NUISANCE

Since nuisance is a tort against land, only persons with a proprietary interest in the affected land can sue. Proprietary interest means interest in property as owner, tenant in possession, grantees of an easement/*profit a prendre*, or licensee/occupier with exclusive possession.

> In *Malone v Laskey* [1907] 2 KB 144, a woman who was injured by a falling toilet cistern in the property of her husband's employer could not claim in private nuisance against the defendant whose vibrating generator caused the cistern to fall. She had no proprietary interest in the property.

> In *Hunter v Canary Wharf* [1997] 2 All ER 426, it was held that a person who had no proprietary right to the land affected by a nuisance could not sue in private nuisance. A mere licensee or occupier cannot sue; right to exclusive possession is required.

However, persons without proprietary interest in land may sue for damages under *article 8 of the Human Rights Act 1998* for infringement of their right to private and family life.

> *Dobson & Ors v Thames Water Utilities Ltd & Anor* [2009] EWCA Civ. 28 (CA) – The case involved complaints about smell and mosquitoes emanating from the defendant's sewage works. Many of the people affected by the smell and mosquitoes had no proprietary interest in the properties where they lived and could not therefore sue in private nuisance. The question before the Court of Appeal was whether without proprietary interest a person could receive compensation under article 8(1) Human Rights Act 1998 when those with such an interest had received damages in private nuisance.
>
> It was held that compensation could be paid under article 8(1) of the HRA 1998 for interference with a person's use or enjoyment of land where the person has no proprietary interest in the land even though others with such an interest have been compensated in nuisance.

13.4 PUBLIC NUISANCE

A person is guilty of the crime of public nuisance (also known as common nuisance) who:

> Does an act not warranted by law or omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all her Majesty's subjects – *Archibold's Criminal Law Pleadings, Evidence and Practice.*

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The tort of public nuisance has been defined as "any nuisance which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects". However, it it is not necessary to show that every member of the class has been affected by the nuisance. It is sufficient only to show that a representative cross-section of the class has so been affected (Romer LJ in *Attorney General v PYA Quarries Ltd* [1957] All ER 894; [1958] EWCA Civ 1 (CA). We shall only focus on the tort of public nuisance.

13.4.1 CONDITIONS FOR THE TORT OF PUBLIC NUISANCE

For nuisance to be classified as public, it must be wide spread and affect actually or potentially a cross section of the public. In addition, the harm caused must be foreseeable.

13.4.1.1 Wide spread interference

To be actionable a public nuisance, an activity or state of affairs must cause a widespread interference with the convenience, safety, etc. of the public generally or a section thereof. Whether the section of the community affected comprises a sufficient number of people to amount to a class of her majesty's subjects is a question of fact to be judge objectively in each case. However, in every case, the interference would have to be "so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large" (Denning LJ in *AG v PYA Quarries*).

> In the criminal case *R v Johnson,* Times 22 May 1996 (CA), it was held that the defendant who had made a number of obscene telephone calls to different women had committed the crime of public nuisance and that the women who had been telephoned were the 'class of Her Majesty', subjects affected.

13.4.1.2 Foreseeability of harm

Although public nuisance is a strict liability tort in that liability could arise in the absence of fault on the part of the defendant, the harm caused, as in private nuisance, has to be foreseeable.

13.4.2 OCCURRENCES OF PUBLIC NUISANCE

Public Nuisance may occur in different forms, such as, obstructing or causing hazard on the highway, constituting danger in premises adjoining the highway, multiple or amalgamated private nuisance, and nuisances affecting a wide section of the public.

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13.4.2.1 Obstructing or causing hazard on the highway

Obstructing the highway or causing a hazard thereat would amount to a public nuisance if it endangers the safety or unreasonably interferes with the convenience of members of the public or a cross-section of it. In *Dymond v Pearce* [1972] 1 QB 497, a lorry parked on the highway (with parking lights on) was held to constitute public nuisance. However, not all obstructions of the highway will constitute a nuisance. To be a nuisance, the obstruction has to be unreasonable.

13.4.2.2 Danger from premises adjoining the highway

Owners or occupiers of premises adjoining the highway are under a duty to keep them in a state of repair. There is strict liability in public nuisance for damage occurring on the highway from lack of repair of a structure adjoining it unless it was due to an unseen and unforeseeable act of nature or a third party.

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In *Tarry v Ashton* [1876] 1 QBD 314, a lamp on the wall of the front walls of the defendant's house fell and injured the claimant as he passed by in the street. The defendant had no knowledge of the lamp's defective state although he had recently employed an independent contractor to maintain the lamp. The contractor was found to have been negligent in his work. The duty on the occupier to keep the premises in a state of repair was absolute, non-delegable and required no knowledge of the defect in it.

In *Wringe v Cohen* [1940] 1 KB 229, the gable end of the roof of the defendant's lock-up shop (which he had let to a tenant) collapsed unto the claimant's roof and damaged it. Although the immediate cause of the collapse was storm, the gable end, pointing and collaring had been defective for about three years. The defendant denied liability on the ground of lack of knowledge of the state of the premises. The Court of Appeal held that if due to lack of repair, premises on a highway become dangerous and constitute a nuisance, and subsequently collapse and injure a passer-by or an adjoining owner, the occupier or owner of the premises, if he has undertaken the duty to repair, would be liable in nuisance, whether or not he knew about the danger and whether or not he ought to have known about it.

It was also held that under the common law, it is an indictable offence for an occupier of premises on a highway to permit them to get into a dangerous condition owing to non-repair and that it is not to show that the occupier knew or had the means to know about the state of disrepair (p. 234).

Conversely in *Noble v Harrison [1926] 2 KB 332*, a branch of a tree growing on the defendant's land and overhanging the highway 30 feet above the ground broke and fell on the plaintiff's motor coach. The accident was due to a latent and invisible defect in the branch of which the defendant was not, and could not have been, aware. The defendant was found not liable. Unlike in cases of built or installed structures, there was no absolute duty to maintain a tree in a state of repair and the defendant was not liable for damage caused by a latent defect.

There would also be actionable nuisance for the risks created by such dilapidated structures for which the Attorney General or the relevant local authority could sue for abatement.

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13.4.2.3 Multiple private nuisance

Where the activities of the defendant in his premises affect many people in his neighbourhood, this may give rise to private and public nuisance (in respect of neighbours whose properties were affected) and to public nuisance in respect of other members of the public whose land were not affected. For example, dust pollution emanating from a quarry might constitute a private nuisance to neighbouring properties whose enjoyment of their land has been diminished. However, for other members of the public whose right to clean air has been denied, this would be public nuisance. Moreover, because many properties are affected, those with proprietary interest in those properties can also sue in public nuisance if they have suffered more than members of the public as a whole.

> In *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169, the blasting of a quarry affected many people in the neighbourhood of the quarry by the emitting of large amount of dust. It was held that the emissions amounted to public nuisance.

> In *Colour Quest & Others v Total Downstream UK plc* [2009] EWHC 540, an explosion in the defendants' Buncefield oil storage depot caused significant damage to neighbouring properties and businesses. Neighbours, residents and companies in the area brought actions against the defendant private nuisance, public nuisance, and the Rule in Rylands v Fletcher. It was held that actions lay in private nuisance (for those whose properties were affected) and public nuisance (for members of the public who suffered special harm).

13.4.2.4 Nuisance affecting a wide section of the public

This would arise where the defendant's activities affect the "comfort and convenience" of a wide section of the society in places other their own premises. Such nuisances usually involve highways and other public places and spaces. Examples include obstruction of the highway (e.g., due to building or road works), creation of a hazard on the highway or other public spaces (e.g., by digging up and leaving holes on the road), selling food unfit for human consumption, operating a brothel, and pollution of the environment.

13.4.3 RIGHT OF ACTION IN PUBLIC NUISANCE

The requirements for a right of action in public nuisance differs from that in public nuisance. Those who could sue in public nuisance are the Attorney-General, local authorities, and persons who have suffered special damage.

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13.4.3.1 The Attorney-General

Since public nuisance affects the public (and is also a criminal offence) it is the responsibility of the Attorney General to take necessary action against those responsible. The A.G. may commence criminal proceedings on behalf of the state or, upon the application of a member of the public, a civil (relator) action for injunction.

13.4.3.2 Local Authorities

A local authority may sue for injunction to abate or discontinue a public nuisance where such an action is considered "expedient for the promotion or protection of the interest of the inhabitants of their area" (*s. 222 Local Government Act 1972*).

13.4.3.3 Individuals

Persons who have suffered special or particular harm, over and above that suffered by other members of the public affected by the nuisance may sue. Thus, the claimant must show not only that he belonged to the class of the community affected by the nuisance but also that he had suffered damage which exceeds that suffered by the others affected by the nuisance. There is no need to have any interest in any property in order to sue.

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In *Rose v Miles [1815]* 4 M & S 101, a canal was blocked by the defendant, thereby preventing people from using it. Consequently, the claimant was unable to transport his goods through that canal, thereby incurring extra costs. It was held that the claimant could recover damages since he had suffered more than members of the public generally.

In *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, the defendants, while constructing a new ferry terminal in the River Thames, caused siltation in the river and adversely affected navigation. Consequently, the claimant which operated a jetty in the river as part of its manufacturing process was unable to use the river unless it dredged it at the cost of over £500,000. It sued the defendant for the cost of the dredging. It was held that the claim should succeed since the claimant suffered a particular damage as a result of the interference with its navigation rights.

13.5 REMEDIES IN NUISANCE

Injunctions and damages are the main remedies available for nuisance. Although traditionally, injunctions were the primary remedy, in *Coventry v Lawrence* [2014] UKSC 13, the Supreme Court has directed that the courts now have a wide discretion to grant damages instead of injunction if they deem it more appropriate.

13.5.1 INJUNCTIONS

Injunctions are used to abate the nuisance or stop the defendant from continuing it. However, being an equitable remedy, injunctions are granted at the discretion of the court. The court may not grant an injunction if the balance of convenience, the interest of justice, and the conduct of the claimant do not justify it. The gravity of the interference and the public interest are usually taken into account.

In *Watson & Ors v Croft Promo-Sport Ltd* [2009] EWCA Civ 15 (CA), the defendant had a planning permission to hold motor racing events on their premises for 210 days in a year. The claimants who lived nearby complained about excessive noise coming from the racing. It was held that the level of noise generated by the motor racing was unreasonable; an injunction was granted to restrict the racing to 40 days a year.

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13.5.2 DAMAGES

Damages compensate the claimant for losses or inconvenience occasioned by the nuisance. In private nuisance, damages are recoverable for physical injury to property and personal injuries and economic losses consequent thereto, physical damage to Chattels consequential on the damage to the land, and for loss of amenity (enjoyment) of land. Since private nuisance protects a person's land and enjoyment thereof, damages for personal injuries are not, *per se* recoverable. Pure economic losses – those not arising from damage to property – are also not recoverable.

> In *Dennis v Ministry of Defence* [2003] EWHC 793*,* the operations the defendant's Harrier Jets caused excessive noise to the claimants whose home was near the airfield. The court refused to grant an injunction to stop the defendant's operation due to the benefit of its activities to the nation. It instead awarded damages to the claimants.

The range of recoverable damages is wider in public nuisance than in private nuisance since the tort is not tied to any proprietary interest in land or their protection. In public nuisance, a claimant may recover damages for injury to land and chattels, personal injury, economic loss, and inconvenience and delay if substantial and greater than what was suffered by the public generally.

> In *Re Corby Group Litigation* [2009] EWHC 1944, the claimants sued the Corby Council in public nuisance for birth defects (including missing and shortened or missing arms and fingers) in their children. The defects were caused by the inhalation by their pregnant mothers of air contaminated by toxic substances from the defendant's cleaning of a disused steel plant. It was held that damages for personal injury could be recovered in a claim for public nuisance.

13.6 DEFENCES FOR NUISANCE

Defences available in an action for nuisance include prescription, planning permission, act of God, act of strangers, and statutory authority.

13.6.1 PRESCRIPTION

If a person has used his premises in a particular way for 20 years or more without complaint from his neighbour he may acquire a right to continue using it in that way. For this rule to apply, the use must have amounted to actionable nuisance for the whole period against the claimant (*Coventry v Lawrence* [2014] UKSC 14). Prescription does not apply against a person who moved into an area after the defendant had commenced the activity complained of. That the claimant came to the nuisance cannot be used as a defence against him.

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In *Watson & Ors v Croft Promo-Sport Ltd* [2009] EWCA Civ 15 (CA), it was no defence that the defendants had been holding motor racing events for many years before the claimants moved into the area.

13.6.2 STATUTORY AUTHORITY

If the law requires a person, company or institution to do something, the doing of which necessarily causes interference with neighbours' land or enjoyment thereof, they cannot be liable in nuisance for doing it. The only obligation on them would be to perform the activity without negligence (under which tort they might be liable for breach of duty of care).

In *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, the defendant had statutory authority to construct and operate an oil refinery. It was sued by the claimant in nuisance because of noise, smell and vibration arising from its operations. It was held that the defendant was not liable since it had statutory authority to undertake the activity.

