AQA A2

Law

Online resources for students
Extension exercises

Contents

Introduction

These online resources are intended to provide you with extension questions relevant to the topics covered in the *AQA A2 Law* textbook published by Philip Allan Updates (978-0-340-98566-3).

The questions encourage you to develop your understanding of the subject and to think critically. You should read the source information carefully and then work your way through the series of questions that follows.

Some of the source information is taken from articles originally published in the magazine *A-level Law Review*.

Answers to these questions are provided in the Teacher Guide that accompanies the textbook (978-0-340-98567-0).

For additional questions and answers, together with examiner comments and specific content guidance on each unit, see our *Student Unit Guides* for A2 law. For more information and to order copies online, visit www.philipallan.co.uk, or contact Bookpoint on 01235 827720.

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AQA A2 Law Unit 4: Tort Law and Property Offences	978-0-340-96801-7
AQA A2 Law Unit 4: Concepts of Law	978-0-340-95804-9

Unit 3A: Criminal law

Murder less foul?

A-level Lawreview

Ian Yule, *A-level Law Review*, Vol. 3, No. 1

The law governing homicide in England and Wales is a rickety structure set upon shaky foundations. Some of its rules have remained unaltered since the seventeenth century, even though it has long been acknowledged that they are in dire need of reform. Other rules are of uncertain content, often because they have been constantly changed to the point that they can no longer be stated with any certainty or clarity. Moreover, certain piecemeal reforms effected by Parliament, although valuable at the time, are now beginning to show their age or have been overtaken by other legal changes, and, yet, have been left unreformed.

The above quotation, taken from the Law Commission's report on murder, manslaughter and infanticide, serves to confirm and underline how seriously flawed our present homicide law is. This article summarises the major problems referred to by the Law Commission, together with the remedies recommended.

A single offence of murder?

In relation to murder, the Law Commission is concerned to:

- 'provide coherent and clear offences which protect individuals and society', and
- 'enable those convicted to be appropriately punished'

The first issue to be addressed is that of the *mens rea* of murder, currently recognised as the 'intention to kill or commit serious harm'. This 'implied malice' rule has been severely criticised by many commentators. In *R* v *Vickers* (1957), Lord Edmund-Davies argued that this rule is tantamount to making murder in such circumstances an offence of constructive liability. The Commission notes that:

> Parliament, when it passed the Homicide Act 1957, never intended a killing to amount to murder — at that time a capital offence — unless D realised that his conduct might cause death.

The present widening of the *mens rea* to include intention to cause serious harm (but without the need for D to be aware that death was likely) came about effectively by judicial error in *R* v *Vickers*. That it should take almost 50 years for such a serious mistake to be identified is almost impossible to understand.

The Law Commission recommends that the offence of murder should be subdivided into two separate offences:

- **First-degree murder** would encompass intentional killing, and killing through an intention to do serious injury with an awareness of a serious risk of causing death. It would continue to carry the mandatory life sentence.
- **Second-degree murder** would include killing through an intention to do serious injury, or killing where there was an awareness of causing death coupled with an intention to cause either some injury, a fear of injury or a risk of injury.

This recommendation at a stroke deals with probably the single most serious criticism of the present murder law. Second-degree murder would also include the present offence of voluntary manslaughter, where what would otherwise be a murder conviction is reduced to that of manslaughter because of the partial defences under the **Homicide Act 1957**: provocation, diminished responsibility and suicide pact.

The Law Commission has decided to restrict the operation of partial defences to first-degree murder only, which, if successfully pleaded, would result in a conviction for second-degree murder, and not manslaughter as at present. The principal reason for this is that 'the primary importance of partial defences should be seen as lying in the impact they have on sentence rather than on verdict' — the 'sentence mitigation' principle.

Questions

1 **What serious error was made in *R* v *Vickers* (1957)?**
2 **What is the proposed definition for first-degree murder?**
3 **In *Hyam* v *DPP* (1975), the defendant, in order to frighten Mrs Booth, her rival for the affections of X, put petrol through the letterbox of Booth's house and caused the death of two of her children. She knew at the time that X was not in the house. Discuss whether she would be guilty of first- or second-degree murder under the Law Commission's recommendations.**
4 **How does the proposal on second-degree murder address 'probably the single most serious criticism of the present murder law'?**
5 **Why did the Law Commission decide that defendants who successfully pleaded provocation, diminished responsibility or suicide pact should in future be convicted of second-degree murder rather than (at present) manslaughter?**

Unit 3A: Criminal law

Making sense of manslaughter

A-level Lawreview

Ian Yule, *A-level Law Review*, Vol. 3, No. 2

Involuntary manslaughter is succinctly defined in the Law Commission Report 237 (1996), which states:

> Involuntary manslaughter is the name given to those unintentional killings that are criminal at common law: causing death in the course of doing an unlawful act, and causing death by gross negligence or recklessness. Involuntary manslaughter is not recognised as a separate crime in its own right; it is simply a label used to describe certain ways of committing the very broad common law crime of manslaughter.

The 'breadth' of the crime of manslaughter was well described by Lord Lane CJ, who said this offence 'ranges in its gravity from the borders of murder right down to those of accidental death'.

The Law Commission's report on homicide (2006) makes some well-argued recommendations which, if accepted by the government and passed into law by legislation, should go a long way to answering some of the many criticisms rightly made against our present law.

It is recommended in the 2006 report that the offence of involuntary manslaughter should reflect the following circumstances:

- killing another person through gross negligence

or

- killing another person:
  - through the commission of a criminal act intended by the defendant to cause injury, or
  - through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury

Gross negligence manslaughter

Although the recommended changes still leave the gross negligence form of involuntary manslaughter dependent on the civil law rules of tort, there are some improvements that will both clarify these rules and tighten them up. The new report repeats the recommendations made in the 1996 report, that the risk arising from the defendant's conduct is one of causing death, not of causing serious injury. This would deal with one of the most serious problems identified with gross negligence manslaughter, and one that Lord Mackay failed to define in *R* v *Adomako* (1995). It should also be a requirement that such a risk of death 'would be obvious to a reasonable person in his or her position', and further that 'the defendant was capable of appreciating

that level of risk'. Finally, for a successful prosecution, it must be proved that the defendant's conduct 'falls far below what can reasonably be expected of him or her in the circumstances'.

The Law Commission considers that in many cases of gross negligence manslaughter, the defendant (D, hereafter) 'would be hard-pressed to deny that he/she was in broad terms perfectly well aware of the risk of his/her conduct killing someone'. An example is given in *R* v *Lidar* (1999), where D drove off knowing that the victim was hanging from the car window with his body half in the vehicle.

A final improvement is the recommendation that reckless manslaughter:

> …can be subsumed within gross negligence manslaughter, on the ground that the term 'reckless' has an unhappy history in the context of homicide…we now believe that the law of homicide is better off without it.

What problems remain with gross negligence manslaughter?

Even the Law Commission recognises that the law on gross negligence manslaughter will continue to be based on objective, not subjective, fault. Its report states:

> Gross negligence manslaughter can be committed even when D was unaware that his/her conduct might cause death, or even injury. This is because negligence, however gross, does not necessarily involve any actual realisation that one is posing a risk of harm: it is a question of how glaringly obvious the risk would have been to a reasonable person.

Given the removal of objective recklessness in *R* v *G* (2003), the continued inclusion in such a serious crime of this objective element must be a major criticism. This problem is exacerbated, of course, by the requirement in criminal act manslaughter (see below) of proving *subjective* awareness.

Gross negligence manslaughter is often concerned with omissions — the failure to act where the law has imposed a duty to act. In 1980, the Criminal Law Revision Committee recommended that the law on omissions should not be codified:

> …most of us are of the opinion that the extent of the duty to act should be left undefined so that the courts can apply the common law to omissions. The main reason for this is that the boundaries of the common law are not clearly marked and there would be difficulty in setting them out in statutory form.

Professor Glanville Williams, in his usual forthright style, dismissed this view by arguing:

> If the top lawyers in a government committee find the law hard to state clearly, what hope have the Stones and Dobinsons of this world of ascertaining their legal position, in advance of prosecution, when they find themselves landed with a hunger-striking relative.

This offence continues to be 'circular', in that the jury must be directed to convict D if it thinks his or her conduct was 'criminal', in effect leaving this question of law to the jury. As juries do not give reasons for their verdicts, it is impossible to tell what criteria will be applied in an individual case.

Criminal act manslaughter

One major improvement is the acceptance that the criminal act form of manslaughter should require an awareness of a serious risk of causing some injury — the present law of unlawful, dangerous act manslaughter has no such requirement. However, the Law Commission rejected the view put forward by the pressure group 'Justice' that this offence should require an awareness of a risk of *serious* injury, because it was felt this 'would introduce excessive complexity into the law'. Such a requirement would 'encourage forensic disputes' about whether an assault (say, a punch) causing death was actually intended to cause injury or was only a criminal act D thought might cause some (but not serious) injury. If the former, D would be guilty of manslaughter, but if the latter, D would only be guilty of an assault. The Law Commission stated: 'We do not believe that liability for manslaughter should turn on such fine distinctions.' At least this recommendation considerably reduces the amount of constructive liability in this form of manslaughter.

The requirement of D's awareness of there being a serious risk of causing some injury reinforces the subjective element. The absence of the wide objective test of 'dangerousness' from *Church* (2000) is much to be welcomed.

While there should be no difficulty in distinguishing gross negligence manslaughter from second-degree murder, this may prove to be a significant issue with criminal act manslaughter. Second-degree murder includes the requirement that D intends to cause injury or a risk of injury, in the awareness that his or her conduct involves a serious risk of causing death. Would D in *Hyam* (1975) be guilty of second-degree murder or criminal act manslaughter? The same question equally applies to *Hancock and Shankland* (1986).

To repeat the point made above in my coverage of gross negligence manslaughter, there remains a serious problem of imbalance between the two forms of involuntary manslaughter. While the scope of criminal act manslaughter has been reduced, there have only been limited changes recommended to gross negligence manslaughter, which will continue to be based on an objective fault element. For such a serious crime as manslaughter, this must persist as the most severe single criticism that can be made. When one compares the respective fault levels of both forms, there can be no doubt that criminal act manslaughter is by far the more serious offence. Even in its earlier 1996 report, the Law Commission recognised that fact when it recommended that gross negligence manslaughter should carry a determinate sentence of imprisonment rather than a discretionary life sentence.

Conclusion

It appears that as far as reforms to the law of murder are concerned, the Law Commission has made some welcome, even bold, recommendations, which will greatly improve the present homicide law. The distinction between first- and second-degree murder and new rules on provocation address most of the serious problems identified in case law over the years. However, when one considers the recommended changes to involuntary manslaughter, one is left feeling that much still remains to be done. Of course, every recommendation is only just that — a recommendation. Without government action to bring forward a major homicide bill, nothing will happen, and it is already clear that such a bill will require considerable parliamentary time.

Questions

1 How did Lord Lane CJ describe the breadth of the offence of involuntary manslaughter?

2 What recommendations did the Law Commission make in its 2006 report about the ways in which involuntary manslaughter could be committed?

3 What specific recommendation was made regarding the risk arising from the defendant's conduct?

4 Why did the Law Commission recommend that reckless manslaughter should not become a separate head of manslaughter?

5 Why did the Law Commission decide to leave liability for gross negligence manslaughter based on objective criteria? What is the main criticism of this decision?

6 What recommendation about omissions was made by the Criminal Law Revision Committee in 1980? How did Professor Glanville Williams respond to this?

7 What argument was employed by the Law Commission to reject the view put forward by 'Justice' that criminal act manslaughter should require an awareness of risk of *serious* injury?

8 Study the facts of *Hyam* v *DPP* (1975) and of *R* v *Hancock and Shankland* (1986), and briefly discuss whether under the Law Commission proposals the defendants would be guilty of criminal act manslaughter or second-degree murder.

Unit 3A: Criminal law

General defences in criminal law

A-level Lawreview

Ian Yule, *A-level Law Review*, Vol. 1, No. 3

This article attempts to deal with a problem that recurs frequently in A2 criminal law answers. Many candidates, while able to achieve 'sound' answers on offences, tend to provide much weaker answers on defences.

The following sections cover the main defences that arise, with key points summarised to aid learning, understanding and revision in this important area of criminal law.

Consent

Like the defence of intoxication, consent has limited applications, and it is important to remember just how limited this defence actually is. Indeed, the general rule, as far as its application to non-fatal crimes is concerned, is that it is *not* a defence.

There are two key points to be explained. First, the consent must be genuine, for example the cases of *R* v *Richardson* (1999) and *R* v *Tabassum* (2000).

Second, consent can only be pleaded to the crimes of assault and battery and not to any more serious crime, unless the circumstances fall under the following heads:

- **sporting activities**, where physical contact is effectively part of the sport, e.g. rugby, football, etc. In these cases, players are deemed to have consented to even serious injuries, provided these occurred when the players were acting within the rules of the game (see *R* v *Billinghurst*, 1978).
- **rough horseplay.** In *R* v *Jones* (1986), a gang of schoolboys threw their victims up to 10 feet into the air, with the result that one victim suffered a ruptured spleen and broke his arm when he hit the ground. The defence was allowed on the basis that there was no intention to cause injury and, on appeal, convictions for GBH were quashed.
- **surgery**, including tattooing and body piercing. Note the curious case of *R* v *Wilson* (1996), where the defendant had, at his wife's request, used a hot knife to brand his initials onto her bottom. The scars were found during a medical examination and the defendant was subsequently charged with s.47 ABH. At his trial, it was argued that his wife had consented to his conduct, but the judge ruled (following *R* v *Brown*, 1993) that this defence was not available on these facts. However, the Court of Appeal allowed his appeal on the basis that it fell within the exception recognised by *Brown* of tattooing cases and that, since Mrs Wilson had instigated the branding, there was no aggressive intent on the part of the husband.

Self-defence

Where an attack of a violent, unlawful or indecent nature is made so that the person under attack fears for his or her life or safety of his or her person from injury, then the person is entitled to protect himself or herself and to repel such attack by force, provided that he or she uses no more force than is reasonable in the circumstances (see Lord Morris in *R* v *Palmer*, 1971).

There is a common-law right of self-defence, in addition to s.3 of the Criminal Law Act 1967 which states:

> A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders/suspected offenders or of persons unlawfully at large.

Where justified, self-defence can provide a complete defence to charges of murder or any non-fatal offence. The defence operates by negating the unlawfulness of the homicide/assault by in effect rendering the circumstances that surround the act not unlawful.

The key points of this defence are:

- The use of force by the defendant was reasonable in the circumstances of the attack. This requires the jury to consider that no reasonable person put in the position of the defendant and with the time for reflection available to him or her in the actual case would consider the violence used by the defendant to be justifiable (*Farrell* v *Secretary of State for Defence*, 1976).
- Where defendants have used excessive (and therefore unreasonable) force, neither the common-law nor statutory defences will be open to them, and their criminal liability will be determined by their *mens rea* and the harm they have inflicted.
- The law has no sympathy with persons who are drunk so that an honest mistake made by a drunken defendant will render this defence inadmissible (*R* v *O'Grady*, 1987).

