UNIVERSITY OF PORTSMOUTH BUSINESS SCHOOL

BUSINESS & EMPLOYMENT LAW

(U21764 & U24401)

Lecture Notes

2018

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BUSINESS & EMPLOYMENT LAW

AUTUMN TEACHING BLOCK 2018

Week	Week beginning	Lecture	Seminar
1	24 September	Introduction to the unit Classification & sources of law	What is law?
2	1 October	Domestic legislation and European law	Classification and sources of law
3	8 October	Case law and judicial precedent How to read and understand cases	Legislation and statutory interpretation
4	15 October	Introduction to contract law Contract formation	Case law and judicial precedent How to read and understand cases
5	22 October	Contractual terms	Contract formation
6	**29 October**	**Consolidation week**	**Consolidation week**
7	5 November	Controls on exemption clauses and unfair terms	Contractual terms
8	12 November	Misrepresentation	Controls on exemption clauses and unfair terms
9	19 November	Discharging a contract Remedies for breach of contract	Misrepresentation
10	26 November	Introduction to torts and the law of negligence part 1	Discharging a contract Remedies for breach of contract
11	3 December	Negligence part 2	Introduction to torts and the law of negligence part I
12	10 December	Vicarious liability, defences and remedies	Negligence part II

FIRST ASSESSMENT – 9th January 2019 at 1500

WEEK ONE

Classification and Sources of Law

CONTENT OF THIS LECTURE

- Introduction to the unit
- What is law?
- Classification of law
- Sources of law
- Overview of the Courts System

Introduction to this unit

To help you throughout the year don't forget these resources:

1 Lecture notes - you need to supplement these with your own notes, as they only give an overview of a topic

2 University Library

3 Moodle where you will find:-

a. the weekly seminar questions

b. Unit Handbook

c. lots of other useful info to expand your knowledge of the law and how the unit is run

4 Lecturer and seminar tutor

5 Core text

6 Unit handbook, this is on Moodle and has lots of useful info about the unit, you will need to refer to it throughout the year

Preparation for seminars

Seminars are most important and you should prepare for them properly and attend each week.

Evidence shows a clear link between those students who do not attend seminars and those who do badly and fail coursework and exams

To ensure this does not happen to you make sure you:

- **Read the pages of the core text indicated on the seminar sheet <u>before</u> the seminar**
- **Identify what words you will need to understand in order to answer the questions on the seminar sheet.**
- **Prepare answers to the questions on the seminar sheets**
- **After the class, engage in some further reading as listed on your seminar sheets**
- **Ask your seminar tutor to go over any points you are not certain about, they are paid to help you learn!**

WHY STUDY LAW?

<u>It affects everyone</u> - we should all know a little about the legal system of the country in which we live and work. How are laws made? What is the role of judges? Brexit, what is likely to happen to our laws once we leave Europe?

<u>Consumer protection</u> - understand your rights when you enter into contracts and what you can do if you are not happy with the service or goods you have purchased.

<u>Identify problem situations when you get into the business world</u> - depending on where you end up working, you will come across legal problems in a variety of situations

What is Law?

A set of rules recognised by society as being binding on all its citizens. This set of rules can be divided into different groups, we call this classification of law

Classification of Law

Our laws can be divided into 2 groups:

Public laws and Civil laws

Public Law - concerns laws that relate to powers possessed by State bodies and governs the relationship between these bodies. Here are some examples:

- Human Rights – concerns rights that individuals can hold against the State. eg the right to life right to liberty, right to a fair trial.

- Administrative Law – laws that permit individual citizens to hold the State to account for its public duties. eg limits the powers of public authorities e.g. Scottish parliament, Portsmouth City Council.

- Criminal Law – laws which govern behaviour of citizens which the State wishes to prohibit or regulate eg murder, stealing, consumption of illegal drugs

Civil Law - concerns relationships between individuals. Here are some examples:

- Family Law – law governing relationships between husband & wife, adopting children etc.

- Company Law – deals with relationships between companies or between companies and individuals eg Marks & Spencers altering the rights its shareholders have to decide its directors pay.

- Contract law – this includes buying goods, employment law, having your car repaired

Why bother with the public law/civil law distinction?

There is an **important practical distinction** between public law and civil law.

Civil Law - seen as matters for individuals themselves to regulate without interference from the State (the State simply provides the mechanism for deciding the issues and enforcing the decision eg a court room and a judge). This means the parties are encouraged to come to their own solution.

The primary purpose of the civil law is provide rules by which individual can govern their own relationships. For example in a contact the parties reach their own agreement.

Civil cases are brought to assert the claimant's right (e.g. a purchaser's right to compensation if sold faulty goods by a seller) to obtain compensation (money) from the defendant seller.