If however, somebody only has legal power or permission to do something, he may be liable for nuisance caused by the exercise of that power or permission, even if it was inevitable. The duty is on the defendant, in that situation to exercise the power in such a way as not to cause a nuisance.

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13.6.3 PLANNING PERMISSION

Where planning permission strategically changes the nature or character of a locality, an activity carried out in the locality pursuant to the permission, which produces interference with neighbours' land or the enjoyment of it, may not amount to actionable nuisance if it was consistent with the permission.

> In *Gillingham Borough Council v Medway (Chatham) Dock Co. Ltd* [1993] QB] 343, the defendant had been granted planning permission for the operation of commercial dock. Pursuant to the permission, the defendant began a 24-hour operation on its premises. This meant that many heavy goods vehicles operated round the clock in the area causing significant disturbance to residents in the adjoining residential area. The case for nuisance was dismissed on the ground that the planning permission had changed the nature of a locality for the purposes of nuisance action.

13.6.4 ACTS OF NATURE AND STRANGERS

Inevitable accidents and other secret and unobservable acts of nature that cause nuisance from the defendant's land cannot found an action in nuisance. Examples would include subsidence that causes part of defendant's house to fall and damage the claimant's premises; a tornado that uproots a defendant's tree unto a neighbouring property, etc. To provide a defence, the act of nature would have to be unforeseeable. The defendant will also not be liable in nuisance for the acts of strangers which he could not reasonable foresee and which he had not adopted or continued.

> In *Wringe v Cohen [1940] 1 KB 229*, it was held that "if premises become dangerous, not by the occupier's act or neglect of duty, but as the result of the act of a third party, or of a latent defect, the occupier is not liable without proof of knowledge or means of knowledge and failure to abate it" (248–249).

13.6.5 CLAIMANT'S CONSENT

If the claimant had consented or acquiesced to the creation of the nuisance, he may not be to sue in respected thereof.

13.7 THE DEFENDANTS IN PRIVATE AND PUBLIC NUISANCE

The persons who may be sued in private nuisance are the owners or occupiers of the property from which the nuisance emanated and the person who created the nuisance.

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13.7.1 OWNERS AND OCCUPIERS OF PREMISES

Usually, the owner or occupier of the premises from which the nuisance emanates would be liable for the nuisance. However, the landlord of a rented property would not be liable for nuisance created by his tenant unless he expressly or impliedly authorised it; or has a duty to repair (ss. 11 – 16*, Landlord and Tenant Act 1985*). Authorisation would be implied where the landlord grants the lease of a property when he knows (or ought to know) that it would be used to create a nuisance.

> In *Tetley v Chitty* [1986] 1 All ER 633, a local council gave permission for its land to be used by a go-carting club for go-cart racing. In so doing, the club caused nuisance for the neighbours. It was held that the council was liable for authorising the nuisance.

Owners or occupiers who did not create the nuisance may be sued if they had adopted or continued a nuisance created by another person or by an act of nature; or if they had control over the creator of the nuisance as employer, master or principal.

> In *Sedleigh Denfield v O'Callaghan* [1940] AC 888, the defendant was held liable in private nuisance for adopting and continuing a state of affairs created on his land by a local council, and which subsequently flooded the claimant's property.

13.7.2 CREATORS OF THE NUISANCE

The person who creates a nuisance may be sued for it even if he does not own the property from which it arises but is a licensee, trespasser, or has given up possession of land which he previously occupied.

13.8 STATUTORY NUISANCE

Under Part III of the *Environmental Protection Act 1990*, the following (subject to stated exceptions) will give rise to Statutory nuisance:

- Keeping premises in a state prejudicial to health or in a state of nuisance
- The emission from premises of smoke or gas which are prejudicial to health or a nuisance
- The raising of dust, steam or other effluvia on industrial, trade or business premises such as to create prejudice to health or cause a nuisance
- The emission of noise from premises so as to cause prejudice to health or a nuisance
- The emission of noise from vehicles, machinery or equipment on the street so as to cause prejudice to health or a nuisance

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- The accumulation or deposit of anything which creates prejudice to health or a nuisance
- The keeping of animals in such a place or manner as to be prejudicial to health, or a nuisance
- The emanation of insects from industrial, trade or business premises that cause prejudice to health, or a nuisance
- The emission of artificial light from premises so as to be prejudicial to health or a nuisance

Accordingly, state of affairs constituting private or public nuisance in Tort may also give rise to criminal responsibility in Statutory Nuisance.

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13.8.1 RIGHT OF ACTION FOR STATUTORY NUISANCE

Action may be brought by the relevant local authority or the individuals directly affected by statutory nuisance. Where there has been, or there is likely to be, a statutory nuisance, the relevant local authority is required to issue an abatement notice against those responsible – *Environmental Protection Act 1990, s. 80*. Failure to carry out the abatement and any remedial work is a criminal offence punishable by a fine. The council action may come as result of complaint by affected persons. A person "aggrieved" by the statutory nuisance may also file a complaint at the magistrate court for abatement and remedial work if the local authority fails to take the necessary action – *s. 82*.

13.9 CHAPTER SUMMARY

- Private nuisance prohibits unlawful interferences with persons' land or the use and enjoyment of it by activities or state of affairs in a neighbours' land.
- Only persons with proprietary interest in land could sue in private nuisance while the owners of the offending property or the creators of the nuisance may be sued.
- For any interference to amount to actionable private nuisance, it must be unreasonable and the damage caused by it must be foreseeable.
- What is unreasonable interference is a question of fact. However, some factors would be considered. These include the nature, duration and extent of the interference, the location of the properties, the sensitivity of the claimant, the utility of the defendant's use of land and his motive. Other factors include the relative cost of removing or stopping the offending activity or state of affairs and nature of the planning permission for the area.
- Injunctions and damages (as appropriate) are the main remedies in private nuisance
- Damages could be recovered for damage to the property or interest in or enjoyment of it. Damages may also be recovered for personal injury and damage to chattels as a result of damage to property.
- The main defences in private nuisance action are statutory authority, act of God, act of strangers, consent of the claimant, prescription and planning permission.
- Damage would be foreseeable if a reasonable person could have anticipated it as a likely consequence of the relevant activity or state of affairs. However, a person does not need to be careless in respect of the activity or state of affairs.
- Public nuisance is both a crime and a tort, but both protect the rights, safety, convenience, health, morality and comfort of members of the public.
- To amount to public nuisance the interference must be unreasonable as well as wide spread, in that it affects or is likely to affect a considerable number of people.

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- The tort of public nuisance may occur as obstruction of the highway; dangerous protrusions from premises adjoining the highway; multiple or amalgamated private nuisance; or as any interference affecting the convenience, safety, etc. of a wide section of Her Majesty's subjects.
- Although liability is strict in public nuisance, foreseeability of the type of harm that occurred is foreseeable. The rule is the same in private nuisance.
- Those able to sue in public nuisance are the Attorney General, relevant local authorities and individuals specially affected by the nuisance. Proprietary interest is not required in order to sue in public nuisance.
- Remedies recoverable in public nuisance are wider than those in private nuisance and covers land, chattels, personal injury and financial loss.

13.10 PRACTICE QUESTIONS

1. Define private nuisance and state the requirements for liability under the tor
2. Define public nuisance and state the requirements for liability under the tort; explain the main differences between private and public nuisance
3. Explain the different ways in which public nuisance may occur
4. Why is it necessary that a person must have proprietary interest in land before they could sue in private nuisance? Why is this not required in public nuisance?
5. State and explain the main defences to a claim in nuisance
6. Invent Ltd is a manufacturer of industrial chemicals. The chemicals are usually stored in a warehouse in the company's premises before they are sold to customers. Due to faulty machines which were supplied to the company by Smart Technologies Ltd, large amounts of poisonous gaseous chemicals were released into the atmosphere in the vicinity of the company. Large amounts of liquid chemicals were also released into the company's premises.

   Alex who lives in an adjoining property complains that the poisonous gases have made it impossible for him to use the front and back gardens of his house. The gases have also damaged the quality of air that comes into the house, thereby exposing him to health risks.

   New Farms Ltd, located in another adjoining compound, complains that chemicals from Invent Ltd.'s compound have flowed into its premises and destroyed its plants. The employees of New Farms Ltd also complain that the poisonous gases expose them to health risks daily and have damaged their work experience.

   Advise Alex, New Farms Ltd and its employees on whether they can successfully sue Invent Ltd in Private Nuisance.

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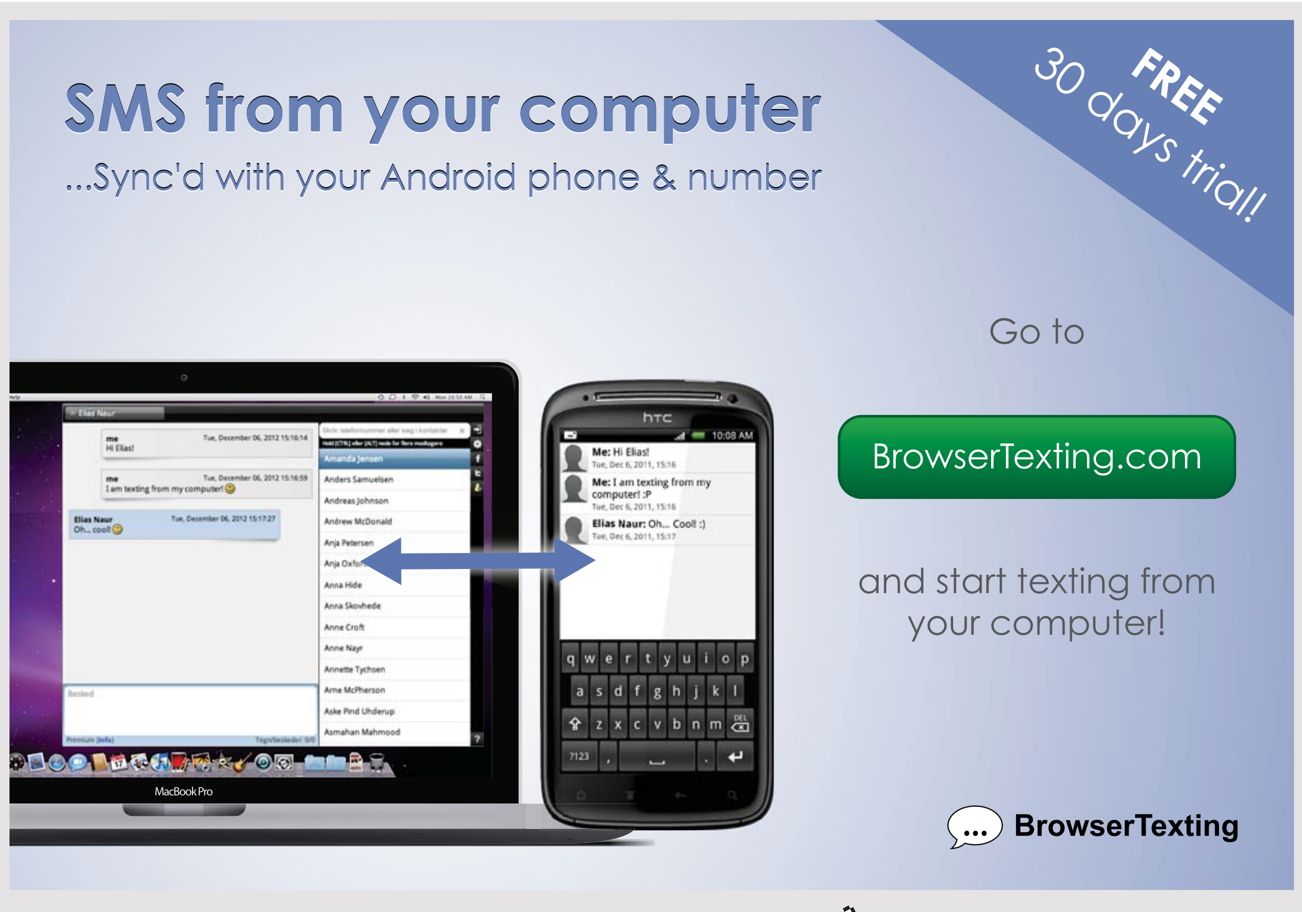
14 LIABILITY FOR HARMFUL ESCAPES

14.1 INTRODUCTION

Liability may be incurred in tort for damages caused by the escape of things from one's land onto another's land. This form of tortious liability is covered by the Rule in *Rylands v Fletcher*, so named because it was first established in that case. This tort is an offshoot of private nuisance and protects interests in land. It is particularly applicable to businesses or individuals that store hazardous or potentially hazardous materials in their premises in the course of producing things; or those engaged in mining, quarrying or similar activities. It is the responsibility of such persons to store and secure the materials safely and to carry on their activities in a manner that would not cause harmful escapes from their premises.



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14.2 LEARNING OBJECTIVES

At the end of this chapter, the reader should clearly:

- Understand how and when persons and businesses may be liable for escape of materials from their land
- Understand the nature of liability under the rule in Rylands v Fletcher
- Understand the origins of and rationale for the rule in Rylands v Fletcher
- Appreciate the limitations to claims under the rule
- Understand the defences applicable to persons or businesses sued under the rule
- Be able to identify from given scenarios, incidence of the rule and answer relevant questions on the topic.