However, it must be noted that the defendant, if he or she has honestly but mistakenly believed himself or herself to be under attack, must be judged according to his or her mistaken view of the facts, regardless of whether his or her mistake was reasonable or not. The leading case here is that of *R* v *Williams* (1984), where the defendant claimed that when he attacked his victim, he honestly believed that he was trying to rescue a youth who was being beaten up. His appeal against his conviction for s.47 ABH under the **Offences against the Person Act 1861** was successful. Lord Lane CJ ruled that:

> …even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.

It also appears to be the case that a person is not obliged to wait until he or she is attacked before taking steps to protect himself or herself (*Attorney General's Reference No. 2 of 1983*).

Intoxication

Students often find it difficult to get to grips with the defence of intoxication, as the way in which it operates, if at all, depends on types of intoxication — whether voluntary or involuntary, whether by alcohol and illegal drugs or by sedative/prescribed drugs, and finally whether the particular offence charged is an offence of basic or specific intent.

The first general rule to learn is that, as Smith and Hogan write (in *Criminal Law*): 'Intoxication is not and never has been a defence as such, nor is a defect of reason produced by drunkenness.'

Voluntary intoxication by alcohol or illegal drugs

The legal rule is that intoxication by alcohol or illegal drugs is only at best a partial defence to offences of specific intent such as murder and s.18 GBH with intent. Following the leading case of *DPP* v *Beard* (1920), if the defendant can prove that at the time of committing the crime he or she was so drunk as to be unable to form the necessary *mens rea* of intent for the crime, he or she will be acquitted of that offence. This condition will not be a defence for a basic intent offence such as manslaughter or s.20 GBH, as confirmed in *DPP* v *Majewski* (1977). If a defendant is charged with a specific intent crime and suggests he or she was intoxicated, the prosecution should charge him or her with the alternative offence.

The same position applies for intoxication by illegal drugs (see the leading case of *R* v *Lipman*, 1977).

Voluntary intoxication using sedative drugs

If the defendant has taken drugs that normally have a sedative or soporific effect, making the user relaxed or sleepy, he or she will usually be treated as being involuntarily intoxicated. In *R* v *Hardie* (1984), the defendant, after taking Valium tablets prescribed for the woman with whom he shared a flat, started a fire when she asked him to leave, and he was charged and convicted under the **Criminal Damage Act 1971**. The Court of Appeal, quashing this conviction, overturned the trial judge's direction to the jury, which had made no mention of the distinction that the law draws between illegal and prescription drugs.

Involuntary intoxication

This deals with the situation in which the defendant claims that he or she did not know that he or she was taking alcohol or an intoxicating drug, as in cases where food or drink is laced without someone's knowledge. The legal rule here is that if this negates the *mens rea* of the offence, it will provide a full defence to any type of offence. However, in the difficult case of *R* v *Kingston* (1994), which involved a defendant who was attracted to young boys, the defendant was drugged without his knowledge by his co-defendant who had intended to blackmail him. His defence to a charge of indecent assault was that the involuntary intoxication effectively disinhibited him, and that, if sober, he would not have carried out these acts. Although the Court of Appeal allowed his appeal, the House of Lords overturned the decision and approved the trial judge's direction to the jury, in which it was stated that an intoxicated intent is still intent, and the fact that the intoxication was involuntary made no difference.

Intoxication causing insanity or abnormality of mind

It is settled law that where excessively heavy drinking causes actual insanity, such as the condition of delirium tremens, then the M'Naghten rules apply and the defence becomes one of insanity. As regards the issue of abnormality of mind, which gives rise to the possible (partial)

defence to murder of diminished responsibility (**Homicide Act 1957**, s.2), it is also clear that self-induced intoxication must be ignored in deciding whether the defendant was suffering from such an abnormality of mind as to amount to diminished responsibility, unless it can be proved that the craving for drink or drugs was itself an abnormality of mind (see the important case of *R* v *Dietschmann*, 2003).

Questions

1. **What is the first element that must be proved if consent is pleaded?**
2. **List the exceptions to the rule that consent cannot be pleaded to offences more serious than assault and battery, and provide appropriate case authorities for each.**
3. **In what circumstances can the use of physical force be justified?**
4. **In which case was it held that a mistaken belief only has to be genuine and not reasonable?**
5. **Which case is the authority for the rule that voluntary intoxication cannot be pleaded to a basic intent offence?**
6. **What is the legal rule regarding sedative or prescription drugs?**
7. **What ruling was made in *R* v *Dietschmann* (2003)?**

A taxing case

In the case of *Inland Revenue Commissioners* v *Fry* (2001), Mrs Fry owed over £100,000 in unpaid tax. Her husband sent a cheque for £10,000, stating that if the Inland Revenue accepted the offer of this amount as full and final settlement, it should pay it into the bank. It did cash the cheque but then later demanded payment of the rest of the outstanding debt.

The court held that an offer could be accepted through conduct, but that there must be a meeting of minds. In this instance, it is likely that the Inland Revenue would receive many cheques each day; there was no evidence that Mrs Fry's cheque was banked in the knowledge that this would constitute acceptance of an offer to pay less than the full amount.

It could be argued that in this case the Inland Revenue was probably unaware of the offer. The principle has generally been assumed that you cannot accept an offer of which you are unaware. The main application of this rule is in reward cases, where someone returns a lost item not knowing that a reward has been offered. In fact, there is no English authority on this point and the legal position remains unclear. In *The Law of Contract* (2007), Treitel states:

> The general view is that acceptance in ignorance of an offer should have no effect. To create a contract parties must reach agreement. It is not enough that their wishes happen to coincide.

Questions

1. **Why was there not a 'meeting of minds' in this case?**
2. **Why might this case be relevant to reward cases?**
3. **What is the difference between reaching agreement and a coincidence of wishes?**

Promissory estoppel

The origins of the doctrine of promissory estoppel can be seen in the case of *Hughes* v *Metropolitan Railway* (1877), where it was held that there was an implied promise by a landlord not to enforce the ending of a lease, which the tenants had relied on. Lord Cairns argued in his judgement that where a party to a contract has led another party to suppose that strict rights under the contract would not be enforced, the first party will 'not be allowed to enforce them where it would be inequitable'.

The idea was developed by Lord Denning in the case of *Central London Property* v *High Trees House* (1947). This case concerned a promise made by the owners of a block of flats to reduce the rent on the block during the Second World War, when it was difficult to get tenants for the flats. At the end of the war, the owners decided to go back to the original rent and sued for the full amount for the last half of 1945, when the flats were occupied. The court held that they were entitled to do so, but Denning J, as he then was, said *obiter dicta* that the owners should be estopped from enforcing payment for the war years, should they try to do so, because it would be inequitable to allow them to go back on a promise on which the defendant had relied.

This became known as the doctrine of promissory estoppel, and in certain important respects it goes beyond the principle outlined by Lord Cairns in *Hughes* because it destroyed rather than suspended the landlord's right to recover the rent for the years 1940–45.

In practice, there are a number of important qualifications to the operation of the doctrine:

- There must be an existing legal relationship between the parties.
- The legal rights must be waived voluntarily. In the *High Trees* case, the owners *chose* to reduce the rent, and arguably it was in their interests to do so because it meant that at least they were receiving *some* income for the duration of the war. Following the judgement in *Williams* v *Roffey* (1990), it would probably be argued today that the owners had received some benefit in return for their reduction of the rent.
- There must be a clear and unambiguous promise not to enforce legal rights, although this can be implied from conduct. The claim was rejected in *China-Pacific SA* v *Food Corporation of India* (1980), because on the facts of the case no unambiguous promise was made.
- It is also necessary that the promisee has acted in reliance on the promise. In the *High Trees* case, for example, the lessees did not try to sell their leasehold interest on to someone else. In *Tool Metal Manufacturing Co. Ltd* v *Tungsten Electric Co. Ltd* (1955), it was suggested that reliance on the promise should disadvantage the promisee, so that it can clearly be demonstrated that it would be inequitable to allow the party making the promise to go back on it. Lord Denning argued in *Alan* v *El Nasr* (1972) and *Brikom Investments* v *Carr* (1979) that the element of detriment is not strictly necessary.

- The requirement that it must be inequitable to allow enforcement of strict legal rights is clearly important. This was demonstrated in *D and C Builders* v *Rees* (1965). Building work was done which Mr and Mrs Rees claimed was defective. They refused to pay the full amount owed but offered a reduced amount in full settlement. The builders were in financial difficulties and eventually agreed to accept the sum being offered. They later sued for the full amount owed. A claim of promissory estoppel by Mr and Mrs Rees was rejected because they had deliberately taken advantage of the builders' financial position and seemingly had been less than candid about their own. In the light of such behaviour, it would be inequitable to allow them to rely on promissory estoppel.
- Promissory estoppel can only be used as a defence. In *Combe* v *Combe* (1951), it was held that it could only be 'a shield and not a sword' and could not be used to start an action. This was confirmed by the Court of Appeal in *Baird Textile Holdings Ltd* v *Marks and Spencer plc* (2001).
- The person making the promise can withdraw it, providing that reasonable notice is given and providing that it is possible for the other party to return to the original position.

It is unclear whether the doctrine will be developed any further. Lord Roskill in *Brikom Investments* v *Carr* argued that it would be wrong to extend the doctrine 'to the extent of abolishing in this backhanded way the doctrine of consideration'. It seems, following the judgement in *Re Selectmove* (1995), that the doctrine is unlikely to be accepted in situations where promise concerns the acceptance of part of a debt.

Questions

1. **Explain in your own words what is meant by promissory estoppel.**
2. **In which case was the doctrine developed, and in what respects did it go beyond the existing law?**
3. **Suggest three qualifications to the operation of the doctrine.**
4. **On what basis was the claim of promissory estoppel rejected in *D and C Builders* v *Rees* (1965)?**
5. **What is the significance of promissory estoppel being 'a shield and not a sword'?**
6. **How could it be a 'backhanded way' of abolishing consideration?**

Affirming a contract after a breach

In *White and Carter (Councils) Ltd* v *McGregor* (1962), there was an agreement for advertising plates for a garage company to be affixed to council litter-bins for a period of 3 years, the idea being that the advertising revenue would pay for the council's bins. The defendant garage company repudiated the contract on the same day that it was made and before the advertising plates were even ordered. The plaintiffs elected to affirm the contract, prepared the plates and affixed them to the litter-bins. In other words, they continued with the contract. They then sued the defendant. The court held that even though the contract had been repudiated at such an early stage, the plaintiffs were entitled to refuse to accept the repudiation, perform their side of the bargain and sue for the payment as a debt.

It might have been thought that the plaintiffs should have mitigated their loss by attempting to re-let the advertising. However, the burden of proving that they could indeed have done this was on the defendant, and it seems that the defendant could not prove it.

Lord Reid laid down certain restrictions on compensating performance that the other party does not want.

The first is that, fairly obviously, it has to be possible to carry out the performance without the other party's cooperation. However, in *Ministry of Sound (Ireland) Ltd* v *World Online Ltd* (2003), the claimant company was allowed to affirm the contract in circumstances where it was impossible to perform its part of the contract, giving a narrow interpretation to this restriction. The contract had involved the supply to Ministry of Sound of CDs giving access to World Online's internet service, which Ministry of Sound would market. World Online paid quarterly instalments for this service. However, it stopped supplying the CDs, so that Ministry of Sound was unable to market them. Despite this, Ministry of Sound claimed the final instalment due under the contract rather than accepting that the contract was ended and suing for damages, and the court upheld this claim.

Lord Reid's second restriction was that the party must have a 'legitimate interest' in performing the contract, rather than simply claiming damages. In *Clea Shipping Corp.* v *Bulk Oil International Ltd (The Alaskan Trader)* (1984), the charterers of a ship cancelled the contract. The shipowners, instead of claiming damages, chose to spend money on repairing the ship and having a crew ready for the whole period of the charter, at the end of which they sold the ship for scrap. It was held that they had no legitimate interest in continuing with the contract, but were simply trying to inflate their damages.

Questions

1. **Why on the face of it should White and Carter not have been allowed to affirm the contract?**
2. **Why were they allowed to affirm?**
3. **What has happened to Lord Reid's conditions in subsequent cases?**

Innominate terms

In *Hong Kong Fir Shipping Co.* v *Kawasaki Kisen Kaisha Ltd* (1962), the term that caused the difficulty was the statement that the ship being chartered was 'in every way fitted for ordinary cargo service'. In other words, there was an obligation that the ship was seaworthy. Upjohn LJ pointed out that:

> …if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances, the parties contemplated that the charterer should at once be entitled to treat the contract as at an end for such trifling breaches.

The court decided that being unseaworthy for 20 weeks out of a total charter period of 2 years did not amount to a breach of condition. Diplock LJ said that to be a breach of condition, the effect would have to be to 'deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract'.

This approach is rather different to that used traditionally, because the court was not labelling the term as either a condition or a warranty but treating the term as being like a condition or a warranty in the particular situation, so that if the contract continued, the term could be treated in a different way in the future.

The same principle was applied in *Cehave* v *Bremer Handelsgesellschaft* (*The Hansa Nord*) (1975), where a cargo was under contract to be shipped 'in good condition'. Some of the cargo was damaged but not seriously, and the court treated this as a breach of warranty. Similarly, in *Reardon Smith Line* v *Hansen Tangen* (1976), the buyers of a new tanker tried to repudiate the contract because the vessel was labelled with a different name by a subcontractor, claiming that it no longer conformed to its original description. The House of Lords held that this was a small technical breach that should not allow the buyers to repudiate.

However, this approach has not been universally adopted. It can be criticised because it creates uncertainty as to how the courts will treat the terms of an agreement, with the parties not knowing the consequences of a breach until after it has occurred.

Where the parties are of equal commercial standing, it may be justified, in the interests of certainty and consistency, to interpret terms more strictly. This has been the approach with breaches of terms relating to the time at which ships are to be ready or the period of notice of loading required. In *The Mihalis Angelis* (1970), a ship was chartered and a date was specified for it to be loaded. The ship was not ready by this date. The courts chose to treat this as a breach of condition, because a breach of warranty would have left the hirer with damages for losses suffered, but with no ship to transport his goods. A breach of condition would allow the hirer to repudiate the agreement and hire another ship. Similarly, in *Bunge Corporation* v *Tradex* (1981), a term in a shipping contract requiring notice of readiness to load was breached by just a few days. Nevertheless, this was held by the House of Lords to be a breach of condition, because a stipulation over time in a shipping contract is of great importance and the outcome needs to be certain.

Questions

1. Why is the traditional approach not appropriate in all cases?
2. Why did the court decide there was not a breach of condition in *Hong Kong Fir Shipping Co.* (1962)?
3. In which other cases was this principle applied?
4. What potential difficulties are created by using the idea of innominate terms?
5. Why do the two cases involving the loading dates for ships appear to have been interpreted more strictly? Do you think this is reasonable?