How to talk the talk

Civil cases are written in the form ***Black v White*** (pronounced Black **and** White).

Today ***Black*** would be called the **claimant**; ***White*** the **defendant.**

Black is bring a case to court complaining about something **White** has /has not done which has caused **Black** some kind of harm eg **Black** bought faulty goods from **White** which have injured **Black**

Public Law - seen as issues relating to the interest of the State and general public, and as such are to be protected and prosecuted by the State. This means that, if for example in criminal law if a crime is committed, the State can prosecute regardless of the feelings of the victim.

Take criminal law for example. Criminal law's primary purpose is to punish those who break laws designed to protect society. The state brings the **prosecution** and is called the **prosecutor**. The prosecution is brought against a **defendant** (the alleged criminal).

A criminal is prosecuted by the State at a trial in a criminal court.

In law books criminal prosecutions (called 'cases' in legal speak) are identified like this:

R v Burton

R represents the head of State (the monarch, the Crown) using the Latin R (Rex/Regina)
V signifies against
Burton is the alleged criminal who is being prosecuted

How to talk the talk

For example if I was prosecuted, the case would be referred to as **R v Burton**

This is pronounced in one of the following ways:

the Crown against Burton; or
the Queen (King) against Burton, or
Regina (Rex) against Burton

Criminal prosecutions (trials) take place in either the Magistrates' Court or the Crown Court.

Comparison between civil law and criminal law

Civil Law	Criminal Law
Disputes between persons	**Offences** committed by alleged criminal
Action taken by the claimant	Action taken by the State
The action is first heard either in the County Court or the High Court	The trial of the defendant is heard in either the Magistrates Court or the Crown Court
Case cited by the names of the parties in the dispute Claimant's name v Defendant's name **Black v White**	Case is usually cited R v Defendant's name **R V Terry**
A claimant **sues** a defendant	The State **prosecutes** a defendant
The claimant must prove his case on the balance of probabilities	The State must prove the defendant is guilty beyond all reasonable doubt
Judgment will be entered for the claimant where the defendant is found to be **liable**	A defendant must be convicted if he is found guilty and acquitted if found not guilty
The commonest remedy for a successful claimant is damages (financial compensation)	A guilty defendant is sentenced to the prescribed punishment
In an appeal the person bringing the appeal is called the appellant and the other party is called the respondent	In an appeal the person bringing the appeal is called the appellant and the other party is called the respondent
The purpose of a civil action is to provide a remedy for the civil wrong and is not to punish the person who loses the case	The purpose of a criminal case is to punish the defendant if found guilty such as imprisonment and fines

SOURCES OF LAW

- Legislation
- Case law
- European Union Law
- European Convention of Human Rights

Legislation and case law are created within the UK and are sometimes referred to as domestic law

1. Legislation

Primary legislation = Acts of Parliament/ statutes made by Parliament

e.g. **The Sale of Goods Act 1979 Misuse of Drugs Act 1970 Consumer Protections Act 2015**

Secondary legislation (or delegated legislation) can take the form of regulations, rules or orders, or bye-laws.

e.g.Working Time Regulations 1998 (SI 1998/1833) Agency Workers Regulations 2010(SI 2010/93)

We will look at how both types of legislation are made next week.

2. Case law

Today most of the law in England and Wales derives from legislation. However, another very important source of law is made by some of our judges. This is called case-law or common law. Judges make law in two ways:

(i) **Interpreting statutes**

Legislation may not be particularly clear and precise so judges have the role of interpreting legislation to give effect to the intention of Parliament.

(ii) **Developing common law**

Some areas of law e.g. the law of contract and negligence, which we will be studying on this unit, have been left alone by Parliament so judges are able to develop the law in these areas through their decisions

3. European Union Law

The UK joined the European Union (formerly known as the European Economic Community) in 1973. In order to join, the UK had to pass the European Communities Act 1972 under which the UK agreed to apply EU law in UK courts.

The 1972 Act stated that in the event of any conflict between EU law and UK law, the EU law would take precedence.

The main impact of European Union law is in the areas of trade, industry, employment and the provision of financial services.

Until the UK formally leaves, EU law remains a major source of law upheld in our courts

4. European Convention on Human Rights

Its full tile is:

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

It was incorporated into UK law by Human Rights Act 1998.

It has nothing to do with the European Union.

It is an agreement between those 47 countries who have signed up to it that they will uphold and respect certain human rights such as the right to liberty, freedom of expression, the right to family life and the right to a fair trial.

All UK laws must be interpreted to give effect to it.

THE COURT SYSTEM IN ENGLAND & WALES

There are many courts in England and Wales. They were divided into two types:

criminal courts;

and

civil courts.