14.3 THE TORT: THE RULE IN RYLANDS V FLETCHER

The Rule in Rylands v Fletcher states that:

> If a person for his own purposes and in the non-natural use of land, brings, collects and keeps on his land anything likely to do mischief if it escapes, he must keep it at his own peril. However, if the thing escapes, he will be responsible for any damage that is the natural consequence of the escape.
>
> In the case of *Rylands v Fletcher* [1866] LR 1 Ex 265, the defendant employed an independent contractor to build a reservoir on his land. In the course of the work, the contractor broke a mineshaft that connected to the claimant's mine in the adjoining premises. The contractors failed to seal the shaft. Consequently, when the reservoir was filled with water, the claimant's mine was flooded through the shaft. It was held that the defendants were liable for the damage.

The rule in Rylands v Fletcher is a tort of strict liability in that the defendant does not have to foresee the likelihood of an escape or be at fault in failing to prevent it. Before liability can arise under this tort, however, the following conditions must be satisfied:

- The defendant must bring and accumulate something on his land
- The thing brought in and accumulated must be likely to do damage if it escapes
- The use of the land must be non-natural
- The thing brought in and accumulated must escape unto the land of the claimant
- Damage must result from the escape
- The damage resulting from the escape must be foreseeable

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14.3.1 BRINGING AND ACCUMULATING THINGS

Generally, the thing that caused the damage must not have been naturally on the land but must have been brought in and kept on the land by the defendant. Things naturally on the land like trees and earth will not give rise to liability if they escape, although they might do in nuisance. In *Transco v Stockport MBC* [2004] 2 AC 1, it was held that piping water to an apartment block was not an accumulation. The defendant had merely arranged a supply adequate to meet the needs of the residents of the block of flats.

14.3.2 NON-NATURAL USE OF LAND

There will be no liability if the defendant was engaged in a natural or ordinary use of his land, such as growing non-poisonous trees, lighting a fireplace in a house, mining minerals naturally, building a house on a land in an ordinary way, etc. A non-natural use is such use that is not ordinary or for the general benefit of the community and would bring about increased danger to others. Examples of this would be a chemical factory, a nuclear facility, waterworks, storage of gas or electricity, storage of inflammable material, etc.

> In *Transco v Stockport Metropolitan Borough Council* [2004] 2 AC 1, the defendant supplied water to a large block of flats by means of pipes. A section of the pipe broke and was not discovered on time. Consequently, water from the leaking pipe caused an embankment to collapse and expose the claimant's gas mains. The claimant rebuilt the embankment and sued the council for damages. It was held that the council was carrying out a routine function which amounted to a natural use of land and was not liable under the Rule in Rylands v Fletcher.

Whether use of land is or is not natural is a question of fact depending on the circumstances of each case, the place and time of the incident and the practice and way of life of the community concerned. What is seen as natural use today might have been considered non-natural in the distant past. Moreover, the manner of storage, the quantity of the material accumulated and the exact locality where it was kept might be taken into account in determining whether the use was natural. What have been held to be non-natural use include:

- The storage of substantial quantities of industrial chemicals (*Cambridge Water Company v Eastern Leather Plc* [1994] 1 All ER 53)
- The storage of machinery in inflammable packaging, petroleum, acetylene and paints (*Mason v Levy Auto Parts* [1967] 2 All ER 62)
- The storage of about 200,000 litres of inflammable substances, including paints, chemicals and solvents for the making of paint (*Harooni v Rustins* [2011] EWHC 1632).

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The court will also consider whether the use of the land was for the overall benefit of the community and not merely for the benefit of the defendant. Thus, a public utility company may avoid liability under this tort if escape of harmful substances is a necessary consequence of its activities.

> In *British Celenese v Hunt* [1969] 2 All 1252, metal foil blown from the defendant's electronics factory into the claimant's electricity sub-station grounded the claimant's machines. It was held that this was not a non-natural or special use since the metal foil "was there for use in the manufacture of goods of a common type which at all material times were needed for the general benefit of the community".

> In *Dunne v North West Gas Board* [1964] 2 QB 806, the escape of flammable gas from the gas mains of the defendant corporation caused an explosion that injured the claimants. The House of Lords held that the defendant was not liable since it could not be said to have collected and distributed gas for its own purposes.

Finally, the performance of an activity authorised, empowered or permitted by statute is not likely to be considered non-natural (*Transco v Stockport MBC* [2004] 2 AC 1).

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14.3.3 LIKELIHOOD OF DAMAGE IF THE THING ESCAPES

The thing brought in and accumulated must be such as likely to do damage if it escapes. In other words, it must be foreseeable that damage could be caused if the thing escapes from the defendant's premises. There is no requirement that the thing should be inherently dangerous.

> In *Cambridge Water Co. v Eastern Counties Leather Plc* [1994] 1 All ER 53, the defendant stored chlorinated solvent at its tannery which was about I mile away from the claimant's borehole. Solvents from the tannery seeped into the ground below the defendant's premises and contaminated the water in the borehole. Consequently, the water became unfit for domestic use. It was held that foreseeability of the relevant type of harm by the defendant was a pre-requisite for the recovery of damages in Rylands v Fletcher (as well as in Nuisance). Therefore, even though the storage of solvents was not a natural use of land, the defendant was not liable.

14.3.4 ESCAPE

There will be no liability unless the thing collected and accumulated, or some manifestation of it, actually escapes from the defendant's land and onto the claimant's premises and causes damage there. Examples include:

- Escape of fumes from a ruptured vat of concentrated sulphuric acid (*West v Bristol Tramways* [1908] 2 KB 14).
- An explosion in a factory causing glass, rock, masonry etc., to fly out onto the highway and adjoining land (*Miles v Forest Rock Granite* [1918] 34 TLR 500).
- Escape of viruses from a research facility (*Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569).
- Escape of fire or inflammable materials from one premises to another (*Mason v Levy Auto Parts* [1967] 2 All ER 62; *LMS International Ltd v Styrene Packaging and Installation Ltd* [*2005*] *EWHC 2065*).

If however, the damage occurs inside the defendant's premises or on land not belonging to the claimant, there would be no cause of action, since no escape would have taken place.

> *Read v. Lyons & Co* [1945] KB 216, the defendant's factory was engaged in the filling of shells with high explosives. The appellant, an employee of the Ministry of Supplies, was injured by an explosion while on the premises to inspect the shells. It was held that there was no liability in the absence of negligence or escape, for bringing, collecting or manufacturing something (dangerous or not) on one's land.

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In *Ponting v Noakes* [1894] QB 281, there was no escape and therefore no liability when the claimant's horse reached over the defendant's fence and ate leaves from a poisonous Yew tree in the compound.

14.4 RIGHT OF ACTION

A proprietary interest is needed in order to bring a case under the rule in Rylands v Fletcher. Accordingly, a landowner, tenant or occupier whose land or other property has been damaged by the escaping material may sue. A person without a propriatary interest cannot sue under the rule (*Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61).

14.5 THE PROPER DEFENDANT

The following persons may be sued under this tort:

- The owner or occupier of land from which the escape occurred
- An owner or occupier who engages the person (independent contractor) responsible for the bringing in and accumulation of the escaping thing
- An owner or occupier who authorises the bringing in and accumulation of the escaping thing
- A licensee responsible for the accumulation of the escaped thing on another's land (*Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 464).

14.6 RECOVERABLE DAMAGES

Damages may now only be recovered under the rule for injury to the land or interest in it. A holder of proprietary interest in land whose non-land property is damaged could also recover damages for it (*Transco v Stockport MBC* [2003] UKHL 61). However, damages cannot be recovered for pure economic losses or personal injuries (*Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569). Persons without proprietary interest in land cannot recover damages for any injuries caused to them or their chattels.

14.7 DEFENCES

The following defences may be available under the rule: statutory authority, act of God, and act of strangers.

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14.7.1 STATUTORY AUTHORITY

The law usually exempts public utility companies from liability for storing things like water, electricity, gas, wastes etc. on their premises. Such bodies will not be liable for escapes under the rule in R v F. However, this defence will only apply where the defendant was under a statutory authority or duty to provide the facility but not where it is only permitted by statute to carry out an activity. In the later situation, the defendant must carry out the permitted activity in such a way as not to cause harmful escapes (*Dunne v North West Gas Board* [1964] 2 QB 806; *Transco v Stockport MBC*).

14.7.2 ACT OF GOD

If the escape was caused by an unexpected and an unforeseeable natural event, the defendant will not be liable. The defence therefore covers escape caused by things like unexpected damage of guttering by rats (*Carstairs v Taylor* (1871) LR 6 Ex 217), exceptional rain and flooding (*Nichols v Marsland* (1876) 2 Ex D 1), hurricanes, tornadoes, earthquakes, etc.

14.7.3 ACT OF A STRANGER

If the escape was caused by the act of an unknown and unforeseeable stranger, the owner or occupier of the property where it came from would not be liable.

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In *Rickards v Lothian [1913] AC 263*, the defendant was not liable for water escape when an unknown stranger maliciously turned on his tap and locked the drain. Similarly, in *Perry v Kendricks Transport Ltd* [1956] 1 WLR 85, two boys threw a lighted match into the petrol tank of an abandoned coach belonging to the defendant as the claimant came towards them. The ensuing explosion and fire caused severe burns to the claimant. It was held that the defendant was not liable since the two boys were strangers.

14.7.4 CLAIMANT'S CONSENT

If the claimant, either expressly or implied, knowingly consents to the activity from which the escape arose or permits the defendant to collect and accumulate the thing that escaped, he cannot sue.

In *Peters v Prince of Whales Theatres* [1943] KB 73, flood water caused damage to the claimant's shop. The flooding was caused by damage to the sprinkler system in the property in which the claimant was tenant due to icy weather. It was held that the defendant landlord was not liable in R v F since the claimant consented to the sprinkler system which was also for his benefit.

14.7.5 CONTRIBUTORY NEGLIGENCE

Where the claimant was partly to blame for the accumulation or escape, it seems he will share the liability proportionate to his contribution. *The Law Reform (Contributory Negligence) Act 1945* applies to a claim based on Rylands v Fletcher.

14.8 CHAPTER SUMMARY

- The rule in Rylands v Fletcher is a tort that protects land from the dangerous escape of things from others' land.
- The tort is more likely to be committed by companies and businesses that handle hazardous or large materials that are likely to cause damage to neighbouring land if they were to escape.
- The tort is one of strict liability in that the escape of the thing need not be foreseeable or out of carelessness. However, to be liable, any damage must be of a foreseeable kind.
- For the tort to be committed, all its elements must be present. The use of land must be non-natural and for one's own purposes; something not naturally on the land, and which is likely to cause harm upon escape, must have been brought in, collected and kept there; there must be an escape of the thing; damage must be caused by the escape; and the kind of damage caused must be foreseeable.

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- The tort protects land and interest in it; accordingly only persons that have proprietary interest in the affected land could sue. Moreover, damages can only be recovered for damage to land or non-land properties belonging to the person with interest in the land.
- The persons liable to be sued are those responsible for the accumulation and/or escape. These could be the owners/occupiers of premises or their servants, strangers or independent contractors.
- The defences available under the tort include statutory authority, act of nature, act of stranger, consent and contributory negligence.

14.9 PRACTICE QUESTIONS

1. Define/Explain the rule in Rylands v Fletcher and state the interests protected by the tort.
2. State and explain the conditions/circumstances for liability under the rule
3. Who would be entitled to bring an action under this tort, against whom, and for what?
4. State and discuss the defences to a person sued under this tort
5. Invent Ltd is a manufacturer of industrial chemicals. The chemicals are usually stored in a warehouse in the company's premises before they are sold to customers. In the course of time, and unknown to the company, large amounts of chemicals had leaked from containers and into the ground. New Farms Ltd, located in premises behind Invent Ltd, complains that chemicals from Invent's compound have flowed into its premises, contaminated its soil and destroyed its plants.

   Advise New Farms Ltd on whether it can successfully sue Invent under the rule in Rylands v Fletcher.

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15 ECONOMIC TORTS

15.1 INTRODUCTION TO ECONOMIC TORTS

Economic torts are designed to protect commercial and business interests from intentional and unlawful or unwarranted interferences. They seek to strike a balance between free market practices and competition and unacceptable business practices. Thus, although businesses and business people are entitled to engage in activities that enhance their profits and profitability even if they undermine those of their rivals, they are not entitled to do so by illegitimate means. If they do, they could be liable in tort. Economic torts also seek to strike a balance between the right of trade unions and workers to embark on industrial action against the right of employers to expect their employees to respect their contracts. While lawfully procured industrial action will incur no liability in tort even if it causes financial loss to an employer, unlawful ones could. There are four economic torts, namely, inducing breach of contract, causing loss by unlawful means, unlawful means conspiracy and lawful means conspiracy.