The 'red hand' rule

The 'red hand' rule was applied by the Court of Appeal in *Interfoto Picture Library* v *Stiletto Visual Programme Ltd* (1989). This was a case that strictly speaking did not concern an exemption clause, but it did concern a clause that imposed an onerous condition, namely that hired photographs returned late were to be charged £5 per picture per day. The result was that 47 pictures returned late incurred a charge of over £3,700. The Court of Appeal held that the particular condition had not been incorporated into the contract, as Interfoto had not taken reasonable steps to bring such an unreasonable, unusual and onerous term to Stiletto's notice.

This case was applied in *O'Brien* v *MGN Ltd* (2001), which concerned a scratchcard game run by the *Daily Mirror* newspaper. One of the rules of the game said that if more prizes were claimed than were available for any reason, a simple draw would take place to determine the prizewinner. The issue that arose was that because of a mistake on one occasion, instead of the usual one or two £50,000 winners, there were nearly 1,500. Applying the rule, the newspaper held a draw to determine one £50,000 prizewinner. The remaining winners, unsuccessful in this draw, shared a further £50,000 between them, meaning each received £34 rather than the £50,000 they had originally been told they had won. The Court of Appeal distinguished the Interfoto case and held that the rules had been incorporated into the contract. The newspaper had done enough to draw the rules to people's attention. Also this particular rule, though seeming to turn winners into losers, was not unreasonable or onerous. All it did was to deprive someone of a windfall, for which he or she had done very little in return.

Questions

1. **Explain what is meant by the 'red hand' rule. In which case was it first outlined?**
2. **What steps could have been taken by Interfoto to bring the term to the notice of customers?**
3. **Explain why the court decided that the clause in *Interfoto* was onerous, while that in *O'Brien* was not.**

Unit 4A: Criminal law (offences against property)

Theft

A-level Lawreview

Siân Richards, *A-level Law Review*, Vol. 4, No. 3

The offence of theft is triable either way; it can be heard in either the Magistrates' Court or the Crown Court. It could potentially lead to imprisonment on conviction and carries a maximum sentence of 7 years.

Did you know that you could be found guilty of theft if:

- you accept a gift from a friend in certain circumstances? (see *Hinks*, 2000)
- you take your own car from a garage while it is being repaired?
- you borrow an item from work (e.g. money from the safe), even though you intend to replace it?

Section 1 of the **Theft Act 1968** defines theft as follows:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

There are therefore five elements to this offence, which are outlined in sections 2–6 and can be subdivided into *actus reus* and *mens rea*:

- s.2 — dishonesty (*mens rea*)
- s.3 — appropriation (*actus reus*)
- s.4 — property (*actus reus*)
- s.5 — belonging to another (*actus reus*)
- s.6 — intention to permanently deprive (*mens rea*)

The prosecution has to prove the presence of each element beyond reasonable doubt if a conviction is to be secured. Failure to establish even one element of the offence will result in an acquittal.

In this article, I shall explain the meaning of each of these elements, using both statutory definitions and judicial interpretation.

Unit 4A: Criminal law (offences against property)

Actus reus

Appropriation

Section 3 defines appropriation as 'any assumption by a person of the rights of an owner'. These may include the right to:

- use
- consume
- lend
- hire
- sell
- discard
- destroy

Therefore, a non-owner who does something that is inconsistent with the owner's rights, by assuming those rights for himself or herself, has appropriated property. Note that property does not need to leave the owner's possession; simply switching price tags on goods in order to buy a more expensive product at a cheaper price (*Morris*, 1983) or offering to sell your neighbour's furniture (*Pitman and Hehl*, 1976) can amount to an appropriation.

So far, the appropriations mentioned have been non-consensual. However, they can also take place with the consent of the victim, as happened in *Lawrence* v *MPC* (1972): a taxi driver was convicted of theft after the victim allowed him to help himself to money from the victim's wallet. The House of Lords in *Hinks* (2000) took the meaning of appropriation one step further when it held that the passing of property that in civil law amounted to a gift could still constitute an appropriation in criminal law. Recent decisions such as this have given appropriation a wide interpretation, placing a stronger emphasis on other elements of the offence, particularly dishonesty.

Property

Section 4(1) offers a fairly comprehensive list of what amounts to property for the purposes of theft:

- money (e.g. coins, bank notes)
- real property (i.e. land)
- personal property (e.g. physical objects)
- things in action (e.g. debts)
- other intangible property (e.g. copyright)

Despite this list, there remain some points of confusion. The following are considered property for this offence:

- examination papers (*R* v *Akbar*, 2002)
- body parts and fluids (*Kelly and Lindsay*, 1998; *R* v *Welsh*, 1974)
- wild flowers, fruit, foliage and mushrooms picked for reward, sale or another commercial purpose (s.4(3))
- wild creatures reduced into a person's possession (s.4(4))

However, the following are not:

- information or knowledge (*Oxford* v *Moss*,1979)
- corpses
- mushrooms growing wild, or fruit or foliage from a wild plant (s.4(3))
- wild animals that are untamed (s.4(4))
- electricity

Belonging to another

At first glance, this requirement seems straightforward; one assumes it refers to the property's legal owner. Section 5(1) extends the meaning to include anyone who has possession or control of, or a proprietary right or interest in, the property when it is stolen. The legal reasoning behind this is simple: it saves the prosecution from having to prove the legal ownership of the property. It has, however, led to some seemingly absurd decisions. In *Turner (No 2)* (1971), the defendant was found guilty of the theft of his own car after he took it from a garage without first paying for the repairs, and the garage was therefore deemed by the court to be 'in possession or control'.

Section 5(3) further extends the meaning of 'belonging to another', so that if a recipient of property is legally obliged to deal with it in a particular way, that property will still be treated as belonging to the donor until the obligation is carried out. For example, if members of a lottery syndicate each give you £2 per week to buy lotto tickets and you instead invest the money in your bank account, that may well amount to theft (as well as fraud by abuse of position) because you have not used the money for the specified purpose.

Similarly, s.5(4) states that if a person receives property by mistake and is under a legal obligation to make restoration, the property is treated as belonging to the person who made the mistake until restoration is made. For example, if on payday you notice that you have been paid £50 more than usual by mistake, you are under a duty to restore that money to your employer, and you may have stolen it if you fail to do so.

Mens rea

Dishonesty

When is a person dishonest? Unfortunately, s.2 does not provide a definition of dishonesty. Instead, it offers three scenarios where the defendant has *not* been dishonest:

- Section 2(1)(a) — the defendant believes that he or she has a legal right to the property (e.g. you pick up an umbrella on leaving a restaurant, mistakenly believing it to be your own)
- Section 2(1)(b) — the defendant believes that the owner would have consented to the appropriation if he or she knew of the appropriation and its circumstances (e.g. you help yourself to a drink in your friend's house while he or she is on the phone)
- Section 2(1)(c) — the defendant believes that the owner cannot be discovered by taking reasonable steps (e.g. while out shopping, you find a £5 note on the pavement in Oxford Street)

Note that all of these scenarios have a common theme — they are all based on the defendant's belief. This belief only has to be honest and need not be reasonable (although the more reasonable it is, the more likely it is to be honestly held, and vice-versa).

The courts developed the Ghosh test (from *R* v *Ghosh*, 1982) to help to determine dishonesty. It contains an objective and a subjective part, both of which are for the magistrates or jury to decide:

1. Would the defendant's actions be considered dishonest by the ordinary standards of reasonable and honest people? (objective)
2. Was the defendant aware that his or her actions would be considered dishonest by those standards? (subjective)

The defendant's own opinion of his or her actions is therefore irrelevant. Provided the magistrates or jurors can answer 'yes' to both questions, they can make a finding of dishonesty. Thus, the extent to which this test incorporates the subjective element is questionable.

Intention to permanently deprive

Section 6 defines this as intending to treat the thing as one's own to dispose of, regardless of the other's rights. In *DPP* v *Lavender* (1994), the court decided that 'dispose of' was wide enough to cover 'deal with' and, as such, s.6 should be read as intending to treat the thing as one's own to deal with (use), regardless of the other's rights.

This gives a broad interpretation to this element of theft, as shown in *Velumyl* (1989), where the defendant borrowed £1,000 from the office safe without authority, intending to return that amount when a friend repaid a debt. He was convicted of theft, as he would not have returned the same notes as were taken, even though he might have replaced the money with property of an equal value.

Borrowing

Section 6 maintains that borrowing can amount to an intention to permanently deprive if it is for such a period and in circumstances that make it equivalent to an outright taking or disposal.

In *Lloyd* (1985), this was not the case, as the defendant borrowed, copied and returned the cinema film within such a time that it was not missed. The Court of Appeal here suggested that borrowing only constitutes an intention to permanently deprive if the goodness and virtue have gone from the property. What about the student who takes another student's photocopying card and uses it until its credit almost runs out, or the law student who fails to return his friend's law notes until the day after the law exam? The factors stated in *Lloyd* are helpful but some of these questions are still to be answered definitively.

When the Theft Act was passed in 1968, it is doubtful that Parliament envisaged the scope it would have now. Recent decisions such as *Hinks* (2000) have significantly widened the offence, yet having to prove all five elements perhaps acts as a safeguard against an innocent party being convicted.

Questions

1. **What are the *actus reus* and *mens rea* elements of theft?**
2. **What is the definition of 'appropriation'? List six examples of conduct that could constitute 'appropriation'.**
3. **What example of 'appropriation' is given in *R* v *Morris* (1983)?**
4. **In which case was it held that appropriation could take place even where the victim consented to it?**
5. **List six examples of 'property'.**
6. **List three examples of things that are not 'property' for the offence of theft.**
7. **Why was the defendant in *Turner* (1971) convicted of stealing his own car?**
8. **What are the three situations listed in s.2(1) where the defendant will not be held to have acted dishonestly?**
9. **What is the Ghosh test of dishonesty?**
10. **What is the definition in s.6 of 'intending to permanently deprive'? What wider definition was provided in *DPP* v *Lavender* (1994)?**

Burglary

A-level Lawreview

Giles Bayliss, *A-level Law Review*, Vol. 3, No. 1

Sections 9(1)(a) and 9(1)(b) of the **Theft Act 1968** contain two key offences of burglary. These offences have some common elements, in that they both require entry as a trespasser into a building or part of a building; however, they differ in important respects, and candidates need to be able to distinguish between them. It should also be remembered that due to a degree of overlap between the two offences, it is possible that a person who commits an offence under s.9(1)(b) may also commit an offence under s.9(1)(a), although this will not always be the case.

Section 9(1)(a)

Section 9(1)(a) of the **Theft Act 1968** states that a person is guilty of burglary if:

> …he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) (stealing, inflicting grievous bodily harm or causing criminal damage).

Actus reus

The *actus reus* of this offence is the entry into a building or part of a building as a trespasser. Note that the ulterior offences also included the intention to commit rape until it was removed by s.63 of the **Criminal Justice Act 2003** (some older textbooks will still refer to this).

Enters

The meaning of the term 'enters' is not defined by the 1968 Act, and despite a series of Court of Appeal decisions it is still not entirely clear:

- In *Collins* (1973), the Court of Appeal stated that entry had to be 'effective and substantial', but this requirement was criticised, and in the later case of *Brown* (1985), the Court stated that entry simply had to be 'effective'.
- In the most recent case of *Ryan* (1996), the Court of Appeal preferred not to use the term 'effective' and simply stated that whether there was an entry was a question of fact for the jury. It also stated that there was no need for the defendant to be capable of committing the offence for there to be an entry.

On the basis of these decisions, it appears that partial access is sufficient to amount to an entry, although quite what this constitutes remains unclear. Critics argue that this could result in different juries reaching different decisions in similar cases. Other unresolved issues relate to the use of instruments to obtain property, e.g. using a hook through a letterbox, or the use of an innocent person such as a child to enter the building.

Building

The term 'building' was not defined in the 1968 Act because it was in common use. The Act does however state that a building can include a vessel or vehicle if it is used for the purpose of habitation. The Act therefore covers caravans, houseboats, mobile homes and camper vans, but there is no need for them to be occupied at the time of the burglary. Case law indicates that:

- the building must have a degree of permanency
- temporary structures (e.g. a tent) will not amount to a building

In *B and S* v *Leathley* (1979), a 25-foot-long freezer container that had been in a fixed position for over 2 years was held to amount to a building. It was resting on railway sleepers with its wheels removed, it had a locking door and was connected to an electricity supply. In contrast, in *Norfolk Constabulary* v *Seekings and Gould* (1986) a supermarket was using two articulated lorry trailers as storage. Both were locked and connected to an electricity supply. The defendants were not guilty of burglary, as the containers had wheels and were, therefore, uninhabited vehicles, even though they had been used as storage for over a year.

Part of a building

Burglary can also be committed where the defendant enters any part of a building that he or she is not authorised to be in, e.g. in *Walkington* (1979) the defendant went behind the counter at a department store.

Trespasser

For the purpose of burglary, trespass means entry without consent. A person can become a trespasser by exceeding the permission he or she receives from the occupier. In *Jones and Smith* (1976), the defendant had permission to enter his father's house, but when he did so in the middle of the night with his friend and took two television sets, the court held that he was a trespasser. Likewise, a person has permission to browse in a shop but not to enter in order to steal. If someone is at a house party, he or she may have permission to wander around the downstairs rooms but not to look around the upstairs bedrooms for something to steal. In *Walkington* (above), the defendant was not a trespasser when he entered the shop (as there was no intention to steal) but became one when he entered the unauthorised area.

Mens rea

The defendant must either intend or be reckless that he or she is a trespasser. He or she must also intend to commit one of the ulterior offences in s.9(2) — causing criminal damage, stealing or inflicting grievous bodily harm.

It is worth noting that a conditional intent to steal can amount to burglary although it does not amount to theft. This can be seen in *Walkington*, where the defendant looked in a half-open cash register to see if there was any money inside.

Section 9(1)(b)

This section states that a person is guilty of burglary if:

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

Actus reus

The *actus reus* of this offence is entering a building or part of a building as a trespasser and committing or attempting to commit theft or GBH. Unlike s.9(1)(a), there is no need for the defendant to have the intention to commit an offence when he or she enters — he or she must actually carry out the *actus reus* of the offence. Note that GBH could be committed as the defendant escapes (*Jenkins*, 2002).

Mens rea

The *mens rea* for s.9(1)(b) is the *mens rea* for the theft or GBH and the knowledge or recognition that the defendant is trespassing. It is sufficient as far as the GBH is concerned that the defendant has the *mens rea* for s.20 of the **Offences Against the Person Act 1861** (intention to cause some harm or subjective recklessness).