A criminal case will take place in a criminal court whereas a civil case will be heard in a civil court. Both criminal and civil courts have their own **hierarchy** and decisions made by judges in higher courts can overrule decisions made by judges in lower courts.

Decisions made by judges in higher courts are **BINDING** on judges in lower courts

It is vital to understand the position of courts in their hierarchies. Take time to study the diagrams and explanation of the hierarchies in the core text.

The court in which a case starts (where the trial occurs) is called a **court of first instance or inferior court. They are found at the bottom of the hierarchies**.

If there is an appeal after a trial in the court of first instance the appeal is heard by the appropriate criminal / civil appeal court higher up in the hierarchy. In both the criminal and civil court hierarchy these appeal courts are called **appellate courts or superior courts.**

Criminal Courts

Which court of first instance (magistrates or crown court) is used for the trial venue depends upon the seriousness of the alleged crime.

The trial is known as the prosecution of the alleged criminal. You will hear the phrase "this is a criminal case", this is referring to the prosecution and any subsequent appeal.

Minor crimes/offences (such as driving without insurance, petty shop lifting) are called **summary offences**. More serious offences (such as murder) are called **indictable offences.** There is a third type of crime/ offence known as an **offence triable either way** e.g. burglary assault dangerous driving. It can be tried in either the magistrates court or the crown court

1. **Magistrates' Courts** - this is a court of first instance or inferior court and is at the bottom of the criminal court hierarchy

   Exclusive jurisdiction over **summary only** cases (e.g. minor motoring offences).

   Cases heard either by a district judge or by a panel of three lay **magistrates (**they are from all walks of life hairdressers, shop workers, engineers with no legal backgrounds) aided by legally trained clerk, or a **District Judge** of the Magistrates' Court.

   Limited powers of sentence but can send cases to Crown Court for sentencing.

2. **Crown Court** this can be both a court of first instance and also an appellate court

   Exclusive jurisdiction over **indictable offences** (serious crimes e.g. murder or rape).

   These cases are heard by a jury (12 persons). They deliver a verdict (guilty, or not guilty).

   Judge directs jury on legal issues and passes sentence if the jury find the defendant guilty.

   Hears appeals from Magistrates' Court on verdict and sentence.

   They are found in large towns and cities

Civil Courts

These are arranged in their own hierarchy and consist of inferior courts and superior courts

1. **Magistrates' Courts** - this is a court of first instance or inferior court and is at the bottom of the civil court hierarchy

   It has very limited civil jurisdiction (e.g. non-payment of council tax), and hears family matters (when it's known as Family Proceedings Court) such as maintenance disputes.

   They are found in every large town

2. **County Courts** – this is a court of first instance or inferior court and is at the bottom of the civil court hierarchy

   It deals only with civil cases where the claim is generally for less than £100,000. The judges who sit (preside) in the trial are either circuit judges or district judges.

   They are found in every large town.

3. **High Court** -this is a court of first instance or inferior court and is towards the bottom of the civil court hierarchy

   It hears all other civil cases. It is very expensive to hold a trial here so it usually only hears the most complex or costly or specialist cases.

   It is divided into three divisions:

   Family – divorce, adoption, wills

   Chancery – finance and property, tax, bankruptcy

   Queen's Bench – contract and tort matters which cannot be heard in the County Courts

   They are found only in large cities and the biggest of all is in London

Appeal Courts or superior courts

(i) **Court of Appeal**

The Court of Appeal has 2 divisions (Criminal Division and Civil Division).

Generally, the Court of Appeal has three judges deciding on an appeal but five may sit on very important cases.

Decisions only need to be by majority

Criminal Division hears appeals from the Crown Court

Civil Division hears appeals from the High Court and the County Court

It is only in London

(ii) **Supreme Court**

- Highest court in the UK
- Came into operation on 1st October 2009
- Same function and method of as old House of Lords
- Currently has 11 Justices (only 1 female and none from any ethnic minority)
- It is the final court of appeal in the country for all civil and criminal matters from the Court of Appeal or occasionally from the High Court.
- Permission must be obtained from either this court of the Court of Appeal to have the appeal heard here.
- Justices usually sit in fives and decisions only need to be by a majority.
- All courts must follow the decisions of the Supreme Court
- Only found in London

NOTE: House of Lords UP TO 1ST OCTOBER 2009 was the highest court in the UK before the creation of the Supreme Court.

Other Courts beyond the borders of the UK

The Court of Justice of the European Union - the court of the European Union.

The European Court of Human Rights - the judicial body that decides cases relating to the European Convention on Human Rights.