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15.2 LEARNING OBJECTIVES

At the end of this chapter, the reader should clearly:

- The nature of economic torts and the rationale for their existence
- The various types of economic torts and how they may be committed
- The defences applicable to claims for economic torts
- How business and individuals may avoid committing the torts
- Be able to identify relevant torts from given scenarios and answer questions arising from the topic.

15.3 INDUCING BREACH OF CONTRACT

It is a tort intentionally and unlawfully to cause another person to breach a valid and existing contract with a third party. Inducement means acts of encouragement, threat, persuasion etc. that causes a person to break his contract with another. A mere advice will not amount to inducement. For there to be an inducement, the action of the defendant must be must have caused the breach, in that the third party did not exercise an independent decision to breach the contract and would not have done so without the interference of the defendant. Inducement of breach of contract is also referred to as the *Lumley v Gye* tort, after the case in which it was established.

Liability for inducing breach of contract is secondary or **accessorial** since it is based on the primary wrongdoing of breach of contract by a contractual party. Where an inducement has taken place, the claimant may have two causes of action: against the contract breaker for breach of contract; and against the inducer in tort.

> In *Lumley v Gye* (1853) 2 E & B 216, an opera singer had a contract with the claimant, the manager of an opera house, to perform exclusively for the opera house. The defendant persuaded the singer to break that contract and perform for him instead. It was held that the defendant was liable to pay damages to the claimant for inducing the breach of contract.

15.3.1 CONDITIONS FOR LIABILITY

For this tort to be committed, the relevant elements must be present. These are the existence of a valid contract; knowledge by the defendant of the existence of the contract and that his action would lead to its breach; a breach of contract by the contract party; and intention by the defendant to procure a breach of the contract; and the suffering of financial loss by the claimant.

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15.3.1.1 The existence of a valid contract

A valid contract must exist between the claimant and a third party. If there is no valid contract, or if either party to the contract is entitled to end it, it is not actionable in tort if the defendant induces one of the parties to end that contract.

> *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2007] 1 All ER 542– In December 2000, the claimant, a football agent, entered into a contract with Wayne Rooney, then 15 years old, to represent him for two years. In June 2002, Rooney and his parents informed the claimant in writing that the contract would not be renewed. In December 2002 (3 days after the expiry of the first contract) Rooney entered into a new representation contract with the defendant. The claimant claimed that the defendant had induced the breach of his own contract with Rooney. It was held that there was no liability since the contract with the claimant was with a minor and was therefore voidable at any time.

15.3.1.2 knowledge of contract and the likelihood of breach

The defendant must have known about the existence of the contract which has been breached and that his actions would lead to its breach. Mistake will not suffice. In the absence of knowledge, the defendant would not have intended to breach the contract. The knowledge may be actual or constructive. A person will be deemed to know about the existence of a contract if he refused to make necessary enquiries, if he turned a blind eye to the truth, or if he was recklessly indifferent as to whether a contract existed or not.

> *British Industrial Plastics Ltd v Ferguson* [*1940*] *1 All ER* 479 – The defendant was given the secrets of an invention by an employee of the claimant company in breach of his contract of employment. The employee had made the invention while working for the claimant. Although the defendant knew about the employee's contractual obligation not to divulge his employer's trade secrets, he had believed that the employee, as the inventor, was entitled to the patent of the invention. It was held that the defendant was not liable since he was not aware that the employee's contract was being breached.

15.3.1.3 Intention to cause the breach

The defendant must have done the act of inducement with the intention of bringing about a breaking of the contract. Once the intention is present, it does not matter the reason behind it. There need not be malice or an intention to cause financial loss.

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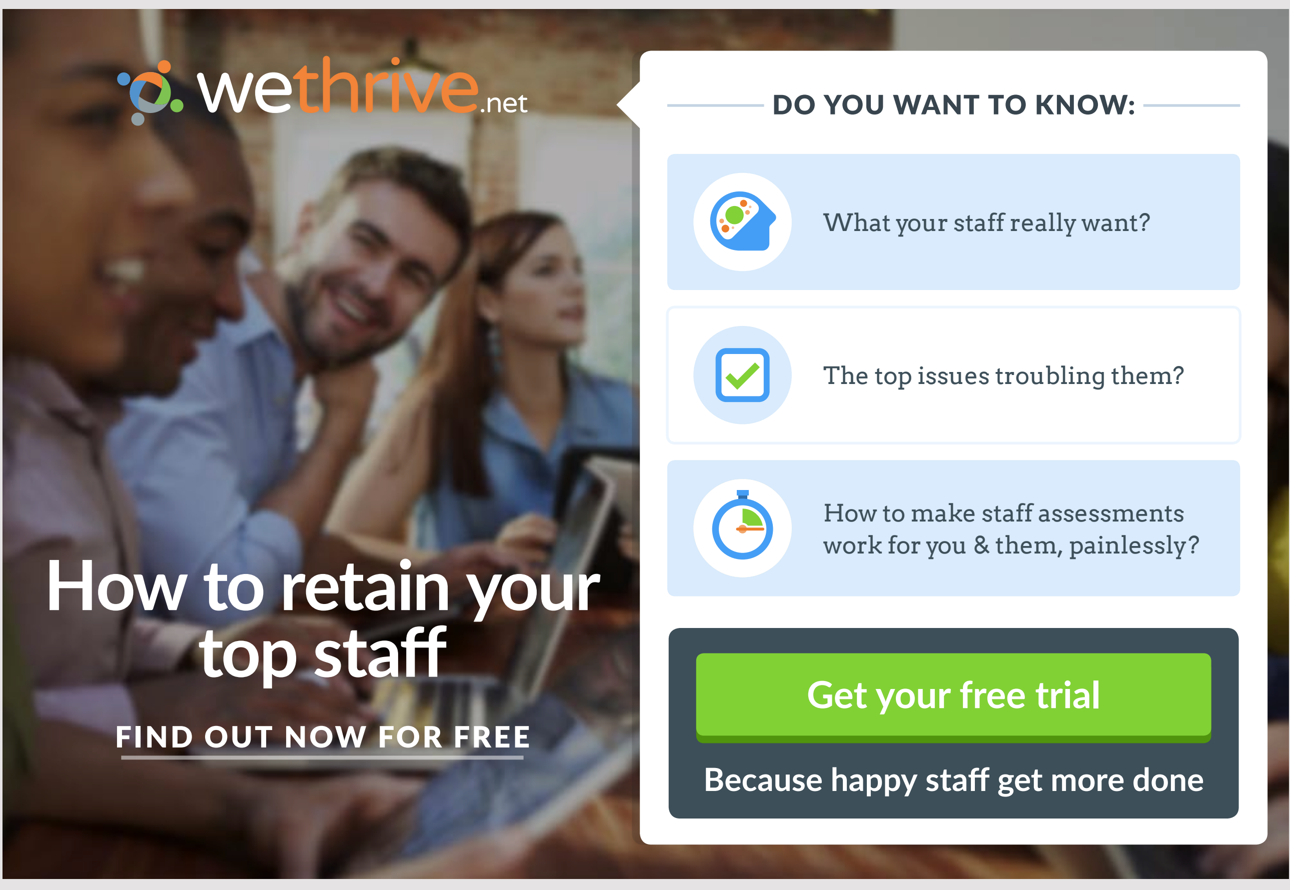
South Wales Miners' Federation v Glamorgan Coal Co Ltd [1905] AC 239 – A miners' union unlawfully called a strike of mineworkers with the intention of restricting production and thereby raising the price of coal. It was held that the miners' union was liable for inducing breach of contract.

Mainstream Properties Ltd v Young & Others [2007] UKHL 21 – Two managers of the claimant company, in breach of their contractual and fiduciary duties, diverted a development opportunity belonging to the company to a joint venture between them and a third party. The deal was financed by one of the defendants/respondents – Mr De Winter. Mr Winter knew about the managers' position in the claimant company but was assured by them that there was no conflict of interest since the claimant company had rejected the development opportunity after it was offered to it. It was held that Mr. De Winter was not liable for inducing breach of contract since there was no intention on his part to do so.

15.3.1.4 Breach of contract

Since liability here is dependent on breach of contract, there must have been a breach of contract by a contracting party. Without this breach of contract, there cannot be an accessory liability for inducing breach of contract.



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Allen v Flood [1898] AC 1 (HL) – Ship owners refused to retain the services of the claimants (shipwrights) following objections to their continued employment by the defendant, a delegate acting on behalf of a rival group of iron workers. The defendant had insisted that his members would not continue to work for the ship owners if the claimants also continued to work for them. It was held that there was no cause of action since the ship owners only hired the claimants from day to day and was entitled to refuse to hire them on any given day. Since there was no breach of contract and since the defendant had done nothing unlawful, there could be no liability for causing economic loss.

15.3.1.5 Economic loss

The claimant must suffer financial loss as a result of the induced breach of contract before he could succeed.

15.3.2 DEFENCES

The main defences for this tort are justification and the act of a trade union.

15.3.2.1 Justification

In some circumstances, the inducement of breach of contract might be justified. This might be because:

- The defendant was protecting a prior and superior right (*Edwin Hill and Partners v. First National Finance Corp. Plc* [1989] 1 WLR 225).
- The nature of the contract, public policy or public morality warrants the interference. If the defendant has a legal, moral or social obligation to interfere with the contract, he would not be found liable.

  In *Brimelow v Casson* [*1924*] *1 Ch 302*, as a result of the low wages paid to chorus girls employed by the claimant, the girls had to engage in prostitution to make ends meet. The defendant who belonged to the Theatrical Workers Protection Group induced theatre owners to break their contracts with the claimant. It was held that the action of the defendant was justified by the appalling conditions under which the girls worked.

- The defendant (such as a regulatory body) had a statutory authority to interfere with the contract

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15.3.2.2 Act of a trade Union

Under *s. 219 Trade Union and Labour Relations (Consolidation) Act 1992*, leaders of a trade union will not be liable for inducing a breach of contract when they get their members to embark on lawful strike action in the course of a trade dispute. However, an unlawful strike action will afford no defence – *s. 226*.

15.4 CAUSING LOSS BY UNLAWFUL MEANS

Causing loss by unlawful means committed by the intentional use of illegal or unlawful means to interfere with the freedom of a third party in order cause financial loss to a claimant or his business. The tort seeks to strike a balance between free market competition and the protection of business interests against unlawful practices and interferences. The rationale for the tort is that individuals or companies have the right and freedom to do business with whomsoever they please and nobody has the right to deny them this freedom as a way of getting at a competitor.

15.4.1 HOW MAY THE TORT BE COMMITTED?

The tort of causing loss by unlawful means may be committed in many ways, for example, through:

- Threat, intimidation or blackmail of the third party
- Detention or harassment of the third party
- Unlawfully causing the third party to breach his contract with the claimant
- Wrongfully procuring workers of a company to embark on a strike action

The following cases illustrate the commission of this tort:

> *Garret v Taylor* (1620) Cro Jac 567 – The defendant was held liable for causing loss to the claimant after driving customers away from the claimant's quarry with threats of mayhem and vexatious suits.

> *Tarleton v McGawley* (1790) 1 Peake NPC 270 – The defendant shipmaster was held liable for trade losses suffered by the claimant when he drove away customers approaching the claimant's ship by firing cannons at them.

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GWK v Dunlop Rubber Co Ltd [1926] 4 TLR 376 – The claimant (GWK), a car manufacturer, had a contract with ARM, a tyre manufacturer, to fit its new cars with ARM tyres and to display its cars with the said tyres at trade exhibitions. During a trade exhibition, employees of the defendant, with the defendant's knowledge, removed ARM tyres from two cars in the exhibition and replaced them with Dunlop tyres. It was held that the defendant was liable in tort for causing loss to the claimant.

Rookes v Barnard [1964] AC 1129 – The defendants, who were trade union officials, threatened the employers of the claimant with an unlawful strike action unless they dismissed the claimant. The employers succumbed to this intimidation and dismissed the claimant, albeit lawfully. It was held that the defendants were liable for causing loss to the claimant through the intimidation of his employers.

15.4.2 ELEMENTS OF THE TORT

The elements of the tort must be present before it could be committed. These are interference with the liberty or autonomy of a third party to deal with the claimant, the use of unlawful means, an intention to cause financial loss to the claimant, and the suffering of financial loss by the claimant

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15.4.2.1 Interference with the liberty of a third party

For liability to arise, the defendant must have interfered with the liberty or freedom of a third party to deal with the claimant as they wished. The mere fact that the defendant's action led to loss of profit by the claimant will not suffice.

> *RCA Corporation v Pollard* [1983] Ch 135 – The claimant had exclusive right with Elvis Presley's estate to market the latter's musical recordings. The defendant sold bootlegged copies of Elvis's concert recordings without the consent of the claimant. It was held that the defendant was not liable under this tort since he had not interfered with the exclusive marketing contract between the claimant and the Elvis Presley estate.