Questions

1. **What common element of burglary occurs in both s.9(1)(a) and s.9(1)(b)?**
2. **What are the ulterior intent offences in s.9(1)(a)?**
3. **Which Act removed rape as an ulterior offence?**
4. **In *R* v *Collins* (1973), how was 'entry' defined?**
5. **What rulings were made in *R* v *Ryan* (1996)?**
6. **Compare the decisions in *B and S* v *Leathley* (1979) and *Norfolk Constabulary* v *Seekings and Gould* (1986).**
7. **Why was the son convicted in *R* v *Jones and Smith* (1976)?**
8. **What case showed that conditional intent to steal can be enough for the *mens rea* of burglary?**
9. **What is the key difference between s.9(1)(a) and s.9(1)(b)?**
10. **What legal rule is set out in *R* v *Jenkins* (2002)?**
11. **Daniel enters Safeware Supermarket, intending to steal an iPod if it has one. After looking around the store for 10 minutes, he enters a door marked 'staff only' and proceeds to search newly delivered stock. As he is doing so, Felix, an employee at the store, walks in and confronts him. Daniel smashes several items on the floor and then punches Felix with such force that he fractures his jaw. Daniel is restrained by another employee, Carlos, as he tries to escape from the building. Consider Daniel's criminal liability.**

Unit 4A: Criminal law (offences against property)

Reform of fraud offences in criminal law

A-level Lawreview

Denis Lanser, *A-level Law Review*, Vol. 3, No. 3

The **Fraud Act 2006** made sweeping changes to the way in which English criminal law deals with the issue of fraud, abolishing the deception offences in the **Theft Acts 1968 and 1978**, and replacing them with a new fraud offence. A modified version of the offence involving obtaining services has also been enacted, dependent upon dishonesty rather than requiring deception.

What is fraud?

Consider the following examples:

- D sneaks up behind V and stealthily removes her bag, which she has put on the floor beside her.
- While V is away on holiday, D breaks into his house and takes valuable items.
- V advertises a car for sale. D persuades V to take a cheque in payment for the car. The cheque is forged and V does not get any money.
- The producers of a television quiz show persistently invite viewers to pay money to telephone the programme in the hope of winning a prize, even when the winners have already been chosen.

We would not regard the incidents in the first two cases as involving fraud — D simply stole the bag, as well as burgling V's house in the second case. In the other two cases, however, it could be said that V 'willingly' hands over the car or the money, but only because he or she has been tricked into doing so. Here, we would say that D was guilty of fraud, or has 'defrauded' V. Therefore, it seems that fraud is something to do with telling lies or being deceitful in order to gain an advantage. This is supported by dictionary definitions such as 'wrongful or criminal deception intended to result in financial or personal gain' (*Compact Oxford English Dictionary*) and 'the use of false representations to gain an unjust advantage' (*Concise Oxford English Dictionary*).

English law before the Fraud Act 2006

English law recognised the distinction between theft and fraud by creating separate offences to deal with the two different ways of unlawfully obtaining someone else's property. It also created fraud offences dealing with getting services and with avoiding paying debts. To describe this in a modern way, we would say that this approach satisfies the principle of 'fair labelling', i.e. when creating criminal offences, we want to distinguish different kinds of conduct and their consequences from each other in an appropriate way. For example, we want to distinguish killing people from taking their property. Equally, we want to distinguish taking another person's property *without* his or her consent from taking it *with* his or her consent but by a trick or deception. Assuming we

perceive that these two ways of obtaining V's property are significantly different, we should recognise that fact by creating different offences.

The **Theft Act 1968** achieved this by creating, for example, offences of theft, robbery and burglary, all of which are, in general, committed without any fraud. Alongside these were the fraud-based offences, including obtaining property by deception and obtaining a pecuniary advantage by deception. The **Theft Act 1978** added offences of obtaining services by deception and of evading liability by deception.

However, when judges began the task of interpreting the **Theft Act 1968**, they quickly decided that D could be guilty of theft where, rather than simply taking V's property without his or her consent, D deceived V into handing over the property (*Lawrence*, 1971, affirmed by the House of Lords decisions in *Gomez*, 1993 and *Hinks*, 2000). Therefore, there was a considerable overlap between theft and obtaining property by deception. Consequently, the offence of theft was also a mechanism for dealing with some aspects of fraud.

There was also a much broader offence of conspiracy to defraud, the essence of which was that D agreed with one or more others dishonestly to deprive V of property or to injure some right to property that V possessed.

What was wrong with this structure?

For a long time, there has been a debate about which of two different approaches to fraud-based offences is preferable. Is it better to:

- base liability on a series of separate offences, which carefully specify, and distinguish between, different kinds of advantage dishonestly gained or disadvantage dishonestly imposed (for example, obtaining property or services, or avoiding payment of debts)?

or

- base liability on a broadly defined offence, capable of dealing with a wide range of conduct (for example, a 'dishonesty' offence or a 'fraud' offence)?

In a sense, the law prior to the enactment of the **Fraud Act 2006** adopted the first approach, as already indicated above, while holding in reserve a much broader-based offence which was applicable only if D agreed with others (conspiracy to defraud). This approach was fraught with difficulties:

- The idea of 'deception' made proof of some obvious instances of fraud difficult or impossible, such as where a machine rather than a person was 'tricked', or where V did not really care whether statements being made were true or false because he or she knew he or she would be paid by, say, a bank (for example, where D used a cheque or credit card in payment, and there were no obviously suspicious circumstances).
- Some instances of fraud could fall into the gaps between the offences. This problem was made all the worse by rapidly developing technology, which led to new ways of engaging in fraudulent conduct.
- Prosecutors might fail to identify the correct charge, resulting in costly failures in prosecutions.
- 'Conspiracy to defraud' charges were relied upon too frequently, partly because they provided a safety net to catch conduct that might not be easy to classify, and partly because they might enable a better description of the nature of the fraud to be presented than would any of the individual offences.

Changes made by the Fraud Act 2006

The **Fraud Act 2006** abolishes all of the specific deception offences referred to above, as well as others outside the scope of this article. However, it does not abolish the offence of conspiracy to defraud, which the government did not want to abandon before having been able to review the operation of the Act in practice. Nor does it have anything to say about the capacity of the offence of theft itself to deal with some aspects of fraud.

In place of the deception offences comes, primarily, an offence of fraud (s.1). The Act does not define fraud, but it specifies three ways in which the offence can be committed:

- by false representation (s.2)
- by failing to disclose information (s.3)
- by abuse of position (s.4)

Of these three, the first is by far the broadest, but the third also potentially extends the scope of criminal liability by a significant amount. There is also an offence of obtaining services dishonestly (s.11).

Fraud by false representation

Section 2 of the **Fraud Act 2006** states that fraud by false representation is committed where D:

> …dishonestly makes a false representation, and intends, by making the representation, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss.

The Act goes on to state that a representation is false if it is 'untrue or misleading', and the person making it 'knows that it is, or might be, untrue or misleading'.

A 'representation', which may be express or implied, means:

> …any representation as to fact or law, including a representation as to the state of mind of the person making the representation, or any other person.

'Gain' and 'loss' are defined as being in money or other property, and apply whether permanent or temporary.

The scope of the offence

This way of committing fraud represents a significant departure from the approach that was followed when the offence depended upon a deception. For fraud by false representation to occur:

- the representation does not have to be believed by V, or even actually be communicated to V
- there is no requirement that D should actually make a gain, or that V should suffer a loss or be exposed to the risk of a loss

The making of the representation, with the appropriate *mens rea*, is the essence of the offence. The Act also emphasises (at s.2(5)) that D may be guilty when making an untrue or misleading representation using a method that does not involve any other human being (say, making purchases on the internet by fully automated methods).

Consider the example given earlier, where D forges a cheque to pay for V's car. D would be guilty of the offence in relation to the car simply by trying to use the forged cheque to pay for it. It would not matter if V was taken in by the cheque and accepted it, or took one look at it, realised that it was forged, and sent D away without the car.

It has been suggested that the effect of the offence is to criminalise telling lies, irrespective of whether any harm results. In fact, the law goes rather further because not only does it deal with lies as such, it also deals with 'misleading' statements. We are all used to the suggestion that advertisers, salespeople and politicians are sometimes 'economical with the truth'. It now appears that the first two, at least, may commit an offence if they knowingly mislead without actually telling lies. The enterprising advertiser who, many years ago, invited readers to send in payment to discover how to become 'two inches taller', would now probably commit the offence if he were to send back, as he or she did then, the accurate, but surely unwelcome, advice to 'stand on a two-inch box'.

Of course, apart from the other *mens rea* requirements, D will only be guilty of the offence if he or she was dishonest. The role of dishonesty here is to limit liability, in accordance with the *Ghosh* (1982) test, to those whom the jury considers to be acting contrary to the standards of ordinary decent people, and who know that they are doing so. Just as in theft, where the decisions in *Gomez* and *Hinks* have forced dishonesty to bear a large burden in establishing the offence, so in fraud by false representation much will depend on the view taken by a jury about the acceptability of D's conduct. For example, the line between commercial 'sharp practice' and criminal conduct may become difficult to establish, so that the law will be much less certain.

Fraud by failing to disclose information

Fraud by failing to disclose information is committed when D is under a legal duty to disclose information and dishonestly fails to do so, intending to make a gain or cause a loss or expose another to a risk of loss.

This version of the offence is limited by the need to prove that D was under a legal duty, which will include dealings where the utmost good faith is required (insurance contracts, for example), and where there was a special relationship between D and V, sometimes called a 'fiduciary' relationship. Inevitably, this means that the criminal law will rely heavily on civil law concepts.

To take one example, D will be guilty if he or she tries to get cheaper car insurance by not disclosing that he or she has a conviction for a driving offence.

Fraud by abuse of position

This version of the offence is committed where D:

> …occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, and dishonestly abuses that position.

As always, D must intend to make a gain or cause a loss or expose another to a risk of loss.

This area of fraud raises the spectre of yet more uncertainty, because there is no clear idea of:

- what such a 'position' will cover
- exactly what amounts to 'abuse'

The Act deliberately avoids confining the 'position' to relationships where such an expectation is well established (for example, trustee and beneficiary, and employer and employee). It seems that the offence may extend to a much broader range of relationships (such as those within families), and it is not clear whether it will be a matter of law for the judge to decide when D occupies such a position or whether the jury will have a role to play in determining this. If the jury is to play any significant part, the uncertainties multiply.

Obtaining services dishonestly

This offence is similar to that found in the **Theft Act 1978**, although there are some crucial differences. D must get the services by a 'dishonest act' rather than by any deception. The services must be provided on the basis that payment has been, is being, or will be made, and D must receive them without such payment having been made, or having been made in full. The *mens rea* is that D knows that the services are, or might be, made available on that basis and that he or she does not intend to pay, or to pay in full. Therefore, the offence will cover activities such as:

- sneaking into a cinema without paying
- pretending to be a young person or a senior citizen to get reduced-price entry to an event
- using another person's membership card to get into a gym for free or at a reduced price
- using another person's credit card (without his or her permission) to book tickets over the internet

Conclusion

By comparison with the offences that it replaces, the fraud offence could be interpreted as allowing for an astonishing (perhaps disturbing) breadth of criminal liability, characterised by a great deal of potential uncertainty. This uncertainty may itself be in breach of UK obligations under Article 7 of the European Convention on Human Rights. The major elements of concern appear to be that:

- fraud by false representation can be committed without any proof of harm to another
- the line between the commission of a full offence and an attempted offence has shifted dramatically
- the falsity of a representation can be established not only where it is 'untrue' but also where it is 'misleading', an inherently more difficult concept to pin down
- much will depend on the application of the notoriously unreliable definition of 'dishonesty'
- fraud by abuse of position leaves considerable scope for the interpretation of both 'abuse' and, particularly, 'position'

Unit 4A: Criminal law (offences against property)

Questions

1 How is fraud defined, and what examples are provided to illustrate it? Can you think of any further examples?

2 What was the legal result of decisions in the cases of *Lawrence* (1971), *Gomez* (1993) and *Hinks* (2000) in terms of fraud and theft?

3 What were some of the problems with fraud that the law prior to the Fraud Act 2006 failed to deal with?

4 In the Fraud Act 2006, how is 'fraud by false representation' defined?

5 In what circumstances will 'fraud by failing to disclose information' be likely to occur?

6 What activities could be included in the offence of 'obtaining services dishonestly'?

Unit 4A: Criminal law (offences against property)

The defence of duress by threats

A-level Lawreview

Gavin Murray, *A-level Law Review*, Vol. 3, No. 2

It has long been an established principle that a person compelled to commit a crime by threats of violence from another can be excused from liability by a plea of duress. But is the defence of duress a genuine attempt to protect those subjected to threats, or is it simply a 'get out of jail free' card, offered to muggers, drug dealers or anyone else who decides to commit a crime?

The answer is not that simple. First, we must acknowledge that duress operates in a slightly different way from other defences. Successfully pleading duress does not remove *mens rea*, nor does it prove that the *actus reus* was not voluntary; anyone pleading duress is simply saying: 'Yes, I committed the crime, but I should be excused from liability because I was unable to resist the threats that were made against me.' What this means is that the defence of duress has tended to be relatively successful, as it is easy for a defendant to claim that he or she has been subjected to a threat that he or she was unable to resist, but incredibly difficult for the prosecution to disprove this claim.

The test for duress

The leading case on duress is *R* v *Graham* (1982), in which the Court of Appeal laid down the following test:

- Was the defendant impelled to act as he did because, as a result of what he reasonably believed the threatener had said or done, he had good cause to fear that if he did not so act, the threatener would kill him or cause him serious physical injury? (subjective test)
- Would a sober person of reasonable firmness sharing the defendant's characteristics have responded in the same way to the threats? (objective test)

This test was approved by the House of Lords in *R* v *Howe* (1987) and, at first glance, it seems relatively simple. However, it should be noted that in recent years the courts have allowed the defence where defendants 'genuinely believe' that the threat will be carried out. This interpretation, which has been influenced by the Judicial Studies Board specimen direction (Direction 49.2), accepts that the first test is phrased in subjective terms but ignores the fact that it contains objective elements. The defence actually depends upon the defendant having committed the crime because he or she feared death or serious injury *and* it must have been reasonable for him or her to have believed that the threatener was serious and willing to carry out the threatened action.

Furthermore, the test must now also be read in light of the House of Lords' decision in *R* v *Hasan* (2005), in which Lord Bingham restated it so as to reduce the circumstances in which it can be successfully relied upon, thus restricting the availability of using the 'get out of jail free' card. Consequently, the defendant's subjective perception of the threat is now not enough; he or she must genuinely and reasonably believe in the efficacy of the threat. He or she is therefore judged on his or her belief in the strength of the threat, provided that this belief is genuinely held and

objectively reasonable. Therefore, a defendant who is extremely weak or of low intelligence might not be judged on what he or she actually believed.