> *Douglas v Hello Ltd* [2007] UKHL 21 – *OK* Magazine had bought exclusive rights to the photographs taken at the wedding of Michael Douglas and Catherine Zeta Jones. Under the contract, the couple were required to ensure that no unauthorised photographs were taken at the wedding. The defendant, had published photographs taken secretly at the wedding by an unauthorised undercover photographer who managed to breach the tight security measures implemented at the wedding. The claimant alleged that by publishing the unauthorised photographs, *Hello* had unlawfully interfered with its contractual relations with OK! It was also alleged that *Hello* had breached the claimant's equitable right to the confidentiality of the wedding photographs. It was held that *Hello* had breached the confidentiality of both the wedding couple and *OK* magazine; but that it had not caused them loss by unlawful means.

> *Future Investments SA v Federation Internationale de Football Association (FIFA)* [2010] EWHC 1019 – The claimant claimed exclusive right to the live coverage and videos of the 1998 FIFA World Cup. The claimants complained that the defendant in contravention of this exclusive right had awarded video marketing rights of the same competition to a third party – IMG. By so doing, the claimant argued, the defendant caused it financial loss since IMG did not feel it necessary anymore to approach it for licence to market the world cup videos. It was held that there was no cause of action. Although IMG might have been discouraged from approaching Future Investments for a licence as a result of FIFA's licence, that fact did not eliminate Future Investments' rights or make them less valuable.

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15.4.2.2 Intention to cause financial loss to the claimant

The defendant must have intended to cause financial damage or loss to the claimant. It does not matter whether the intent of the defendant to cause loss to the claimant is an end in itself or a means to an end. Therefore, it is no defence that the defendant only wished to promote his own business or profits and did not actively set out to injure the claimant's business.

> In *Douglas v Hello Magazine*, the defendant had submitted in evidence that it respected the claimants and had no wish to cause them any loss, but was only trying to protect its own business from the financial consequences of losing out on the publication of the photographs. This argument was rejected by the Supreme Court as immaterial.

15.4.2.3 Use of unlawful Means

The tort can only be committed by means which are illegal or unlawful under an independent rule of law, and which could give the third party a cause of action, if it had suffered any loss. A lawful act, or one which cannot confer a right of action on the third party, cannot give rise to a cause of action.

> In *OBG v Allan* [2007] UKHL 21, the defendants were receivers who were wrongly appointed by holders of a floating charge over the assets of the claimants. As a result of the wrongful appointment, the defendants took over the assets, business and contracts of the claimant which ultimately went into insolvent liquidation. The claimant claimed that the defendant had trespassed on its property, interfered with its contractual obligations, or converted its property. It was held that the defendants were not liable for causing loss by unlawful means:

15.4.2.4 The claimant must suffer financial loss

The claimant must have suffered financial loss in order to succeed. Without such loss, there would be no cause of action since the tort is not one of strict liability.

15.5 UNLAWFUL MEANS CONSPIRACY

Conspiracy may be described as a common plan or arrangement by two or more people to do something wrong. Unlawful Means Conspiracy means a common plan or design by two or more persons to cause loss to another by illegal means.

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15.5.1 ELEMENTS OF THE TORT

For this tort to be committed, there must be:

- A common plan or arrangement between two or more people to injure the claimant financially; and
- An intention by the people to carry out an unlawful act against the claimant

In *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013, the claimant was a music recording company. The 1st defendant/respondent manufactured twin deck tape playing and recording machines which were marketed by the 2nd defendant/respondent. The machines were capable of copying sound recordings from one deck to the other. However, the machines were sold with warnings that some copying might require copyright permission which the defendants did not have the authority to grant. The claimant claimed, among other things, that the defendants/respondents had incited the public or otherwise joined with them to infringe its copyright over its music recordings.

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It was held that there had not been any incitement or conspiracy since the defendants/respondents had no control of the machines once sold; had not authorised the infringement of the claimant's copyright; and did not have a common plan with those who infringed the copyright since the machines could be used both lawfully and unlawfully.

- An intention by the people to injure the claimant financially, although this intention need not be exclusive or predominant; and

- The suffering of actual financial loss by the claimant

15.5.2 HOW THE TORT MAY BE COMMITTED

Unlawfully Means Conspiracy may be committed:

- Whenever the tort of causing loss by unlawful means is committed through a plan or arrangement by more than one person; and
- Where economic loss is caused to a claimant by unlawful means of any type, whether independently actionable by the claimant or not, by two or more people acting under a common plan or design.

Total Network SL v Revenue & Customs Commissioners [2008] UKHL 19 – Total Network SL (which was registered in Spain) had cheated the Revenue and Customs Commissioners of VAT through a complex system of "carousel" tax fraud that involved transactions in different EU member states. The revenue commissioners had no right to sue Total Network for the fraud; instead action was brought by the commissioners for unlawful Means Conspiracy against on the ground that it had cheated the HMRC of revenue and had submitted fraudulent misrepresentations for VAT refund. It was held that the Commissioners could not recover the VAT under the common law and that the unlawful means adopted under this tort need not be independently actionable by the claimant.

15.6 LAWFUL MEANS CONSPIRACY

This tort is committed when two or more persons combine under a common plan or arrangement with intent to injure the claimant financially, and actually injure the claimant financially. Here, the defendants would have done nothing independently unlawful or illegal. The tort arises from the conspiracy itself; the act constituting the conspiracy would not be actionable if done by one person.

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The tort was explained by the House of Lords in *Lornho v Fayed* [1992] 1 AC 448 as follows:

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious (Lord Bridge).

The rationale for this tort appears to be the maintenance of free market competition, the discouragement of cartels, and the prevention of ganging-up of businesses in order to damage others.

15.7 CHAPTER SUMMARY

- Economic torts protect financial and business interests from unlawful interferences from others. They also help to regulate free market competition and the respective rights of employers, employees and labour unions.
- There are four economic torts – inducing breach of contract, causing loss by unlawful means, unlawful means conspiracy and lawful means conspiracy.
- All the economic torts must be committed intentionally and must lead to actual financial loss by the claimant.
- Inducing breach of contract is the intentional and unlawful act of a person to procure another to breach their contract with, and thereby causing loss to, the claimant. Defences to inducing breach of contract are justification and lawful act of a trade union.
- Causing loss by unlawful means is the intentional use by a person of illegal or unlawful means on a third party in order to cause loss to the claimant. It implies the unlawful infringement of the legal right of the third party and their freedom to deal freely with the claimant.
- Unlawful means conspiracy is the common design or arrangement by two or more persons to cause financial loss to another person by illegal means.
- Lawful means conspiracy is the common design or arrangement by two or more persons to cause financial loss to another person by means which are not in themselves unlawful.

15.8 PRACTICE QUESTIONS

1. Explain the tort of inducement of breach of contract, how it may be committed and the available defences.
2. Explain the tort of causing loss by unlawful means and the conditions for liability under it.

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3. Explain the tort of lawful means conspiracy, how it may be committed, and the conditions for liability.
4. *Glamour* had been promised the exclusive rights to the publication of the wedding photographs of Damian Moore, the most popular footballer in the country and his top model wife, Sira. The magazine was to pay £1m for the photographs. However, the right to the photographs was eventually sold to *Five Star*, a rival magazine.

   After the wedding, the photographs first appeared in *Glamour* who had illegally got the pictures by secretly smuggling their own photographer into the wedding venue. *Five Star* was not able to publish its own photographs until one week later because the cameras containing the images had been stolen shortly after the wedding in an armed robbery incident arranged by *Glamour* with the help of Joey, a local gangster.

   It has now been revealed that *Five Star* got the exclusive contract because it had threatened to publish photographs of a secret affair between Damian and Bianca, his wife's younger sister.

   Advise both parties on their potential claims and liabilities in the economic torts.

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PART 4: EMPLOYMENT LAW

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16 EMPLOYMENT LAW: TYPES OF EMPLOYMENT

16.1 INTRODUCTION

A person engaged to work for another person or business usually works under a contract. This contract determines the terms of the service and the relative powers of the worker and the person for whom he works. The general rules of contract law apply to contracts of employment with some peculiarities. There are, broadly speaking, three types of employment – those involving employees, independent contractors and workers.

16.2 LEARNING OBJECTIVES

By the end of this chapter, the reader should clearly understand:

- The types of contracts of employment
- The formalities of contracts of employment
- The tests for determining type of contract
- The importance of the distinction in types of employment
- The liability of employers for wrongs of employees
- The duties of employers and employees
- The category of persons classified as workers and the employment rights available to them.

16.3 TYPES OF EMPLOYMENT

Broadly speaking, and is indicated above, employments are of three categories – employees, independent contractors and workers.

16.3.1 EMPLOYEES

An employee is a person employed under a contract *of* service. It is called a contract of service because the work involves a continuous obligation to 'serve' the employer. Such a contract is now usually referred to as a "contract of employment." A person under a contract of service or employment is usually under the direction and control of his employer. He is paid a regular salary, is entitled to a pension, and has taxes and National Insurance deducted from his salary by the employer on the basis of Pay as You Earn (PAYE). An example of an employee would be a teacher or civil servant employed on a continuous basis by a school or government department.

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16.3.2 INDEPENDENT CONTRACTORS

Independent contractors are people engaged to perform specific assignments either for a short period or for such periods as may be fixed under the terms of their contract. Independent contractors are usually not part of the organisation that engages their services and are not controlled by them. They are self-employed and their commitment is usually to do the job contracted as they see fit provided they fulfil the contract. Independent contractors are engaged under a 'contract *for* service', so called because the contract pertains to a specific assignment, rather than a continuous one. An independent contractor may be an individual or an incorporated company. A computer specialist engaged by a company to repair some faulty computers under a one-off contractual arrangement would be an independent contractor. Likewise, a company engaged to install equipment or to provide a specific service for a fee would be an independent contractor.

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16.4 DETERMINATION OF TYPE OF CONTRACT

Whether somebody is an employee or independent contractor is a question of fact dependent on the circumstances of each case. Although this fact could be discovered from the terms of the contract, the contract is not conclusive in this regard. Moreover, at times it is not always easy to decide whether a particular worker is an employee or an independent contractor from the contract. The contract may not be specific enough as to the terms, or the terms might not capture the exact nature of the contract. Therefore, some tests have been devised to help in determining the point. These are the control test, the integration or organization test, and the economic reality or multiple test. On their own, a single test may not be sufficient to settle the question; the totality of all the facts and a combination of the tests may be used by the court.

16.4.1 THE CONTROL TEST

This test considers the degree of control exercised by the employer over the worker in the performance of the work – the greater the control, the greater the likelihood that the contract is one of service. If the employer controls *what* work is to be done, and *where*, *how*, *when,* by *whom,* and *the tools and finances* with which, it is to be done, and pays the worker a regular and continuous salary, the contract is likely to be one of service. The lesser the control is, the more likely it is that the contract is one for service. If the worker could bring a substitute to work on his behalf; if he provides his own tools and equipment; if he decides the manner and time of performing the work; and if he is free to work for other employers, these will indicate that the person is an independent contractor. In reaching a decision on type of contract, the most important consideration is not the description used by the parties but the actual facts of each case. The cases below illustrate the point.

> *Ferguson v Dawson & Partners Ltd* (1976) 3 All ER 817 – A building labourer was described as a self-employed contractor and his wages paid without deductions of income tax or National Insurance contributions. However, the employer decided which site he worked on, directed him as to the work to be done, and provided the tools with which he worked. The employer could also dismiss him if necessary. On being injured in an accident at work, he sued the employer for breach of duty. It was held that the labourer was an employee under a contract of service.

However, if the terms of the contract make detailed provisions on the nature of the duties of the worker, the court would consider these provisions in determining the employment relationship, unless the reality of the employment contradicts the expressed terms.

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16.4.2 THE INTEGRATION OR ORGANIZATION TEST

The control test may not always be accurate because the nature of the work and the service provided may make traditional control unfeasible. In cases where the employer cannot control the worker as to the details and performance of the employment, the integration test may be used to determine the type of employment involved. The test here would be whether the worker or the work forms an integral part of the employer's organization. If the answer is yes, the contract may be one of service even though sufficient control does not exist.

> *Cassidy v Minister of Health* (1951) 2 KB 343, it was held that a medical doctor was an employee of the hospital for which he worked even though the hospital did not control the manner in which his work was done:
>
> > The reason why the employers are liable in such cases is not because they can control the way in which the work is done – they often have not sufficient knowledge to do so – but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct, the power of dismissal (Denning LJ at 361).

16.4.3 THE ECONOMIC REALITY OR MULTIPLE TEST

This test looks at all the facts of the contractual relationship, in particular, the location of financial risks and the destination of the profits. A negative answer to one or more of the following considerations would indicate employment as an employee:

- Whether the person employed was doing the business on his own account
- whether the person employed uses his own capital or resources in the business
- Whether the person employed bears a significant financial risk and whether a significant part of the profits goes to him
- Whether the person employed has the freedom to bring in a substitute to do the job
- Whether there was no obligation on the employer to provide work or on the person employed to accept it
- Whether the person employed does not work under set hours
- Whether the person employed is not entitled to sick and holiday pay and other benefits
- Whether other people doing similar tasks are not treated as employees; and
- Whether the person is not an integral part of the organisation that employs him

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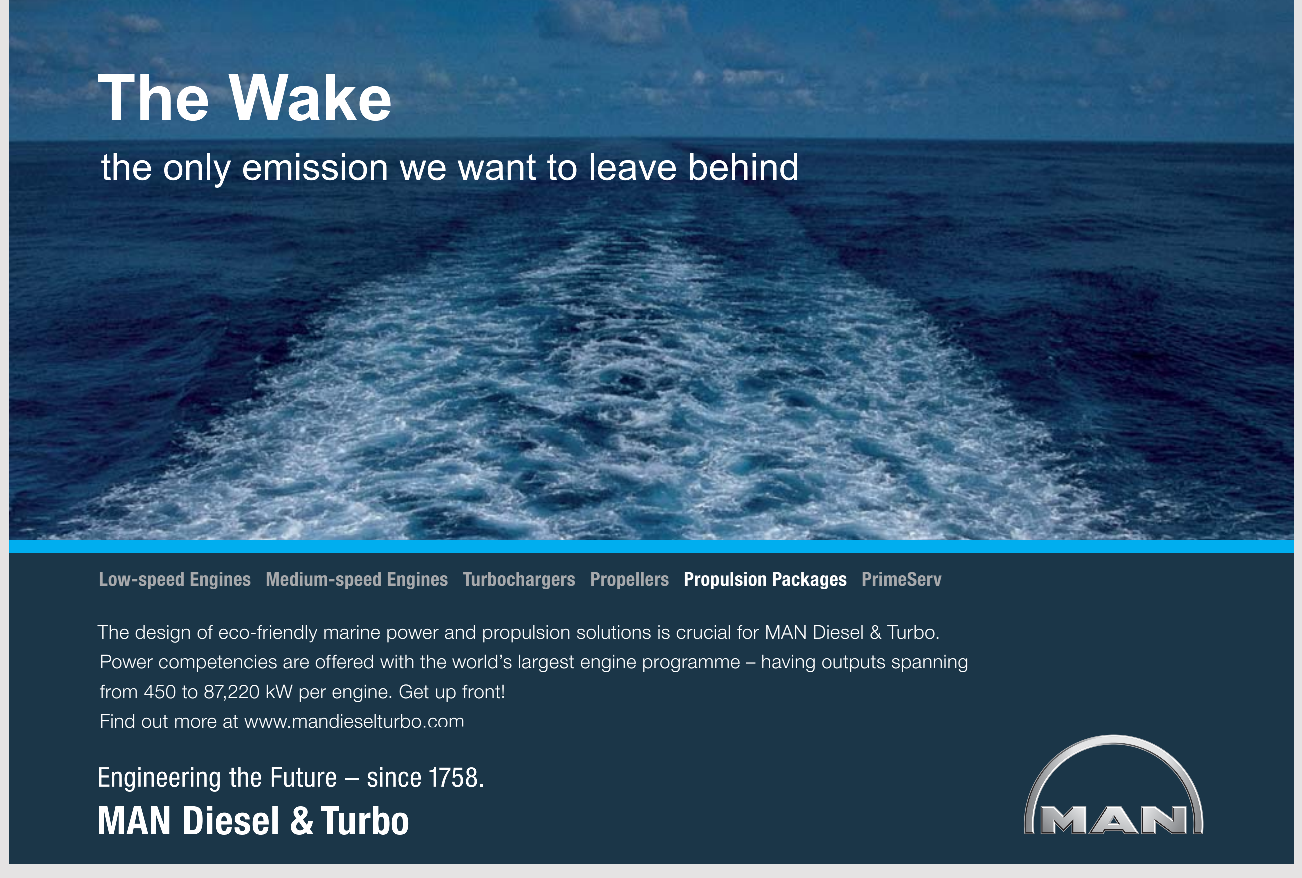
Ready Mixed Concrete Ltd. v. Minister of Pension (1968) 2 QB 497 – The driver of a lorry had a contract with a company under which he provided his own lorry, which he painted in the company's colours, used only for its business, and repaired and maintained at his own expense. He could bring an alternative driver and was paid on the basis of mileage covered and the quantity of goods delivered. He also paid his own tax and National Insurance. However, he obeyed the instructions of the foreman and wore the company's colours. It was held that the driver was an independent contractor since the facts taken as a whole do not point to a contract of service.

In *Melhuish v. Redbridge Citizens Advice Bureau (2005) IRLR 419*, *EAT* the appellant was an unpaid voluntary worker at the CAB. He received free training and reimbursement of expenses incurred in coming to and going from work. There was no mutuality, no contract of employment and no contract at all except to reimburse any expenses incurred. He claimed unfair dismissal. It was held that there could be no contract of employment without the payment of regular wages or salary.



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16.4.4 CHARACTERISTICS OF EMPLOYEES AND INDEPENDENT CONTRACTORS

From foregoing discussions, the characteristics of an employer-employee relationship may be summarized as follows:

- The employee works personally for the employer
- The employer provides tools and equipment for the work
- The employee does not invest his own resources and bears no financial risk
- The employer controls or has the right to control the employee's duties
- The employee is part of the employer's organisation
- The employer normally sets the employee's working hours
- The employee has a right to expect work and the employer the obligation to provide work and the right to expect service
- The employer reports at employer's premises regularly or as required
- The employee is entitled to pensions and other work-related schemes and benefits
- The employee is entitled to regular salary or wages
- The employee is entitled to holiday, maternity and sick pay
- The employee is entitled to reimbursement of any work-related expenses
- The employee is afforded protection from unfair dismissal

In an employer-independent contractor relationship, the person employed:

- Usually works for different employers
- Usually provides own tools and equipment
- Invests own money/capital and bears financial risk of failure or losses
- Is not under the control of the employer
- Is not part of the employer's organisation
- Works at own time and pace
- May employ or bring in substitutes or assistants
- Has no right to expect work or regular salary but only receives a specific sum for work done
- Does not have to report at employer's premises at set times
- Is not entitled to pensions, holiday, sick, or maternity pay or other work-related schemes or benefits
- Is not entitled to a re-imbursement of expenses incurred in the execution of the employment
- Is not entitled to employment protection

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16.5 DIFFERENCES IN THE TREATMENT OF EMPLOYEES AND INDEPENDENT CONTRACTORS

Whether a contract is one of service or one for service has some legal implications. The employer under a contract of service owes a duty of care to his employees. There are also some statutory duties. Some of the implications of the distinction are as follows:

16.5.1 EMPLOYMENT PROTECTION

Employees are protected from wrongful dismissal while independent contractors are not. If employees are wrongfully dismissed, or threatened with wrongful dismissal, they can challenge their dismissal or threat thereof in court. If they are dismissed unfairly, they are entitled to remedies, including re-instatement and re-engagement. An independent contractor can only sue for breach of contract.

16.5.2 EMPLOYER'S DUTIES

There are implied and statutory duties in a contract of employment. These include duty to pay agreed or reasonable remuneration; duty to indemnify the employee for expenses incurred in the course of employment; duty to ensure health and safety at work. Many of these duties do not exist in contract with independent contractors; and where they exist, their of these duties, to the extent that they exist, is less for independent contractors.

16.5.3 EMPLOYEES BENEFITS

Employees are entitled to benefits like statutory sick pay, maternity leave/pay, and paternity leave/pay. Independent contractors are not so entitled.

16.5.4 PREFERENTIAL CREDITORS

Employees' remunerations and pension funds are classed as preferential debts when a company is wound up. This means that they are among the first creditors to be paid, unlike independent contractors whose debts are classed as those of ordinary unsecured creditors – *ss. 175 and 386 Insolvency Act 1986*.

16.5.5 INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS

Different tax and National Insurance calculations apply to employees and independent contractors. Moreover, these are worked out and paid for employees by their employers, while independent contractors do so themselves.

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16.5.6 VICARIOUS LIABILITY

An employer may be responsible for the wrongdoings done by an employee but will not normally be for those of independent contractors.

16.6 VICARIOUS LIABILITY

Employers may be liable for the wrongdoing or negligence of their employees but not usually for those of an independent contractor. In law, vicarious liability is the legal responsibility imposed on an employer, who might not be at fault, for a wrongdoing committed by his employee in the course of his employment. An employer found vicariously liable would have to pay for any damages or personal injury caused by the employee. However, the employer is entitled to seek contribution from the employee under *S.1 Civil Liability (Contribution) Act 1978*.

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Vicarious liability is essentially a device for loss distribution. The rational is that the person who benefits from another's service, the performance of which he controls and directs, should also be responsible for any wrongdoings arising therefrom. In addition, an employer is better able to insure against such injuries and absorb any damages awarded. Vicarious liability also helps to promote good practices on the part of employers. In *Cassidy v Minister of Health* (1951) 2 KB 343, the defendant was held liable in damages for the negligence of its employee doctor. Similarly, in *Gold v Essex County Council* [1942] 2 KB 293, a hospital was held liable for the negligence of one of its radiologists.

Where an employee had been hired or borrowed by another and that employee commits a wrongdoing, vicarious liability would be borne by the person exercising control over him. If control is shared by the permanent employer and hirer, liability might be shared.

16.6.1 COURSE OF EMPLOYMENT

An employer is not liable for everything his employee does. Liability only arises where the employee committed the wrongdoing in the course of his employment. An employee is within the course of his employment if he is at work; if his act was authorised by the employer; if he does his employer's work in an unauthorised or disobedient manner; or if the wrongful act was closely connected with the employment. The following cases illustrate.

> *Limpus v London General Omnibus* [1862] 1 H&C 526 – The defendant forbade its bus drivers from racing with or obstructing other buses. In disobedience to this instruction, their driver obstructed another bus, causing injury to the claimant. It was held that the defendant company was vicariously liable since the driver was doing its work at the time of the accident, albeit in an unauthorised way.
>
> *Harvey v O'Dell* [1958] 2 QB 78 – An employee, while working for his employer, drove some distance from his place of work in order to obtain a midday meal. It was held that he was still within the course of his employment.
>
> *Kay v ITW Ltd* [1968] 1 QB 140 – A storekeeper moved a lorry belonging to a third party out of the way in order to return a fork-lift where it was supposed to be. In the process, he injured the claimant. It was held that the accident happened in the course of employment since the storekeeper's job included driving and moving obstacles out of the way.
>
> *Rose v Plenty [1976] 1 All ER 97* – A milkman, contrary to the employer's orders, allowed children to enter his float and assist him in milk delivery. One of the children was injured in the process. The employer was held liable for the injuries.

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Ilkew v Samuels CA [1993] 1 WLR 991 – An employee allowed a stranger to drive his company's lorry. The stranger caused an accident with the lorry. The employer was held liable for the negligence of its driver in allowing an incompetent person to drive the lorry.

Lister & Others v Hesley Hall Ltd [2001] UKHL 22 – A warden employed in a residential school for vulnerable children sexually assaulted some boys in the school. The employers were held vicariously liable since the sexual assault was closely connected to the nature of the warden's duties.

No liability arises where the employee had gone outside the scope of his employment, i.e. when he was not doing the business of the employer. In other words, when he had gone on a 'frolic of his own'. The following cases illustrate when an employee has gone outside the scope of his employment:

Beard v London General Omnibus [1900] 2 KB 530 – A bus conductor, on his own initiative, negligently turned around a bus and injured the claimant. It was held that the company was not liable. The bus conductor was not acting in the course of his employment since driving the bus was not part of his job.

See also *Iqbal v London Transport Executives [1973] EWCA Civ 3* where the facts are similar and a similar decision was reached.

Twine v Bean's Express Ltd [1946] 62 TLR 155 – The claimant's driver gave a lift to somebody in the company's van contrary to the company's instruction. The passenger was killed in an accident. It was held that the employer was not liable since the driver had gone outside the scope of his employment.

Hilton v Thomas Burton (Rhodes) Ltd [1961] 1 WLR 705 – Employees who had driven their employer's van to a café 7 miles away were held to be on a frolic when they caused an accident.

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16.6.2 ACTS OF INDEPENDENT CONTRACTORS

Generally, an employer is not responsible for the wrongdoings of independent contractors. However, in exceptional circumstances an employer might be responsible for a wrong committed by an independent contractor. This would be the case where:

- The employer is under a non-delegable duty to do something (e.g., to provide suitable plant and equipment, to provide a proper and safe system of work, and observe statutory regulations)
- A strict liability is imposed on the employer, or
- The employer was negligent in employing an unqualified or incompetent contractor

In *Ellis v Sheffield Gas Consumers Co* (1853) 2 E&B 767, the claimant fell over a mound of earth left on the road by a contractor. The defendant had illegally commissioned the contractor to work on the road. The defendant was held liable in nuisance.