Establishing the defence of duress

- There must be a serious threat to the defendant or his or her family. Only threats of death or serious injury will be sufficient.
- There must be some connection between the threat and the crime that the defendant is compelled to commit. A defendant cannot simply claim cover from a threat to justify whatever criminal endeavour he or she chooses to pursue. The threat must be conditional upon the commission of a range of offences, and the offence must fall within that range.
- As Lord Bingham stressed, the defence should be based on the reasonableness of the defendant's actions, phrased in objective terms. As such, the current judicial guideline (from the Judicial Studies Board), which allows for a mistaken belief, is no longer correct. The defendant must genuinely and reasonably believe that the threat will be carried out if he or she fails to comply.
- The defence will fail if a sober person of reasonable firmness, sharing the defendant's age, characteristics and background, would not have been compelled by the threats. *R* v *Horne* (1994) tells us that that such a person is 'an average member of the public; not a hero, not a coward, just an average person'.
- It is necessary to consider if the defendant has failed to take action to evade committing the crime. In other words, the defendant must expect the threatened action to follow immediately or almost immediately from his or her failure to comply with the threat. Any delay between the threat and the compliance that is not used by the defendant to contact the police or seek protection from the threat will render the defence of duress unavailable.

Voluntary association with those engaged in crime

Public policy suggests that the law should discourage association with known criminals. Therefore, the defence of duress is unavailable to those who have voluntarily associated with others engaged in criminal activity, provided that the defendant foresaw or ought reasonably to have foreseen (an objective test) the risk of being subjected to any threat of violence (*Sharp*, 1987). It is no longer necessary for the prosecution to prove that the defendant foresaw that he or she might be coerced to commit a particular crime. It will be enough to exclude the defence if he or she foresaw that he might be coerced to commit an offence of any type within a range of offences similar to that with which he or she has been charged.

Questions

1. **What is the legal basis for the defence of duress?**
2. **What rules were laid down in *R* v *Graham* (1982) in order to establish duress?**
3. **What restrictions on duress were laid down by Lord Bingham in *R* v *Hasan* (2005)?**
4. **How has that judgement affected the direction from the Judical Studies Board?**
5. **How is the 'sober person' described in *R* v *Horne* (1994)?**
6. **What legal rule is illustrated by *R* v *Sharp* (1987)?**

Unit 4B: Law of tort

The law of negligent misstatement

A-level Lawreview

Hannah Roberts, *A-level Law Review*, Vol. 4, No. 2

Students often consider negligent misstatement to be a tricky area of law. This article aims to change that conception by setting out the key points and cutting through some of the difficulties. It will be of little comfort for you to know that had you studied this subject in the 1960s, this article would have been very short, as the law was clear and restrictive. Since then, however, there have been great developments, meaning that while we as UK citizens now have the benefit of increased rights, as students (and teachers) of the law there is much more to learn. Unfortunately, the legal development is not always logical, as judges base their decisions on policy matters, such as whether or not it would be fair to deny the defendant's liability. This article serves as a guide to navigate the twists and turns of a topic that, through perseverance, is interesting and rewarding to learn.

Negligence — revision of the basics

Three requirements must be fulfilled in order to establish a successful claim in the tort of negligence:

- A duty of care was owed by the defendant to the claimant.
- The defendant breached that duty.
- The breach caused the claimant to suffer some damage.

The concept of 'economic loss'

While it is well established in negligence that a claimant can recover compensation for physical injury and suffering and for damage to goods, the traditional approach within tort was that mere financial (or economic) loss (e.g. a loss of profits in no way linked to personal injury or property damage) could *not* be recovered. This was mainly due to the fact that the civil law of contract was considered more suited to dealing with such claims, and to allow them in tort would run the risk of 'opening the floodgates'. This phrase is commonly used in tort, and simply means an extension of liability that could lead to a hugely increased number of claims for the courts to deal with.

One of the leading cases explaining economic loss is *Weller and Co.* v *Foot and Mouth Disease Research Institute* (1966), involving an auctioneering firm that was unable to hold cattle auctions when a ban was imposed on livestock movements. As the ban was the direct result of an outbreak of foot and mouth disease, which itself had arisen due to the negligence of the defendants, the auctioneers attempted to sue the institute for the profits that they had lost out on. It was held that as this was a claim for pure economic loss, the action must fail in tort.

Another important case is *Spartan Steel* v *Martin* (1973), where the electricity supply to a factory was cut for 14 hours, as a result of the defendants' negligence. Only the losses which involved, or which could be linked to, physical damage could be claimed; the pure economic loss of profits on work that could not be carried out during the power cut was not recoverable.

Both these cases involved economic loss resulting from physical acts or omissions. However, the focus of this article is on economic loss caused by negligent misstatements — usually poor advice. This is an example of an area of tort law where claims for economic loss *have* been permitted — since 1963 — in certain situations.

Negligent misstatements

It is long established that damages are recoverable for losses suffered through reliance on inaccurate advice, although this was only permitted under the tort of deceit, for which fraud was required (*Derry* v *Peek*, 1889).

The apparent limits on this area of law were confirmed in *Candler* v *Crane Christmas* (1951), where the court refused to find that a duty of care was owed to a claimant who suffered economic loss as a result of the defendant accountant's negligently prepared accounts. Importantly, though, Lord Justice Denning gave a dissenting judgement here, stating that the accountants should owe a duty of care to:

> …their employer or client, and…any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them.

This point was eventually accepted in the House of Lords decision in *Hedley Byrne* v *Heller* (1964), although only as *obiter*, that for the first time in English law there could be liability owed as a result of a negligently made misstatement.

Within this decision, the requirements for the establishment of a duty in such a situation can be found. Importantly, it was felt that the usual 'neighbour' test of Lord Atkin in *Donoghue* v *Stevenson* (1932) for establishing whether or not a duty of care existed between the parties was inappropriate. This was due to the fact that advice could have a much broader effect than an act. For example, if I were to provide inaccurate 'legal advice' to a group of students, they could then pass this on to their friends and family, who in turn could pass it on to a wider group of acquaintances, and so on. Potentially, there is an almost limitless field of individuals who could make use of my 'advice' and, in turn, sue me for my negligent misstatement. However, if I were to teach my subject negligently to the group of students, there is a clear limit on who is affected.

Due to this distinction, the test set out in *Hedley Byrne* to establish whether the defendant owed the claimant a duty of care in situations of negligent misstatement requires that:

- there is a special relationship between the parties
- the party providing the advice voluntarily assumed responsibility for that advice
- the claimant relied upon that advice, which was a reasonable thing to do

A 'special relationship'

Unfortunately, the House of Lords gave little guidance on this aspect of the test in the *Hedley Byrne* judgement, although Lord Reid did indicate that such relationships would only exist in business situations:

> Quite careful people often express definite opinions on social or informal occasions, even when they see that others are likely to be influenced by them; and they often do that without taking the care that they would take if asked for their opinion professionally, or in a business connection…there can be no duty of care on such occasions.

The boundaries of this statement have been explored in subsequent cases. In *Mutual Life and Citizens Assurance Co. Ltd* v *Evatt* (1971), an insurance company was held not to owe a duty of care when asked for investment advice; as this was not its specialist field, it could not be liable.

Confusingly, though, despite the clear statement by Lord Reid, liability was found to be owed in *Chaudhry* v *Prabhakar* (1989), where the claimant was advised in a social capacity by a friend, who had some knowledge of cars, on an intended purchase. When the car turned out to be not as perfect as hoped, the defendant was successfully sued. Even though he had not provided his advice 'professionally', it was felt that he had indicated he had specialist knowledge and should be responsible for that advice. This outcome does, though, seem to have been a 'one-off', and is probably best viewed as a policy decision, restricted to its own particular facts.

Although the 'special relationship' test was approved in *Caparo* v *Dickman* (1990), it was felt that this would not always be appropriate, especially where (as Lord Bridge stated):

> …a statement is put into more or less general circulation and may foreseeably be relied upon by strangers to the maker of the statement, for any one of a variety of purposes which the maker of the statement has no specific reason to contemplate.

In such situations, more traditional indicators of the existence of a duty of care should be applied — such as proximity, reasonable foreseeability and whether or not the imposition of a duty is just and reasonable.

The application of this test can be seen in an area that commonly arises in negligent misstatement, involving building society surveyors and house purchasers. Although the surveyor has no contractual relationship with the purchaser — instead, he or she is employed by the prospective mortgagor in order to establish the viability of the loan — it has been held in a number of cases that the purchaser can sue the surveyor for losses suffered as a result of negligent information in the survey. For example, in *Yianni* v *Evans* (1981), the surveyor was made to compensate a purchaser who paid £12,000 for a house that needed £18,000 worth of repairs. This is due to the fact that the surveyor will be well aware that the purchaser of a 'bog-standard' residential property is likely to rely on his or her report (i.e. the reliance is reasonably foreseeable, and there is proximity between the parties), especially as it is often a condition of the mortgage that the purchaser pays the surveyor's fee.

The law was again considered in *James McNaughton Papers Group Ltd* v *Hicks Anderson and Co.* (1991), where the Court of Appeal listed a number of points that should be considered by a court to establish that a duty of care exists in such situations. These are:

- purpose of the statement
- purpose of communicating the statement
- power balance between parties
- number of people relying on the advice
- knowledge of the person providing the advice
- claimant's access to other/alternative advice

Voluntary assumption of responsibility

This second point of the test was highlighted by Lord Reid in the *Hedley Byrne* decision, as he suggested that the person from whom advice is sought has three choices:

- to refuse that request
- to provide advice, but add a disclaimer that it should not be relied upon
- to provide advice without any conditions or warnings

He felt that only the person who chose the third option assumed responsibility for the effects of his or her advice. The effectiveness of disclaimers has been explored in a number of cases — including *Smith* v *Eric S Bush* (1990) — and again the decisions appear to be made on a case-by-case basis, with no obvious legal rules appearing.

Reasonable reliance

The final legal requirement is that there has been 'reasonable reliance' on the defendant's advice by the claimant. This means that:

- the claimant actually relied upon the advice given, and
- it was reasonable, in all the circumstances, to do so

The first part of this requirement can be closely linked to causation — if the defendant's advice was not relied upon, it cannot have led to the outcome. The issue arose in *JEB Fastener Ltd* v *Marks Bloom and Co.* (1983), where the negligent misstatement was as to the value of a company that was subsequently purchased by the claimant. However, as the purchase was only taking place in order to obtain certain employees of the company, no reliance had been placed on the valuation report, and therefore no liability was owed.

It must also be shown that the claimant who relies upon the advice is a foreseeable individual to the defendant. Clearly, for an action in tort to ensue, there may not have been a contractual relationship between the two parties. As indicated above, this gives the potential for a wide range of individuals to be affected by negligent advice. For example, in *Smith* v *Eric S Bush*, it was felt that it was reasonable for the purchaser to rely on the surveyor's advice, as liability was limited to the purchaser.

An alternative outcome occurred in *Goodwill* v *British Pregnancy Advice Service* (1996), where the girlfriend of a man who had undergone a vasectomy, prior to their relationship commencing, attempted to sue the BPAS. She became pregnant following an automatic reversal of the operation, about which the man had not been warned. It was held that it was not reasonable for the BPAS to owe a duty of care to all potential girlfriends of the man; she was a member of a large class of females who may have a relationship with him at some future date.

Continued development

This area of law has developed substantially since 1963, when it was first recognised, and has had an impact on other areas of law. For example, the liability of solicitors to potential beneficiaries in probate law (*White* v *Jones*, 1995) and of employers when providing references in employment law (*Spring* v *Guardian Assurance plc*, 1994) has been expanded.

Further, and a point worth bearing in mind if you have difficulties understanding some of the decisions in this legal area: not all of the decisions can be based purely upon logical development of existing legal rules. Instead, it is important to remember that, in a lot of cases, judicial decisions have been based on policy matters, e.g. is it fair to make the defendant liable?

Therefore, those of us involved in legal study must continue to keep a close eye on this area of law.

Questions

1. **Why was it so difficult for tort law to recognise claims for pure economic loss?**
2. **What was the dissenting judgement of Lord Denning in *Candler* v *Crane Christmas* (1951)?**
3. **What are the three requirements that a claimant must establish in claiming for pure economic loss as a result of a negligent misstatement?**
4. **What rule was derived from *Mutual Life and Citizens Assurance Co.* v *Evatt* (1971)?**
5. **In *Chaudhry* v *Prabhakar* (1989), why was the defendant held liable, despite the fact that the advice had been provided in a social setting?**
6. **Why were the defendants in *Yianni* v *Evans* (1982) held liable to pay compensation? What other case demonstrates the same rule?**
7. **What rule was derived from *JEB Fastener Ltd.* v *Marks Bloom and Co.* (1983)?**

Unit 4B: Law of tort

Private nuisance

A-level Lawreview

Sally Russell, *A-level Law Review*, Vol. 3, No. 2

Nuisance negatively affects people's quality of life. There are three types, which may be summarised as follows:

- **Private nuisance** deals with an activity or state of affairs that interferes with the use or enjoyment of land or rights over land. It protects occupiers of land from damage to their land, buildings or vegetation, or from unreasonable interference with their comfort or convenience by excessive noise, dust, fumes, smells etc. It usually entails civil disputes between individuals. If physical harm occurs, the case usually comes under the tort of negligence, but an action may be brought in both torts, as occurred in *Bolton* v *Stone* (1951).
- **Public nuisance** is defined in *Attorney General* v *PYA Quarries* (1957) as something that 'materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects' (i.e. the public or a section of the public). It is a crime, prosecuted by the Attorney General, but if an individual suffers 'special damage' there is a remedy in tort.
- **Statutory nuisances** are created by provisions dealing with noise, the environment, public health and the prevention of pollution. Local authorities can issue abatement notices to stop the nuisance. Some Acts of Parliament deal with specific problems that occur between neighbours, such as noise and high hedges (**Antisocial Behaviour Act 2003**).

Most public nuisance is now covered by statute, and in *R* v *Goldstein and Rimmington* (2005) the House of Lords said this meant common law public nuisance 'will be relatively rare'. However, private nuisance cases still abound, so we will focus on this area.

Unreasonableness

Private nuisance is most commonly described as unreasonable interference with a person's use or enjoyment of land. However, in *Hunter* v *Canary Wharf* (1997), Lord Lloyd said that there were three kinds of private nuisance:

- encroachment
- direct physical injury to a neighbour's land
- interference with a neighbour's enjoyment of land

An example of the first two is seen in *Perrin* v *Northamptonshire Borough Council* (2006). An oak tree, which was the subject of a tree preservation order by the local council, was encroaching onto, and causing damage to, someone's property. Despite the order, the court agreed that the owner of the property could fell the tree to avoid the nuisance.

The third type could be, for example, where the shade from a tree's branches prevents a neighbour sunbathing or being able to grow vegetables. This interferes with the enjoyment of the land. Interference alone is not enough though; it must be *unreasonable* interference. To decide what is unreasonable, the courts will look at, and balance, several factors.