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16.7 FORM AND PARTICULARS OF EMPLOYMENT CONTRACT

Like most other contracts, a contract of employment may be made orally or in writing. It is usual however, for employment contracts to be expressed in some written form or in a standard form. More complex contracts of employment are usually expressed in writing. However, whether the contract is in writing or oral, employers are required to give their employees written statement of prescribed particulars of their employment within 2 months of their employment – *s. 1 Employment Rights Act (ERA) 1996*. The only exceptions are merchant seamen or employees engaged to work wholly or mainly abroad, or where a written employment contract has covered all the particulars. The written prescribed particulars of employment should contain the following matters:

- The names of the employer and employee
- The date of commencement of employment
- The title of the employee's job
- Rate, scale, or interval of pay
- Hours of work
- Holiday and holiday pay entitlements
- Sick leave and sick pay entitlements
- Pension provisions and the company's pension scheme
- Length of notice of termination expected from either party
- Whether any service with a previous employer forms part of the employee's continuous period of employment
- Disciplinary and grievance procedures [unless the employer has less than 20 employees]

Employers are also required to give their employees written particulars of any changes to the above term within one month of their occurring. If an employer fails to provide the written particulars of employment, the employee may apply to the Employment Tribunal for a declaration of what the terms of employment should be – *s. 11 ERA 1996*.

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16.8 DUTIES OF THE EMPLOYER

An employer's duties to employee are statutory and implied. They include:

- Duty to pay the agreed remuneration – In the absence of an agreed remuneration, to pay the employee a reasonable sum.
- Duty to indemnify the employee for reasonable expenses incurred in the course of employment.
- Duty of care, including, the maintenance of a safe place and system of work and to provide and maintain adequate plants and machinery (*Health and Safety at Work Act 1974; Health and Safety at Work Regulations 1999*).
- Duty to provide work where: (a) payment is dependent on work done; (b) working is of essence in the employment; (c) working is essential for the maintenance of the employee's skills; or (d) the employee is an apprentice.
- Duty to provide truthful and accurate reference. Where a reference is provided for a departing employee, there is a duty to make it truthful and accurate.
- Duty of trust and confidence. Confidential information relating to employees should be kept confidential.
- Duty of equal pay. Employers must pay males and females the same remuneration if they do a similar work (*Equal Pay Act 1970; Equality Act 2010*).
- Duty to pay no less than the minimum wage (*National Minimum Wage Act 1998,* as amended).
- Duty to provide pay slip (*s. 8 Employment Rights Act 1996*).
- Duty to pay for time spent off on official Trade Union activities (sections *68–69 Trade Union and Labour Relations (Consolidation) Act 1992*); and for job search upon being given notice of dismissal or redundancy.
- Duty to allow employees to perform public duties (such as jury service).
- Duty to give maternity leave and pay to working mothers, as well as reasonable time off for ante-natal care, and right of return upon completion of maternity leave.
- Duty to insure against risks arising in the work place and course of employment
- Duty to avoid discrimination. It is against the law to discriminate against, victimise or harass employees directly or indirectly on the ground of race, sex, religion, age, disability, sexual orientation gender re-assignment, marriage/civil partnership; or pregnancy/maternity. Any affected employee could go the Employment Tribunal for redress. However, a reasonable and proportionate action taken by an employer to achieve a legitimate objective will not amount to discrimination. Moreover, acts of "positive discrimination" to favour employees from a disadvantaged group will not amount to discrimination. The law against discrimination is contained on the *Race Relations Act 2010*.

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16.9 DUTIES OF THE EMPLOYEE

Employees' duties are implied and based on common law. These include:

- *Duty to provide personal service*. An employer has no right, without the employer's permission, to delegate the performance of his job to a third party.
- *Provision of faithful service*. This means he should work in the interest of the employer and may not engage in direct competition with it either directly or through third parties. It also means that the employee should not disclose the employer's legitimate trade secrets, even after the period of employment.
- *Duty to perform with reasonable care and skill*. The standard of care used is objective, but what is reasonable may vary with the level of skill and competence the employee professes to have.
- *Duty to obey.* Disobedience to lawful and reasonable instructions of the employer could amount to misconduct for which an employee could be dismissed
- *Duty to account for employer's money or property* received in the course of employment.

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16.10 WORKERS

A "Worker" is a person whose employment status lies somewhere between an employee and an independent contractor. Persons are classified as 'worker' if:

- They have a contract or other arrangement to provide work or personal service for a financial reward; and
- They have a limited right to bring in substitutes; and
- They are obliged to go to work and the employer is obliged to provide work; and
- The do not provide the work or service as a limited company for an employer who is a client or customer – https://www.gov.uk/employment-status/worker.

Workers are not self-employed but are employed under contracts of service. They have many of the characteristics and rights of employees. However, unlike employees, they do not have employment protection. They are not entitled to statutory notice of termination and cannot sue for wrongful or unfair dismissal. They are also not entitled to redundancy pay or flexible working, or to time off for emergencies. Examples of workers are people employed by employment agencies or as partners in a Limited Liability Partnerships ((LLP) – *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32). Persons employed under "zero hour" contracts, or those employed as "casual workers" may also qualify as workers.

Agency or temporary workers are normally the workers of the employment agency that recruits them. However, if an agency worker has worked for a long time for one Client Company; is under the control of that company; and is treated in the same way as regular employees of the company; he may be considered an employee.

> *Motorola Ltd v Davidson and Melville Craig Group (2001)* IRLR 4, EAT – Davidson was recruited by Melville group (an employment agency) and sent to work for Motorola after passing strict selection criteria set by Motorola, which also had reached service agreement with him. Davidson worked under the instructions of Motorola and was treated as its other employees. He worked with the company's tools, wore its uniforms, and took holidays with its permission. For two years, he worked only for Motorola who subsequently disciplined and dismissed him without the knowledge of the agency. Following action for unfair dismissal, it was held that Davidson was an employee of Motorola, which had exercised control over him. Control, the court said, may be legal or practical.

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In *Dacas v Brook Street Bureau* [2004] EWCA Civ 217, the Court of Appeal held that an agency worker could become an employee of the client company if she had worked exclusively for it for a long time and the company had control of her and supplied her working equipment and uniform. Conversely, in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, an agency worker on long placement in a client company was held not to be an employee because he remained under the agency's control.

16.11 CHAPTER SUMMARY

- Employment law governs the relationship between employers and those who provide work and service for them.
- Employment contracts may be by conduct, oral or in writing. However, employers are required to provide employees written particulars of their employment and of any changes made to them.
- Service to an employer may be provided by employees, workers or independent contractors.
- Employees are those employed under a contract of continuous service as "servants" of the employer, while independent contractors are work on their own account and are employed under a contract for service.
- Although in most cases, it would be clear whether someone is an employee or independent contractor, sometimes, this may not be so. Where there are doubts, the type of employment may be determined by the control, integration (organisation) and economic reality (multiple) tests.
- Some workers may not fit into the category of employees or independent contractors. These may be classified as "workers". They work under conditions similar to those of employees, but do not enjoy all their rights, including employment protection and termination with notice.
- Employees have many rights and privileges which are not available to independent contractors, and to a lesser extent, workers.
- Both employers and employees have duties to each other
- Employers may be held vicariously liable for the wrongdoings of an employee but not normally for those of an independent contractor.

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16.12 PRACTICE QUESTIONS

1. Explain the key differences between an employee, an independent contractor, and a worker. Cite an example of each.
2. Briefly explain the tests for determining whether a person is an employee or an independent contractor; cite two decided cases in support of each test.
3. Cite and explain four duties of employees to their employers and the main duties of employers to their employees.
4. With the aid of decided cases, explain the concept of vicariously liability and the rationale for it.
5. State and explain the conditions necessary for vicarious liability.
6. Mike, a lorry driver, was employed by Express Haulage Ltd. Under the terms of his contract, Mike provided his own lorry; could bring an alternative driver if he could not make it; was paid on the basis of mileage covered and the quantity of goods delivered. The company repaired and maintained the lorry but Mike paid his own tax and made his own National Insurance contributions. Mike drove the lorry only on the business of Express Haulage Ltd; obeyed the instructions of the company's supervisor and wore the company uniforms. He also painted the lorry in the company colours.

   One day while delivering goods for the company, Mike had an accident and damaged the lorry and Sarah's, car. He and Sarah were seriously injured. Due to the accident, Mike could not work for four weeks but the company has refused to pay him any wages for that period. It insists that Mike was not its employee and was also personally liable for the accident. Sarah is considering suing Express Haulage Ltd. for her injuries and the damage to her car while Mike is con 0idering suing it for his unpaid wages.

   Advise Express Haulages Ltd on whether it would be liable to Sarah and Mike.

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17 EMPLOYMENT CONTRACT: TERMINATION AND REMEDIES

17.1 INTRODUCTION

Where an employment contract has been performed by both parties, there would be no complaint or problem. Problems arise where there has been no performance by one of the parties. Apart from performance, an employment contract may typically be terminated by notice and dismissal. In addition, like other contracts, an employment contract may also be terminated by agreement and frustration. Where an employment contract has been wrongly terminated, the innocent party may have a range of remedies. These methods of termination and remedies will be considered in this chapter.

17.2 LEARNING OBJECTIVES

At the end of this chapter, the reader should know, understand and be able to explain:

- The different ways in which an employment contract may be brought to an end
- The rightful and wrongful ways of terminating an employment contract
- The consequences of the illegal termination of an employment contract
- The remedies for the innocent party of the wrongful termination of an employment contract

17.3 TERMINATION BY NOTICE

Employers and employees usually agree on the notice period for the termination of employment contracts. However, where no agreement exists, *s. 86 Employment Rights Act 1996* provide for the requisite minimum period of notice to be given by the employer, as follows:

- Continuous employment for between 1month and 2 years, at least 1 week notice
- Employment for more than 2 years but less than 12 years, one week notice for each year of continuous employment
- Continuous employment for *over 12 years*, at least 12 weeks' notice

Where a contract is terminated by notice – statutory or by agreement – no reason need be given in the notice of termination as long as the notice period was adequate, unless the contract states otherwise.

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If the contract specifies that it may be terminated only on specific grounds, they cannot lawfully be terminated by notice unless any of those grounds are present.

> In *McClelland v Northern Ireland General Health Services Board* (1957) 2 All ER 129, one of the conditions of the claimant's employment contract was that she could be dismissed for gross misconduct and inefficiency. However, she was dismissed with a 6 months' notice under a policy that required female employees to resign if they became pregnant. The House of Lords held that the dismissal was wrongful. Since there was a specific ground for dismissal, the claimant could not be dismissed by reasonable notice.

17.4 TERMINATION BY SUMMARY DISMISSAL

Summary dismissal is dismissal without due notice. This may happen where an employee has committed a breach of the employment contract or has committed an act of gross misconduct. If the employer dismisses the employee for a justifiable reason, the employee cannot sue for breach of contract. "The question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service" – Lord Evershed MR in *Laws v London Chronicle* [1959] All ER 285. If there was no justifiable reason for the dismissal, this would be a wrongful dismissal and the employee could sue for breach of contract. Summary dismissal may be justified on the ground of breach of contract and gross misconduct.

17.4.1 BREACH OF EMPLOYMENT CONTRACT

If an employee commits a breach of the employment contract or a fundamental term thereof, this would be a ground for dismissal.

> In *Pepper v Webb* [1969] 2 All ER 216, a gardener was asked by his employer to plant some flowers, to which he replied, "I couldn't care less about your bloody greenhouse or your sodden garden." He was summarily dismissed and the dismissal was held to be lawful; the man had breached his employment contract by refusing to obey a lawful instruction and being insolent.

17.4.2 GROSS MISCONDUCT

Gross misconduct, whether in the workplace or outside, could justify dismissal. Examples of such misconduct would be taking bribe, disobedience, leaking confidential information, assaulting a fellow employee, gross negligence, incompetence, or acting in a manner inconsistent with his duty or in breach of trust and confidence. Usually, to amount to gross misconduct, the relevant conduct must be serious. An isolated incident would justify dismissal if it is very serious.

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In *Denco Ltd v. Joinson* [1991] IRLR 63, an employee used unauthorised password to gain unauthorised access to the company's computer and confidential information. His dismissal for gross misconduct was held to be correct.

In *Sinclair v. Neighbour* [1967] 2 QB 279, the manager of a betting shop took £15 from the shop's till knowing that he would not permitted to take the money if he had asked. However, he left a note in the till stating that he had taken the money. Although he returned the money the following day, he was summarily dismissed. It was held that the dismissal was justified even though strictly speaking the manager was not dishonest; he had behaved in manner inconsistent and incompatible with his duty.

Where a summary dismissal is made without a justifiable reason, it becomes wrongful dismissal. The employee in such situations is entitled to sue for damages for breach of contract.

In *Laws v London Chronicle* [1959] 1 WLR 698; [1959] All ER 285, a new assistant to an advertising manager was summarily dismissed for disobeying the order of the managing director not to leave an editorial meeting with her immediate boss. The dismissal was held to be unjustified and wrongful since the action of the assistant was neither wilful not serious, and did not amount to a breach of her contract. According to the court, "one act of disobedience or conduct can justify dismissal only if it is of a nature which goes to show that the servant has repudiated the contract or one of its essential conditions" (Lord Evershed MR).

17.5 UNFAIR DISMISSAL

Most employees are protected by the *Employment Rights Act 1996, s 94(1)* from unfair dismissal. A dismissal would be unfair when there is no admissible or reasonable cause for the dismissal of an employee, even if the employer had given adequate notice. Conversely, dismissal would be fair when there is an admissible or reasonable cause for it. Some employees are however, not protected from unfair dismissal. They include those who ordinarily worked outside Great Britain; those who embark on unofficial strike; and those who work in the military or police forces.

However, before an employee could enjoy the protection against unfair dismissal, he must be under his employment's or the statutory retirement age; and must have been in continuous employment with the employer for at least one year (full time or part-time), or pregnant. Dismissals may be automatically or unfair; or potentially fair or unfair.

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17.5.1 AUTOMATICALLY FAIR DISMISSAL

Dismissal would be automatically fair if it was due to:

- Participation in unofficial strike action, or
- An employee has been adjudged by the government to be a threat to national security

17.5.2 AUTOMATICALLY UNFAIR DISMISSAL

Dismissal on any of the following grounds would be automatically unfair:

- Leave due to pregnancy, maternity, paternity, adoption or other related grounds
- Membership of trade union or embarking on lawful strike action
- Dismissal on transfer of undertaking to another company, where the employee has worked for two or more years in the company
- Averting danger to health and safety at work
- Whistle-blowing
- Opting out of Sunday work or exercising rights under the *Working Time Regulations 1998*. Under these Regulations, an employee should not be required to work for more than 48 hours in a week unless he/she agrees in writing to do so. The choice whether to work for 48 hours or more should be voluntary.
- Taking time off for jury service

17.5.3 POTENTIALLY FAIR OR UNFAIR DISMISSAL

Dismissal would be potentially fair when done for any of the following reasons. The ground on which dismissal is made must however be proven by the employer, otherwise the dismissal would become unfair.

Incompetence or lack of skill – If an employee lacks the qualification or ability to do the job, he may fairly be dismissed. Persistent absenteeism and long-term sickness may amount to inability to do the job.

Loss of right to work – If the employee loses the legal right to work, for example due to withdrawal of operating licence, loss of right to work, or being struck off by a professional body, he may be fairly dismissed.

Misconduct – If the employee is guilty of gross misconduct or persistent misconducts, he may also be fairly dismissed.

Redundancy – If the employee has become truly redundant, his dismissal would be fair.

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Illegality – If continued employment would contravene the law, the employee may fairly be dismissed.

Other substantial reasons – If there are other substantial reasons justifying dismissal, the dismissal would be fair. Examples would include refusal to accept reasonable and fair changes in the work plan, inability to work well with other employees, or breach of employer's trust or confidence.

17.6 CONSTRUCTIVE DISMISSAL

Under *s. 95(1)(c) ERA 1996*, if an employee terminates his employment contract with or without notice, due to the employer's conduct, this may amount to constructive dismissal. The type of employer's conduct that would give rise to constructive dismissal would be a breach of a vital term in the contract. Examples would include where:

- the employer unilaterally and completely changes the nature of the job
- the employer unilaterally reduces the pay of the employer
- the employer fails to provide a suitable working environment or facilities
- the employer fails to follow agreed disciplinary procedure

Constructively dismissal is equivalent to wrongful dismissal, entitling the employee to sue for breach of contract, provided he has not waived the breach.

17.7 REDUNDANCY

Redundancy occurs where an employee, who has worked for two or more years for an employer, has been dismissed, laid off or placed on short-time work by the employer due to lack or insufficiency of work, or the closure of the employer's business or part thereof – *s. 139 (1) Employment Rights Act 1996*. However, employees employed by the Crown, by a relative as a domestic servant, or as fishermen are exempt. For redundancy to occur, the employer must have no need any more of the employee's service either because:

- the business itself is closing; or
- the employee's workplace is closing; or
- there is less need for employees to do particular kinds of work in the business.

However, movement of an employee from one job to another of a similar status and pay, or from one location to another, will not normally amount to redundancy where the employment includes a "mobility" clause.

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The re-organisation of an employer's business or methods of operation such that less staff are needed may not be classified as redundancy. In *North Riding Garages v Butterwick* [1967] 2 KB 56, the inability of a workshop manager to perform new administrative duties following a re-organisation was held not to amount to redundancy. Similarly, in *Vaux & Associated Breweries v Ward* [1968] 3 ITR 385, the employment of a younger barmaid in place of the older one following a refurbishment of a public house does not amount to redundancy for the older woman. Conversely, in *Safeway Stores plc v Burrell* [1997] IRLR 200, a petrol station manager was dismissed following the re-organisation of the employer's business and the scrapping of several management positions, including his own. In a claim for unfair dismissal, it was held that the claimant had been made redundant.

17.7.1 REDUNDANCY PAY

An employee made redundant is entitled to a redundancy pay by the employer provided he has worked continuously for it for at least two years – *s. 135 ERA 1996*. However, the right to redundancy pay may be lost if:

- the claim for redundancy pay is made after 6 months
- the employee, having been notified of the possibility of being made redundant, voluntarily leaves the employer's service before being made redundant
- the redundancy was due to the employee's misconduct
- the employee had refused unreasonably to accept alternative work

17.7.2 REDUNDANCY AS UNFAIR DISMISSAL

Redundancy may amount to unfair dismissal if the employee could prove:

- that the employer's needs of his services had not diminished;
- that two or more other employees could have been made redundant, but were not;
- that he was made redundant without compliance with agreed procedure or customary arrangement; or
- that he was made redundant because he belonged to a trade union

17.8 TERMINATION BY AGREEMENT

The employer and the employee may reach a mutual agreement to terminate an employment contract. The court may however, look into the circumstances to ensure that it is a genuine agreement. However, "tribunals should not find an agreement to terminate employment unless it is proved that the employee really did agree with full knowledge of the implications it had for him" – *Donaldson J in McAlwane v. Boughton Estates Ltd* [1973] 2 All ER 299.

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17.9 TERMINATION BY FRUSTRATION

Frustration, as we saw in chapter 7.5, is an event beyond the control of the parties, and without fault on their part, which makes performance the contract impossible or radically different from what the parties agreed. Frustration brings the contract to an end and releases the parties from their obligations. The rules on discharge of contract by frustration discussed earlier also apply here as appropriate. Frustrating events include incapacity of the employee due to things like illness, imprisonment and army call-up. The question would be whether the employee's incapacity to work was such that further performance of his future obligations under the contract would be either impossible or radically different from what the contract envisaged. Frustration may also include the liquidation of the employer company.

17.10 REMEDIES FOR BREACH OF EMPLOYMENT CONTRACT

Where a breach of contract of employment occurs, the other party – employer or employee – is entitled to sue for damages. An employee whose employment contract has been wrongfully or unfairly terminated may apply to the Employment Tribunal for any of the following remedies. An employer may also apply to the tribunal for the appropriate remedy where the employee breaches the contract.

17.10.1 DAMAGES

Damages may be awarded to a wrongfully dismissed employee and to an employer whose employee breaches the employment contract. For a claim by an employee, damages would be calculated on the basis of the wages and other entitlements he would have earned had the contract not been terminated. The employee could therefore recover lost wages and contractual fringe benefits. Damages would not be awarded for mental distress or loss of reputation. For a claim by the employer, damages would be calculated on the basis of the cost of the loss of the employee. However, as in other contracts, a party affected by breach of an employment contract must try to mitigate his losses. A dismissed employee should therefore look for another job, while an employer should try to replace the employee as soon as possible.

If an employee has been unfairly dismissed, the employment tribunal may also make an order for compensation. This may be for a basic award and a compensatory award. The basic award is a specified minimum (calculated on the basis of age: 41 years and above one and half week's pay for each year of service for up to 20 years; 22–40 years, one week's pay for each year; under 22 years, half a week's pay per year). The compensatory award seeks to place the employee where he would have been (in monetary terms) had he not been dismissed. The tribunal may also make a punitive award against an employer if it fails to comply with the tribunal's order for re-instatement or re-engagement.

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17.10.2 INJUNCTION

Injunctions would not normally be used to maintain a contract of employment against the will of an employee or to stop him from leaving the employment. However, prohibitive injunctions could be granted to a company in order to prevent the breach of a restrictive covenant in an employment contract. Such a covenant could be for example, an agreement that an employee would not work for a rival company or that he would not steal the customers of his employers if he left the employment. This is illustrated in the cases following.

> *Lumley v Wagner* [1852] 42 ER 687 – The defendant, a singer, had agreed in a contract with the claimants that she would not sing for another theatre during the 3 months of the contract. An injunction was granted preventing the defendant from singing elsewhere during the period of the contract.

> *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 – An injunction was granted preventing an employee from engaging in a business similar to that of his employers during the period of employment.

> *Thomas Marshal (Express) Ltd v Guinle* [1979] Ch 227 – The defendant, who was the MD of the claimant company, repudiated his employment contract and set up a company to compete with the claimants. This was in breach of a term of the employment contract. The court granted an injunction stopping the defendant from that competition.

Courts would however not allow a prohibitive injunction to be used as an indirect mechanism for securing specific performance of a contract in circumstances where such a remedy would ordinarily not be available.

17.10.3 RE-INSTATEMENT AND RE-ENGAGEMENT

Under the common law, this remedy was not easily available to an employer since employment contracts are personal in nature and because damages would usually be an adequate remedy. However, an employee could sometimes obtain the order. In *Hill v Parsons & Co Ltd* [1972] Ch 305, a declaration was granted that a contract of employment was subsisting even though the employer had purported to repudiate it. *The Employment Rights Act 1996* now provides for the re-instatement or re-engagement of a wrongfully dismissed employee.

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An employee who has been unfairly dismissed may apply to the employment tribunal for a re-instatement order (*s. 114 ERA 1996*). Re-instatement is the restoration of the employee to his position as if there had been no break in the employment. Upon re-instatement, the employee must be put in the position where he would have been had there not been the dismissal. Therefore, all outstanding pay and entitlement, including any promotion, must be restored.

Re-engagement is an order that the employee be re-employed in a new and comparable position by the employer, its successor, or associated company on the terms stipulated by the order (*s. 115 ERA 1996*).

17.11 CHAPTER SUMMARY

- Contracts of employment may be terminated in different ways including notice, dismissal, redundancy, agreement, performance, frustration and breach.
- Where a contract has been terminated by the appropriate notice stipulated in the contract, the termination will be lawful and not actionable unless it amounts to unfair dismissal.
- Where a contract is terminated without proper notice, it would be wrongful dismissal. This kind of termination may only be justified where an employee has committed a breach of contract or gross misconduct.
- Unfair dismissal is dismissal without any admissible reason even if made with proper notice. This is because the *Employment Rights Act 1996* gives employees employment protection, meaning they cannot be dismissed without just cause.
- Sometimes, a summary dismissal could be automatically or potentially fair. *The Employment Rights Act 1996* does not protect employees from fair dismissal.
- An employee could lawfully be made redundant provided the redundancy was justified and followed proper procedure
- An employment contract may be terminated by agreement provided it could be proved that the employee genuinely agreed to terminate the contract
- A contract may be terminated by frustration due to the incapacity of the employer or employee, or due to circumstances that renders the contract incapable of performance or radically different from what was envisaged.
- The remedies an employee could get for breach of employment contract, including unfair dismissal, include damages, compensation, re-instatement and re-engagement.
- The remedies and employer could get for breach of an employment contract include damages and injunction.

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17.12 PRACTICE QUESTIONS

1. Distinguish between wrongful dismissal and unfair dismissal. State and explain two circumstances in which dismissal would be respectively fair and unfair.
2. Explain the concept of redundancy and when purported redundancy would amount to unfair dismissal.
3. Explain the remedies available to an employee for wrongful dismissal.
4. Daniel was employed by Miller Ltd as a van driver. It was a strict company policy that its drivers must never drink and drive. One day Daniel, having consumed more than the legal limit of alcohol, drove the company's van recklessly and smashed it into a shop, seriously injuring himself and the shop attendant. As a result of the accident, Daniel could not work for 6 months. Miller Ltd has refused to pay Daniel any salary for this period and has dismissed him without any entitlements. Daniel wishes to sue the company for his unpaid salaries and dismissal.

   Advise Daniel.

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ENDNOTES

1. See the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 1998. These Acts allowed these home nations to establish their own parliamentary assemblies for the purpose of making law on matters exclusive to them.
2. Similar provisions are made in the *Sale of Goods Act 1979*.
3. Under the *Sale of Goods Act 1979*, s 21(1), where a thief sell's stolen goods to an innocent party, the innocent party would acquire no title to the goods since the seller had no title to transfer – *nemo dat quod non habet*. This principle was applied in *Helby v Matthews* [1895] *AC 471*. This provision is subject to some exceptions including sale by a person with voidable title (such as a person who obtained goods by fraud) and cars bought on a hire purchase agreement. However, *S. 23 SGA 1979* provides that where a seller sells under a voidable title, he can transfer valid title to a purchaser, provided his title had not been avoided at the time of sale and the buyer bought in good faith and without notice of the seller's deficiency in title.

   Under s. 27 *Hire Purchase Act 1964*, the purchases of such a car who sells it to a third party before he had finished paying the instalments could transfer valid title to a third party who had no knowledge of the hire purchase or conditional sale agreement.

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