Frequency and duration

A 'one-off' or temporary act is generally not enough to be considered unreasonable. A claim is only likely to succeed where something happens frequently and/or goes on for a long time. Thus in *Bolton* v *Stone* (1951), where a cricket ball went over a fence only 6 times in 35 years, it was not deemed to be a nuisance. However, in *Miller* v *Jackson* (1977), balls from a cricket ground landed in a woman's garden several times a year and she succeeded in an action in nuisance. Building works can be a nuisance, but as they are only temporary, an action is unlikely to succeed.

An apparent exception to the need for frequency is where something constitutes a continuing 'state of affairs'. In *Spicer* v *Smee* (1946), faulty wiring led to a fire that damaged a neighbour's property. Although this seemed to be a one-off incident, the claim in nuisance succeeded on the basis that the faulty wiring amounted to a continuing state of affairs.

Locality

Where the nuisance happens will be a relevant factor in assessing reasonableness. For example, in a rural area fumes are more likely to be considered an unreasonable interference than in an industrial area. Similarly, cockerels crowing in the morning are more likely to be considered an unreasonable interference in cities than in the countryside. In *Sturges* v *Bridgman* (1879), Thesiger LJ said: 'What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.' These are two areas in London: Belgrave Square is a quiet residential area, whereas Bermondsey is more industrial. This means that much will depend on the type of area. The remark is hardly politically correct, but the point is valid. Noise or smells in a quiet garden suburb may constitute a nuisance, whereas the same noise or smells elsewhere may not. It is perhaps better to say that what may be a nuisance in a residential area may not be in an industrial estate.

An important distinction was made between physical damage and discomfort in *St Helens Smelting Co.* v *Tipping* (1865). The claimant lived in an industrial area, and fumes from a smelting works caused damage to his garden plants. The action for an injunction succeeded. The House of Lords held that where material damage had been suffered, the locality was not relevant.

Usefulness

If something is for public benefit, it is less likely to be considered a nuisance — the 'utility' argument. However, other factors, such as locality, will be balanced against the usefulness. Thus in *Adams* v *Ursell* (1913), smells from a fish and chip shop in a residential area amounted to a nuisance and the court granted an injunction, even though the shop was in a working-class neighbourhood and supplied a public need.

Sensitivity

If the person or property harmed is particularly sensitive, an action is unlikely to succeed. In *Robinson* v *Kilvert* (1889), the claimant stored special paper on the ground floor of a building. In the cellar below, the defendant made cardboard boxes, which required the room to be kept warm in order to dry the glue used in the process. The heat from the cellar damaged the claimant's paper. However, normal paper would not have been affected, so the claim failed; if normal paper would have been affected, then the claim could succeed and include sensitive items. Thus in *McKinnon Industries* v *Walker* (1951), the claimant successfully claimed in respect of damage to some delicate orchids because it could be shown that normal plants were also damaged.

In *Network Rail Ltd* v *Morris* (2004), a rail company had installed a new signalling system and the owner of a nearby recording studio complained of electromagnetic interference. The Court of Appeal did not consider such interference should amount to nuisance but indicated that if no one else complained the claim would fail anyway on the sensitivity issue.

Malice

Malice and motive are rarely relevant in English law. Why someone does something is usually unimportant; it is whether what he or she does amounts to an illegal act that matters. However, if one person acts out of spite it could tip the balance when considering 'unreasonableness'.

In *Christie* v *Davey* (1893), two neighbours caused a nuisance to each other, one by giving piano lessons, the other by retaliating during these lessons by banging tin trays together and whistling. The latter was found liable in nuisance because his behaviour was deliberate and designed to disrupt the lessons. However, in *Hackney LBC* v *Rottenberg* (2007) a woman complained about loud chanting, shouting, wailing, clapping and other noise from a nearby synagogue, but the court held this did not amount to a nuisance. The fact that the disturbance was caused in the course of religious worship, and that the premises had planning permission for such use, did not exclude it being a nuisance but were relevant factors. In this case, the chanting and shouting were not done in malice but as part of a religious service.

Interference

As well as considering the above factors, there are some types of interference that are unlikely to amount to nuisance in any case:

- In *Hunter* v *Canary Wharf* (1997) (from which Lord Lloyd's definition derived), it was held that interference with television reception caused by a tower block was not actionable. The Court of Appeal decided that television reception was not a right, just as people do not have the right to a view.
- In *Network Rail Ltd* v *Morris* (see above), the claimant's action to protect his recording studio succeeded at first instance, but the Court of Appeal did not consider that electromagnetic interference should amount to nuisance and allowed the rail company's appeal. This seems to confirm the view in *Hunter* that the law of nuisance does not protect such amenities.

It is arguably strange that interference with television reception is not actionable, as this is something that affects people's everyday lives. It certainly affects the 'use and enjoyment' of a property.

Who can sue?

It was established in *Malone* v *Laskey* (1907) that a claim in nuisance is only available to those who have a proprietary (legal) interest in land or property. This would include an owner or tenant but not a lodger.

Arguments have arisen over whether members of a household who do not have a proprietary interest can claim in nuisance. In *Khorasandjian* v *Bush* (1993), the House of Lords adopted a sympathetic view of what amounted to an interest in land. The claimant was a 16-year-old girl who lived with her parents and therefore had no legal interest in the property. She was able to claim in nuisance when she received persistent phone calls and harassment from her ex-boyfriend. The decision was a way of providing a remedy when there appeared to be no alternative action, but this situation has now been dealt with by the **Protection from Harassment Act 1997**, so there is no longer a need for a common law solution. *Khorasandjian* has now been overruled by *Hunter* v *Canary Wharf* (1997), which reconfirmed *Malone*.

Once it has been established that the interference is unreasonable and an action in nuisance is possible, it is important to know whom it is possible to sue.

Who can be sued?

In most cases, the defendant is the creator of the nuisance; however, there may also be liability if someone knows about a nuisance that he or she did not personally create. This can include acts of a third party or natural hazards. The following three cases illustrate the courts' approach to this issue:

- In *Sedleigh-Denfield* v *O'Callaghan* (1940), the defendant was liable when a blocked pipe, laid along his property by the local authority, caused flooding of the claimant's land. Although he was not responsible for positioning the pipe, he knew of its existence and had used it, thus he had 'adopted' the nuisance.
- In *Tetley* v *Chitty* (1986), the claimant brought an action against the council in relation to disturbance from a go-kart track. A club, which leased the land from the council, ran the track. The council was found liable on the basis that the interference was a necessary consequence of operating this activity on the council's land. In effect, the council had implied knowledge of it. An injunction was granted to stop the activity.
- In *Goldman* v *Hargrave* (1967), lightning struck a tree on the defendant's land and it caught fire. He cut it down and left it to burn. Fire spread to the claimant's land when a strong wind rekindled it a few days later. The defendant was found liable because he knew about the risk and so had a duty to do something about it. The decision was much influenced by the case of *Sedleigh-Denfield* above.

In cases where the defendant has 'adopted', rather than 'created', the nuisance, the test for what is reasonable is subjective rather than objective, i.e. it is what this particular defendant should have done, not what the average person would do. In *Leakey* v *National Trust* (1980), due to natural causes, part of a mound on the Trust's property slid down a hill onto neighbouring land. It was held that the Trust was liable for the damage caused because it knew of the risk. Megaw LJ said the duty 'is to do that which is reasonable…having regard, among other things, where a serious expenditure of money is required to eliminate or reduce the danger, to his means'.

Foreseeability is also a key factor. In *Holbeck Hall Hotel* v *Scarborough Borough Council* (2001), a hotel collapsed due to erosion on neighbouring land owned by the council. The court held that liability would depend on the resources of the council and the expense of any remedial work. Also the destruction of the hotel was not foreseeable. The claim failed. In *Rees* v *Skerrett* (2001), the defendant knocked down his own property, exposing his neighbour's wall to the elements. Here, the damage to the neighbour's wall was foreseeable, and failure to take reasonable remedial action was actionable.

Defences and remedies

There is not enough room here to discuss defences and remedies fully, but these should also be considered when applying the law. In brief, there are two main defences to an action in nuisance:

- **statutory authority**, i.e. authorised by an Act of Parliament (*Allen* v *Gulf Oil*, 1981)
- **prescription**, where a nuisance has continued for 20 years without complaint (*Sturges* v *Bridgman*, 1879)

As regards remedies, there are three:

- **abatement** — a 'self-help' remedy to stop the nuisance (*Delaware Mansions Ltd* v *Westminster City Council*, 2001)
- **injunction** — a court order to stop the nuisance (*Shelfer* v *City of London Electric Lighting Co.*, 1895)
- **damages** — these may be appropriate if actual harm has occurred or an injunction is not appropriate (*Miller* v *Jackson*, 1977)

Questions

1. **In which case did the House of Lords indicate that common law public nuisance will be 'relatively rare'?**
2. **In *Hunter* v *Canary Wharf* (1997), what were the three types of private nuisance described by Lord Lloyd?**
3. **Give an example of 'encroachment'.**
4. **What rule of law was illustrated by *St Helens Smelting Co.* v *Tipping* (1865)?**
5. **Why was the claimant successful in *McKinnon Industries* v *Walker* (1951), despite the fact the orchids constituted 'sensitive use'?**
6. **Compare the decisions in *Christie* v *Davey* (1893) and *Hackney LBC* v *Rottenberg* (2007).**
7. **What legal difficulty was created by the decision in *Khorasandjian* v *Bush* (1993)?**
8. **Why are injunctions the usual remedy in private nuisance?**

Unit 4B: Law of tort

Vicarious liability

A-level Lawreview

Sally Russell, *A-level Law Review*, Vol. 2, No. 2

It is not surprising that many students find the topic of vicarious liability troublesome, as this area of law has produced some conflicting and controversial judgements.

What is vicarious liability?

Vicarious liability essentially means liability for someone else and it applies to both tort and criminal law. Most commonly, it applies in employment situations, where an employer is liable for the torts of an employee. This means that the employer, rather than the employee, can be sued or made criminally liable for the employee's actions. This article concentrates on tort liability.

Why is vicarious liability needed?

There are several arguments *for* making an employer liable for the actions of employees, the main one being economic. An employer is normally in a better position to pay compensation, not only having more money but also holding insurance. An argument *against* vicarious liability is that an employer will be liable even if not personally at fault. It is, in effect, a form of strict liability. On the other hand, it can be said to be fair because an employer has a certain amount of control over what an employee does.

What must be proved in a case of strict liability?

Before anyone can be liable, there has to be a tort, and the person committing the tort is called a tortfeasor. It is a common mistake for students to see a question concerning an employment situation and to discuss only vicarious liability and nothing more. However, the claimant will have to prove that the employee has committed a tort. This requires applying the rules for that particular tort, e.g. in negligence there will be no liability if the employee has reached the standard expected of the reasonable person. This will involve looking at the usual factors, such as degree of risk and cost of precautions.

For an employer to be liable, it must be shown:

- that the person who committed the tort was an employee (rather than an independent contractor)
- that the person who committed the tort was acting in the course of employment (rather than what the courts have referred to as 'on a frolic of his own')

The person who committed the tort was an employee

It is important to distinguish between an employee and an independent contractor for whom an employer is not liable. Where people are employed on a casual basis, or via an agency, it may not always be clear whether they are employees or contractors. The courts have produced various tests to help decide this issue. In *Ready Mixed Concrete* v *MPNI* (1968), the 'multiple', or 'composite', test was established. This looks at several factors to assess the economic reality of the situation, including:

- whether the work is done in return for a wage
- whether the employee agrees that the employer controls the work done
- who pays national insurance
- who supplies equipment
- who takes the financial risks

However, this test is not conclusive, merely a starting point. In *Hall* v *Lorimer* (1994), the Court of Appeal said no single test is absolute, and in *Dacas* v *Brooke Street Bureau* (2004), it was held that individual circumstances affect the employment status. In *Cable and Wireless* v *Muscat* (2006), the Court of Appeal confirmed *Dacas*, and said 'mutuality of obligations' (to do work/be paid) was an important factor, along with the amount of control the end-user has over the worker, but restated that all the circumstances should be considered, so each case will be decided on its own facts.

Where an employee is loaned to another employer, it may be hard to decide which employer to sue. Here, the control test may be most appropriate. In *Mersey Docks* v *Coggins and Griffith* (1947), the House of Lords said that where a crane driver and his crane had been lent to the harbour board, the original employer was liable when the driver ran someone over. It was this employer who controlled the method of performance (the way he drove the crane). An important development came in *Viasystems* v *Thermal Transfer* (2005). A flood was caused by the negligence of someone who was working for one company but who was under the supervision of an employee of another company. The Court of Appeal held, for the first time, that *both* employers should bear liability. Thus, in cases where the main question is one of control, both employers may be held sufficiently in control of the work done to share liability for the employee's negligence.

In *Hawley* v *Luminar Leisure* (2006), the Court of Appeal held that a nightclub was vicariously liable for a doorman, even though he was actually employed by another company. Applying the control test, it was found that the security firm provided the personnel, but the club had greater control over the work done. It was therefore vicariously liable for an assault by the doorman outside the club. The Court of Appeal considered, but distinguished, *Viasystems*, as here the original employer had no control at all over what the doorman did or how he did it, so there was no reason to impose dual liability.

These cases show that you need to look carefully at any given facts if dealing with a problem question. If there is an indication of two possible employers, then *Mersey Docks* can be used to show the original employer (the 'lender') may be liable, and *Hawley* to argue that the 'borrower' may be. It will depend on the amount of control exercised by the employer. Finally, *Viasystems* can support an argument that both employers may be liable and that the court may apportion liability.

The person who committed the tort was acting in the course of employment

Traditionally, acting 'in the course of employment' would include not only acts expressly authorised by an employer, but also authorised acts done in a wrongful way, even if specifically prohibited. A comparison of the following two cases illustrates this:

- *Limpus* v *London Omnibus* (1862): a bus driver was forbidden to race other buses but he did so and his employer was found liable for the resulting damage. This was a wrongful way (racing) of doing something authorised (driving).
- *Beard* v *LGOC* (1900): a conductor drove a bus and injured someone. Here, the employer was not liable because driving was not within the scope of his job as a conductor and therefore it was not authorised.

An employer may *avoid* liability if the employee is on what judges call 'a frolic of his own' and therefore acting entirely for his or her own purposes rather than for the benefit of his or her employer. For clear-cut 'frolic of his own' case examples, see *Hilton* v *Burton (Rhodes) Ltd* (1961) and *General Engineering Services Ltd* v *Kingston and Saint Andrew Corporation* (1989). The following comparison — though criticised as a 'fine distinction' — illustrates the point:

- *Twine* v *Bean's Express* (1946): a driver had been told not to give lifts and had done so. The employer was not liable to a hitchhiker for the driver's negligent driving, as it was outside the scope of employment and could be perceived as a 'frolic of his own'.
- *Rose* v *Plenty* (1976): despite there being a strict order not to carry children, the employer was liable for a boy's injuries incurred while on a milk float. Here, the boy was actually assisting in the deliveries and this brought it *within* the scope of employment. The boy's activity clearly benefited the employer, and this might also be seen to explain why liability was imposed in this case.

Therefore, an employer would be liable for any acts that were authorised in the sense that they were part of the employee's work. However, it is hard to reconcile *Twine* with many of the cases where vicarious liability *was* found, as the driver was negligent while doing what he was employed to do — driving. It is particularly at odds with a more recent approach.

The impact of *Lister*

The 'authorised acts' approach caused difficulty in *Lister* v *Hesley Hall Ltd* (2001). Here, unknown to the employer, a warden sexually abused boarders at a school for children with behavioural difficulties. The children sued the school. The Court of Appeal held that the assaults could not be seen as 'authorised acts', so the school was not liable. Allowing the appeal, the House of Lords used a different approach. Rather than asking whether the act was authorised, it concentrated on the closeness of the connection between the nature of the employment and the tort. Sexual abuse against pupils, committed by a warden of a boarding house, was sufficiently connected with the work he was employed to do to be within the course of his employment. The House of Lords overruled *Trotman* v *North Yorkshire CC* (1999), where the employers had been found not to be vicariously liable for a sexual assault by a teacher during a residential school trip.

The principle that comes from *Lister* is that the test for vicarious liability is now based on whether the tort has a 'close connection with the employment'. Lord Millet said it would be 'stretching language to breaking point' to describe the warden's actions as 'merely a wrongful

and unauthorised' method of performance. Many of the older cases would be included in this new definition, but the decision is not without its critics. Indeed, many writers on the law of tort would prefer to see the Lister test restricted to the imposition of liability for an employee's crimes. There are strong and conflicting arguments as to whether *Trotman* or *Lister* is to be preferred. Some writers, such as McBride, Bagshaw and Weir, argue that *Lister* has the impact of replacing the 'authorised acts' approach to establishing vicarious liability.

Other types of assault are treated similarly. In *Mattis* v *Pollock* (2003), a club doorman stabbed and seriously injured a man outside the club. The evidence was that the doorman had gone home to get the knife. The man claimed the club owner was vicariously liable. The trial judge referred to *Lister*, but felt that there was not a sufficiently close connection between the employment (as a doorman) and the later attack. The Court of Appeal disagreed, and said that as a doorman he was expected to use physical force in his work, and the stabbing was connected to an earlier argument in the club. The club was held vicariously liable.

It is useful to be aware of the academic debate surrounding the decision in *Lister*, though at this stage it is not clear whether the 'close connection' test will replace the traditional 'authorised acts' approach to establishing vicarious liability, or simply be restricted to cases where an employee has engaged in criminal conduct. As Mullis and Oliphant (2003) noted:

> Whatever 'test' is chosen, it is likely to remain a very difficult question in many cases whether conduct is or is not within the scope of employment. Much will depend in the end on whether in all the circumstances the court thinks the employer ought to be held liable.

Questions

1. **What reasons are provided in the article for vicarious liability?**
2. **What is the first thing a claimant must prove in any action for vicarious liability?**
3. **What factors can be considered in the 'multiple' or 'composite' test derived from *Ready Mixed Concrete* v *MPNI* (1968)?**
4. **What decision was made in *Cable and Wireless* v *Muscat* (2006)?**
5. **What important legal development was made in *Viasystems* v *Thermal Transfer* (2005)? Which previous case decision was effectively overruled?**
6. **Compare the decisions in *Limpus* v *London Omnibus* (1862) and *Beard* v *LGOC* (1900).**
7. **Why, despite the fact the milkman had disobeyed clear and strict orders, was the dairy held liable in *Rose* v *Plenty* (1976)?**
8. **What was the basis of the legal decision in *Lister* v *Hesley Hall Ltd* (2001)?**

Unit 4C: Concepts of law

Exploring law and morality

A-level Lawreview

Andrew Mitchell, *A-level Law Review*, Vol. 1, No. 1

Let me start this article with a confession. I admit to swearing occasionally, to reading books and watching films that might cause offence to others and to falling out with one of my neighbours. I really ought to know better and I do feel guilty about these things, but there is no law against any of them. These are all breaches of moral, or 'ought', rules and the worst I can anticipate is your disapproval.

However, some moral rules are so important to the protection of social norms and values that they have become part of the law. They no longer express what we *ought* not to do, but rather what we *shall* not do. In other words, these rules must be obeyed. So, if I kill, steal from, rob or inflict violence on another, I can expect to face a criminal penalty that will probably affect my liberty. Alternatively, if I enter into a contract and do not fulfil my promise, I can anticipate a civil lawsuit and the prospect of paying damages to the claimant.

The relationship between legal rules and moral rules

Legal and moral rules are similar in that they guide social conduct and behaviour, but the main point of difference is that only those rules with legal status lead to sanctions and remedies that the courts will enforce.

Salmond's model, which illustrates the overlap between law and morality, also suggests that there are some areas of law that appear unrelated to any moral rule, such as technical road traffic provisions, and, as we have seen, some examples of immoral conduct that are not considered illegal. Lon Fuller, a US jurist, argued that the law would overlap with the morality of duty, but not with the morality of aspiration, a point aptly demonstrated by Lord Atkin's words in *Donoghue* v *Stevenson* (1932): 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour.'

The overlap between law and morality is subject to expansion or contraction, owing to changes in social acceptability. The law might prohibit activities, on the one hand, which fall out of step with modern morality, such as banning fox-hunting in the **Hunting Act 2004**. On the other hand, however, the law might permit some socially tolerated activities that were once strongly prohibited, such as homosexual practices between consenting adults.

The law can also stimulate changes to morality. For example, attitudes toward drink-drivers have hardened as the law has developed.

Sometimes moral rules come into conflict with legal rules. For example, a person of deep religious conviction might be prepared to break the law for a higher moral cause. In these circumstances, the 'shall' rule prevails over the 'ought'. Thus, in *Hammond* v *DPP* (2004), an evangelical Christian preacher was found to have breached criminal public order legislation when his crusade against immorality provoked disorder in a public street.

The legal enforcement of moral values

The above discussion brings us to another important question: to what extent should the law seek to enforce certain moral values?

It might be argued that in a multicultural, multi-faith and pluralistic modern society, where moral agreement might be lacking across a range of issues, it is not the law's place to enforce moral values. This is a powerful point, associated with positivist scholars such as H. L. A. Hart, who believed that, over and above the necessary public rules for cooperative living, the law should take a libertarian stance. Citizens should be allowed the opportunity to exercise their own moral choices, provided that these do not have harmful consequences for others in the community.

However, natural law scholars, for whom the relationship between law and morality is vital, might disagree. Lord Devlin, for example, took issue with Hart's analysis. He believed that an overlap between law and morality helped to promote and preserve the fabric and moral welfare of society. The courts have reflected Devlin's authoritarian view to justify legal interference in unusual, but consensual, private sexual practices (see, for example, the cases of *Brown*, 1994 and *Emmett*, 1999).

The UK's **Human Rights Act 1998**, incorporating the European Convention on Human Rights (ECHR), balances the desire of some natural law theorists for the protection of morality through a 'rights culture', with a more libertarian approach to private freedoms as enshrined, for example, in Article 8 of the ECHR. In matters of sexual morality, while the European Court of Human Rights has upheld state interference with dangerous practices on grounds of 'health or morals' under Article 8, as in the unsuccessful appeal by the defendants in *Laskey, Brown and Jaggard* v *United Kingdom* (1995), it has also made some significant libertarian decisions relating to private, consensual, homosexual practices (see, for example, *ADT* v *UK*, 2000, and *B* v *UK*, 2004). The ECHR's respect for private freedoms arguably gives an impetus to libertarian claims at the expense of the authoritarian view of law and morality.

However, sexual morality is not the only contentious area in the law and morality debate. Others include: moral paternalism and the extension of the 'nanny state' (for example, protective health and safety laws and prevention/limitation of smoking and other vices); the need to resolve complex legal and ethical dilemmas (such as whether to separate conjoined twins in *Re A (Children)*, 2000); the increasing significance of the relationship between law and religion; and the legal regulation of developing scientific and technological advances (such as cloning, GM crops and medical research).

The law cannot please all of the people all of the time. While key areas of civil and criminal law are rooted in morality, there are other aspects of the legal framework that appear unrelated. In seeking to balance public order with private freedoms, the law is informed by a range of moral perspectives but, ultimately, treads its own path via Parliament and the courts.

Questions

1 What behaviour is identified in the article as being in breach of moral but not legal rules?

2 By what terms does the author refer to (a) moral rules and (b) legal rules? Explain why these terms are appropriate.

3 How may an overlap of law and morality arise?

4 What view was expressed by (a) Hart and (b) Devlin as to whether the law should seek to enforce certain moral values?

5 Look up the cases of *Emmett* (1999) and *ADT* v *UK* (2000). Why do you think the Court of Appeal followed the authoritarian approach of Lord Devlin in *Emmett* (1999), and the European Court of Human Rights followed the libertarian approach of H. L. A. Hart in *ADT* v *UK* (2000)?

6 The author concludes: 'The law cannot please all of the people all of the time.' Explain the justification for this conclusion.

Unit 4C: Concepts of law

Judicial law-making in the House of Lords

A-level Lawreview

Giles Bayliss, *A-level Law Review*, Vol. 4, No. 2

Law needs to adapt and develop, in order to meet changes in society. The task of law-making is largely carried out by Parliament, but judges also play a key role in shaping the law.

In the nineteenth century, judges were not open in acknowledging their creative role and denied that they made law. In *Willis* v *Baddeley* (1892), Lord Esher declared: 'There is no such thing as judge-made law, for the judges do not make law.' The prevailing view was that judges simply *declared* the law by applying legal principles to determine the outcome of a case. This is known as the 'declaratory theory', according to which judges had no real discretion in deciding the cases before them. It reflected the concern of judges (then and now) that they should not be seen to undermine the role of Parliament in making law.

By the second half of the twentieth century, judges were more willing to accept that they had a degree of choice in shaping and developing the law. In 1972, Lord Reid dismissed the notion that judges did not make law as a 'fairy tale':

> Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him a knowledge of the magic words 'Open Sesame'. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more.

The very fact that many cases are appealed is an indication that higher courts can reach different decisions from those lower in the hierarchy and have the capacity to make law. The most important court in terms of judicial creativity is the House of Lords (soon to become the Supreme Court). It is the highest appellate court in the English legal system and hears about 50 cases a year, all of which must raise points of law of public importance. There are two key ways in which the Lords of Appeal in Ordinary (referred to as 'Law Lords' in this article) influence the development of the law: through the interpretation of statutes and through the system of precedent.

Statutory interpretation

It is estimated that 75% of cases in the House of Lords concern statutory interpretation. When judges interpret statutes, there may be more than one possible interpretation, evidenced by the number of dissenting judgements in the House of Lords and the differing conclusions that may be reached in the same case by the Court of Appeal and House of Lords. It is this element of choice that gives judges the opportunity to influence the law. This can be seen in *Coltman* v

Bibby Tankers (1988), where the House of Lords, by a majority, ruled that the term 'equipment' in the **Employers' Liability (Defective Equipment) Act 1969** could include the ship the claimants were working on. Another familiar example is the case of *R* v *Ireland* (1998), where the Law Lords developed the law by ruling that the term 'grievous bodily harm' in the **Offences Against the Person Act 1861** could include psychiatric injury.

A more radical example was the decision in *Fitzpatrick* v *Sterling Housing Association* (1999), where the House of Lords by a 3:2 majority ruled that a same-sex partner was a member of the family for the purpose of the **Rent Act 1977** and could thereby take over the tenancy of a deceased partner. This case illustrates the role that judges play in interpreting law to reflect contemporary notions of what is fair and just and also how judges disagree over interpretation. It is unlikely the court would have reached such a decision 15 or 20 years earlier and, interestingly, the Court of Appeal and the minority in the House of Lords took the view that the term could *not* be interpreted to include a same-sex couple.

A case of similar social significance, which also illustrates that judges do not always agree on the scope and extent of their law-making power, is *Royal College of Nursing* v *DHSS* (1981). This case concerned the meaning of the phrase 'terminated by a registered medical practitioner' in the **Abortion Act 1967**. The House of Lords by a majority of 3:2 adopted a purposive approach and looked at the policy behind the passage of the 1967 Act. They ruled the term capable of encompassing terminations carried out by nurses.

Precedent and the common law

The second way judges develop the law is through the system of precedent. In the absence of significant legislation, some areas of law have developed almost entirely from the decisions of judges. Much of tort and contract law is judge made, for example (in tort) the ever-widening scope of the duty of care in negligence. In the field of criminal law, the general principles (e.g. rules of causation) and most defences are defined by common law rather than by statute.

Under the system of precedent, the law can develop through overruling, distinguishing, applying existing rules to new situations and ruling on an entirely new issue.

Since the Practice Statement 1966, the Law Lords have been able to overturn their own previous decisions, although they have been conservative in their use of this power. One of the most significant criminal cases in recent years was *R* v *G* (2003), where the House of Lords overruled the earlier decision in *Caldwell* (1982) on the meaning of recklessness in criminal damage. It held that the earlier decision was wrongly decided and returned to a subjective test.

A clear example of judicial law-making is the case of *R* v *R* (1991), where the issue of rape within marriage came before the House of Lords. For centuries, it had been accepted that an exemption applied within marriage and this had not been altered by legislation (see *R* v *Miller*, 1954). The House of Lords ruled that the exemption was no longer justifiable and was completely at odds with modern society. Parliament had failed to legislate on the issue and the Law Lords were satisfied that it was appropriate for them to overturn an offensive and outdated rule. Lord Keith famously stated that 'the common law is capable of evolving in the light of changing social, economic and cultural developments'. For him, the proposition that by getting married a woman gives irrevocable consent to sexual intercourse with her husband was something that no reasonable person could accept in modern times.

Lord Goff made a similar point in *Kleinwort* v *Lincoln Council* (1988):

> The common law is a living system of law, reacting to new events and new ideas, and so is capable of providing citizens of this country with a system of practical justice relevant to the times in which they live.

In the same case, Lord Browne-Wilkinson said:

> In truth, judges make and change the law. The whole of the common law is judge made and only by judicial change in the law is the common law kept relevant in a changing world.

Judges, however, are conscious of there being a limit to what they can legitimately rule upon and those areas that should be left to Parliament, although they do not always agree on where the limit lies. In *Judging Judges* (1988), Professor Simon Lee identifies three key areas of disagreement:

- what the existing law actually is
- the limits of judges' legitimate law-making
- the direction in which the law should develop

The difficulty in drawing a line was recognised by Lord Browne-Wilkinson in *Airedale NHS Trust* v *Bland* (1993), which raised difficult legal and moral questions about the withdrawal of medical treatment to a person in a persistent vegetative state:

> Should judges seek to develop new law to meet a wholly new situation? Or is this a matter which lies outside the area of legitimate development of the law by judges and requires society, through the democratic expression of its view in Parliament, to reach its decision on the underlying moral and practical problems and then reflect those in the legislation.

Despite the difficulty of the case, the House of Lords concluded that it would be lawful to withdraw treatment, with the consequence that Tony Bland would die.

In some cases, the Law Lords were less willing to develop the law. In *Clegg* (1995), the House of Lords was invited to develop the law on self-defence. It was argued that policemen and soldiers who kill in self-defence using excessive force, and are thereby unable to rely on the defence, should be treated as a special category — they should be convicted of manslaughter rather than murder to avoid the mandatory life sentence. The Law Lords felt the issue was one that could only be dealt with by Parliament. Such a radical departure from existing criminal law was beyond what judges could legitimately rule upon. Lord Lloyd felt that this was clearly the type of issue best left to Parliament:

> I am not averse to judges developing the law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved. But in the present case I am in no doubt that your Lordships should abstain from law-making. The reduction from what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a matter for decision by the legislature (Parliament), and not by this House in its judicial capacity.

A similar reluctance can be seen in *C (a minor)* v *DPP* (1996). The House of Lords was invited to overturn the *doli incapax* rule, which dated back hundreds of years and required the prosecution to prove, in addition to the offence, that a child (between the ages of 10 and 14) knew the difference between right and wrong. The House of Lords was unwilling to overturn such a long-established and important part of the criminal law. This was a question for Parliament, which subsequently abolished the rule under s.34 of the **Crime and Disorder Act 1998**.

The House of Lords decisions in *R* v *Brown* (1993) and *Gillick* v *West Norfolk and Wisbech Area Health Authority* (1986) illustrate just how deeply the Law Lords can be divided on an issue. In *Brown*, the court was divided (3:2) on whether the infliction of harm on a consenting adult for sexual purposes was an offence under existing law. Lord Musthill (dissenting) concluded that the activities taking place were not an offence under the existing law and that it was not the place of the court to make them one. These were issues for Parliament and not the judiciary:

> I regard this task as one which the courts are not suited to perform, and which should be carried out, if at all, by Parliament after a thorough review of all medical, social, moral and political issues.

Nevertheless, the majority disagreed and decided that such behaviour was indeed covered by existing law.

In *Gillick*, the Law Lords were similarly divided (3:2) on the issue of whether contraceptive treatment and advice could be given to girls under 16 without parental consent. The majority were clearly influenced by public policy in preventing unwanted pregnancies and were persuaded that the treatment was dealing with the consequences of behaviour that was already occurring.

Conclusion

The 12 judges in the House of Lords stand at the apex of our legal system and as such have an unparalleled capacity to influence the development of the law. This, however, does not mean that they have an unfettered discretion and can steer the law in any direction they choose. Judges are constrained by the need to respect the will of Parliament, where this is clearly expressed, and they must also operate within the framework of the rules of precedent. However, the changing nature of society will continue to generate new legal issues, which, in the absence of unambiguous legislation from Parliament, will have to be determined by judges.

Unit 4C: Concepts of law

Questions

1. **Which topics studied in Unit 1 are particularly relevant to the judicial creativity topic in Unit 4?**
2. **What court is identified as being the most important in terms of judicial creativity? Why is this? Do you think it can be argued that another court offers more opportunity for judicial law-making?**
3. **What rule of statutory interpretation was used in *Coltman* v *Bibby Tankers* (1988), *Fitzpatrick* v *Sterling Housing Association* (1999) and *Royal College of Nursing* v *DHSS* (1981)? Why do you think it is appropriate for judges to use this rule to develop the law?**
4. **For what reasons was the House of Lords satisfied that a change in the law was appropriate in *R* v *R* (1991)?**
5. **Why was the House of Lords reluctant to develop the law in *R* v *Clegg* (1995) and *C (a minor)* v *DPP* (1996)?**
6. **It can be concluded from the article that most judges agree with the view expressed by Lord Reid in 1972, rather than that expressed by Lord Esher in *Willis* v *Baddeley* (1892). What do the cases explored in this article reveal the judges not to be in agreement on?**

Unit 4C: Concepts of law

Jury selection: one step forwards, two steps back?

A-level Lawreview

Andrew Mitchell, *A-level Law Review*, Vol. 4, No. 1

This article was inspired by a question that arose in one of my classes. Amira had been trying to make sense of the statutory rules on jury selection and then came across recent cases that appeared, at first glance, to contradict them, prompting her to ask: 'So can police officers actually undertake jury service?' As this article explains, the answer is rather less clear-cut than the relevant legislation — the **Criminal Justice Act 2003** — suggests. In order to understand the issue, however, we need first to examine how and why the rules on jury selection changed in the 2003 Act.

Jury selection prior to the 2003 Act

The **Juries Act 1974** set out the qualifications for jury service in criminal cases (Crown Court) and civil cases (High Court and County Court). Prior to its amendment by the 2003 Act, the selection rules identified three categories of people who would not have to serve on a jury:

- those **disqualified** by prior conduct (such as those who had served custodial sentences)
- those **ineligible** by occupation (such as judges, professional lawyers, police officers and other members of the criminal justice system) or owing to mental illness
- those **excused as of right** by virtue of their public service (such as MPs, armed forces personnel and medical professionals)

These categories came under scrutiny following the Auld Review of Criminal Justice (2001), which recommended widening the pool of potential jurors significantly and limiting the exceptions to those disqualified by conduct or mental illness. The government responded with its 2002 White Paper 'Justice for All', which drew attention to research indicating that 'less than half of those summoned for jury service actually serve' and found that 38% of those summoned were excused, 15% did not attend and '13% were ineligible, disqualified or excused by right'. It therefore proposed reforms to jury selection (at p. 123: see **www.cps.gov.uk/Publications/docs/jfawhitepaper.pdf**) to cut down on the number of exceptions in the 1974 Act:

> We expect all who can to play their part in the Criminal Justice System by serving on juries when summoned… This reform will ensure that many individuals previously ruled ineligible for jury service will have the opportunity to fulfil this civic commitment.

The pressure group Justice surveyed the arguments for and against reform in a research paper prepared in 2002 (see p. 38 of **www.parliament.uk/commons/lib/research/rp2002/rp02-073.pdf**) and found that while these proposals had been 'generally welcomed', the Bar Council had voiced clear reservations:

A police officer or a judge serving upon a jury will inevitably carry undue weight in the deliberations of the jury in the privacy of the jury room.

Current rules on jury selection in the 2003 Act

The **Criminal Justice Act 2003** reforms are contained in s.321, in conjunction with schedule 33, and they amend s.1 (and schedule 1) of the **Juries Act 1974**. The jury selection rules now state that all registered electors (found on the electoral roll) between the ages of 18 and 70, who have been resident in the UK for 5 years, can be summoned for jury service by the Central Jury Summoning Bureau (CJSB) unless they:

- have a criminal record, or
- suffer from a mental illness

The key point here is that the old exceptions do not apply, and therefore judges, police officers and other previously exempted 'middle-class' professionals have a duty to carry out the public service task of jury service.

The Lord Chancellor provided guidance, under s.9 of the **Juries Act 1974**, on situations where individuals may defer a period of jury service (for example, a student may ask for a deferral if he or she is summoned to attend jury service during his or her A-level exam period), or where an excusal might be necessary in the circumstances (such as long-term illness). In 2005, the Lord Chief Justice also published a Practice Direction for judges on how to deal 'sensitively' with individuals who found that undertaking jury service might compromise their other 'public service' commitments.

The two remaining exceptions, stated broadly above, are relatively complex in content. The 'criminal record' exception is described loosely, in that it actually applies to a range of specified circumstances:

- those on bail in criminal proceedings
- those with 'unspent convictions' who have received custodial sentences of 5 years or more
- those detained following a court-martial
- those who, in the last 10 years, have been subject to a custodial sentence, a suspended sentence or a specified community sentence

The 'mental illness' exception relates to those defined, in the statute, as 'mentally disordered', either by reference to criteria in the **Mental Health Act 1983** or by virtue of the medical treatment that they are undergoing. A 'mentally disordered person' is defined as having a mental illness, psychopathic disorder or mental handicap.

Why are the new rules an issue?

On the one hand, the government may point to the success of its reforms in generating a larger pool of potential jurors. *The Times* newspaper (law supplement, 24 July 2007) reported on research by Professor Cheryl Thomas, for example, showing that the number of people participating in jury service had risen, with the middle classes — perceived as the most likely to dodge jury service — being the largest participating group of citizens.

However, in solving one problem, the government may also have raised another: the perception of bias when police officers, prosecuting lawyers and other members of the criminal justice system sit on juries. Lord Woolf, when Lord Chief Justice, observed that any 'actual, or apparent, bias' would be sufficient to breach the defendant's right to a fair trial, as protected by Article 6 of the European Convention on Human Rights (ECHR), incorporated into English law by the **Human Rights Act 1998**. Moreover, the principle of 'natural justice' (that justice should not only *be* done, but *be seen to be* done) was famously expressed in English law long before the incorporation of the ECHR, by Lord Hewart, Lord Chief Justice, in *R* v *Sussex Justices ex parte McCarthy* (1924).

There are additional concerns about judges facing more senior colleagues on the jury. Matthew Scott, a barrister quoted in the aforementioned *Times* article, provides just such a scenario:

> What if the judge is a 'wet behind the ears' young Recorder and the jury contains a Lord Justice of Appeal who may have delivered the leading judgement on the point of law in issue?

There is also potential for other jurors to be swayed by judges, academic lawyers and MPs in the jury room. So have the Bar Council's misgivings about the **Criminal Justice Act 2003** been proved right in practice?

Case law following the 2003 Act reforms

The senior appeal courts have had two major opportunities to examine the implications of the new jury selection rules: *R* v *Abdroikov (and joined cases)* (2007), heard by the House of Lords, and *R* v *Khan (and joined cases)* (2008), heard by the Court of Appeal (Criminal Division), with further appeals pending.

In *Abdroikov*, three defendants, who had been separately convicted of attempted murder, assault occasioning actual bodily harm and rape, sought to challenge their convictions on the basis that the juries that convicted them had been biased, in breach of Article 6 ECHR and contrary to 'natural justice'. Two of the defendants raised the challenge of bias because serving police officers had been on their respective juries; the third, because a solicitor working for the Crown Prosecution Service had been a jury member during his trial.

The House of Lords, led by Lord Bingham (with the support of Lord Mance and Lady Hale), found that the presence of these criminal justice professionals could, in certain circumstances, give an appearance of bias contrary to the right to a fair trial, with the impact that convictions might have to be quashed. Indeed, the House of Lords allowed two appeals and quashed the convictions accordingly. Lord Bingham pointed out that the appeals related to apparent rather than actual bias ('the second part of Lord Hewart's aphorism'), identifying a 'possibility of bias, possibly unconscious, which inevitably flowed from the presence on a jury of persons professionally committed to one side of an adversarial trial process'. However, if the case did not turn

on a matter of police evidence, a challenge based on police bias would be unlikely to succeed, and the remaining appeal was in fact dismissed for this reason.

The minority judges in the House of Lords (Lord Rodger and Lord Carswell) argued that all the appeals should be dismissed, echoing to a large extent the powerful arguments in the Court of Appeal advanced by the Lord Chief Justice (then Lord Woolf). These included that:

- having been randomly selected, police officers and lawyers served in their capacity as citizens rather than as criminal justice professionals
- there were procedural safeguards in the system (the jury oath and directions from the judge and court staff)
- individuals would find it difficult, in practice, to dominate a panel comprising 11 other members

They concluded that a 'fair-minded and informed observer' would not identify a real possibility of bias in these circumstances. Lord Rodger commented, in his judgement, that:

> …the decision to allow two of the appeals will drive a coach and horses through Parliament's legislation and will go far to reverse its reform of the law, even though the statutory provisions themselves are not said to be incompatible with Convention [ECHR] rights.

Professor Michael Zander QC agreed that the decision seemed to be at loggerheads with the thrust of parliamentary law, in a critical response to the decision published in the *New Law Journal* (2007, Vol. 157, p. 1530).

More recently in *Khan*, the Court of Appeal (Criminal Division), led by the current Lord Chief Justice (Lord Phillips), examined appeals against conviction by six individuals on the grounds that jurors with occupations in the criminal justice system — here a serving police officer, two prison officers and a Crown Prosecution Service employee — raised the possibility of bias. The Court of Appeal dismissed the appeals, following the guidance provided by the majority of the House of Lords in *Abdroikov*: 'if the police evidence was not challenged or did not form an important part of the prosecution case', it was unlikely that the presence of a juror employed within the criminal justice system would raise the possibility of bias.

However, as a matter of practice, the Lord Chief Justice requested in his judgement that attention be given to one area without delay: that trial judges be made aware of criminal justice professionals on juries from the outset, with this information being recorded by those summoned at the earliest opportunity. He requested that the Crown Prosecution Service and the police, prison and other relevant authorities give consideration to the issues raised in these cases, so that they can develop their own directions for staff.

Conclusion

The government, having steered its criminal justice legislation on jury selection through a legitimate, democratically elected Parliament, must be pleased to see that its reforms have improved the levels of public participation in jury service. However, does it regret ignoring concerns, expressed at the time, about the implications for justice?

Unit 4C: Concepts of law

In answer to Amira's question, posed at the outset, it is clear that police officers and other criminal justice professionals *can* carry out jury service under the current **Criminal Justice Act 2003** rules, but the House of Lords has raised serious concerns, in *Abdroikov*, as to whether this position will continue to attract appeals against conviction. Naturally sensitive to the damage that can be done when Parliament and the courts appear to be on a collision course, and alert to maintaining confidence in the administration of justice, the Court of Appeal's decision in *Khan* provides some practical damage limitation. If there might be a hint of juror bias in a case, the Court of Appeal is effectively saying that it should be highlighted at the outset in order to avoid any subsequent appeals. If this does not resolve the concerns, jury selection might once again become an issue for Parliament in the future.

Questions

1. **How did the Criminal Justice Act 2003 change the rules on jury selection?**
2. **How should the rules under the 2003 Act ensure that justice is achieved in criminal trials?**
3. **How might the rules under the 2003 Act prevent the achievement of justice in criminal trials?**
4. **In *R* v *Abdroikov (and joined cases)* (2007), why did the Court of Appeal dismiss all of the appeals? In what way did the Court of Appeal disagree with the reservations expressed by the Bar Council in 2002?**
5. **In *R* v *Abdroikov (and joined cases)* (2007), why did the House of Lords allow two of the appeals?**
6. **Following the House of Lords ruling in *R* v *Abdroikov (and joined cases)* (2007), and the ruling of the Court of Appeal in *R* v *Khan (and joined cases)* (2008), in what circumstances will it be possible to challenge the presence of a juror employed within the criminal justice system?**
7. **What theory/theories of justice are potentially not met by the rules under the 2003 Act?**

Note that articles with a focus on other units of the specification may sometimes be relevant to the synoptic concepts unit.