WEEK TWO

Domestic Legislation and European Law

CONTENT OF THIS LECTURE

1. Legislation
2. How it's made
3. How it's used : Statutory interpretation
4. Impact of European law
5. European Convention on Human Rights & the Human Rights Act 1998

LEGISLATION

"Legislation" is the term used to describe law made by Parliament. It is divided into primary legislation and secondary legislation. These two types of legislation are created in different ways.

Doctrine of Parliamentary Sovereignty – Parliament is the supreme law making organisation in the UK. It can make any law it chooses and no court can question its validity.

PRIMARY LEGISLATION

- Primary legislation consists of Acts of Parliament e.g. The Sale of Goods Act 1979.
- Acts of Parliament begin life as a '**Bill**'.
- Most Bills are government sponsored (public bills) but Bills can be proposed by individual back bench MPs (private members' bills) or by certain groups of people e.g. public corporations (private bills).

How a Bill becomes a Law

Parliamentary Counsel draft the **Bill**, which is a proposal for a piece of legislation.

1. **First Reading** – title of the Bill is read to the House of Commons.
2. **Second Reading** – the general principles of the Bill are debated in the House of Commons. The Bill might be amended and members vote on whether the legislation should proceed.
3. **Committee Stage** – detailed examination by a committee of the House of Commons – further amendments might be made.

4. **Report Stage** – the committee reports back to the House and proposed amendments are debated and voted on.

5. **Third Reading** – the Bill is presented to the House of Commons for the last time. There might be a short debate and the House votes on whether to accept or reject the legislation.

6. **House of Lords** – first reading, second reading, committee stage, third reading.

7. **The Bill then goes back to the House of Commons** for the MPs to consider the Lord's amendments.

8. The Bill is then put forward for **Royal Assent**.

NB – Bills can be started in either the House of Commons or the House of Lords but must travel through both Houses.

What if the House of Lords refuse to pass a Bill that has passed the Commons?

At one time legislation could not be passed without the agreement of both Houses of Parliament. However, following the Parliament Acts of 1911 and 1949, special procedures are available to allow legislative proposals which were introduced in the House of Commons to be put forward for Royal Assent without the approval of the House of Lords after a one year delay (or one month for "money Bills").

In recent years these procedures have been used to pass a number of high profile statutes e.g. the Hunting Act 2004 and the Sexual Offences (Amendment) Act 2000.

Can you think of some arguments for and against what the Parliament Acts can do?

SECONDARY LEGISLATION

What is delegated legislation?

Parliament does not have time to pass all the necessary law and so delegates law making powers to government ministers and other public bodies to make legislation known as delegated legislation or secondary legislation.

Acts of Parliament lay down a basic framework of the law in a particular area. Delegated legislation is legislation which sets out the detailed rules relating to that law (i.e. it puts the flesh on the bones).

There are 4 main types of delegated legislation.

- **Statutory instruments** – made by Government Ministers and their departments.
- **Bye-laws** – made by local authorities, public and nationalised bodies (although they must be approved by Central Government).
- **Orders in Council** – made by the Government in times of emergency and then signed by the Monarch.
- **Regulations –** made by government departments to implement EU law

What are the benefits/problems of delegated legislation?

STATUTORY INTERPRETATION

In a trial evidence from both sides of the dispute/prosecution is heard and then a decision is made on whether the law has/has not been broken. If the trial involves a dispute over a statutory law, to reach a decision the judge must interrupt the words in that statute with the evidence that has put before the court. This is how statutes are used by judges. The process by which judges assign meanings to ambiguous / vague words or phrases in a statute is called the interpretation of statutes.

Judges can use certain aids rules and presumptions to help them come up with a meaning of a particular word or phrase in the statute

The Literal rule

This rule states that words in legislation should be given their natural, ordinary everyday meaning.

The problem is that this rule can give rise to some absurd decisions.

Fisher v Bell (1960

The Golden Rule

When the literal rule gives more than one meaning or provides an absurd result the golden rule is at hand. This allows the judges to avoid ridiculous consequences of the Literal Rule. This rule allows judges to give the words in the statute their ordinary, literal meaning except where that would lead to absurdity (in that case they can give words a more unusual/modified/ less common meaning which would lead to a more sensible conclusion). The golden rule is used to ensure that preference is given to the meaning that does not result in ab absurdity.

R v National Insurance Commissioner ex parte Connor.

The Mischief Rule

This rule allows the court to take into account the "mischief" that the particular statute was enacted to prevent and allows for an interpretation to provide the intended remedy for that mischief.

Four questions need to be asked to apply this rule.

I. What was the common law before the Act?

II. What was the 'defect or mischief' for which the common law did not provide?

III. What remedy did Parliament intend to provide?

IV. What was the true reason for that remedy?

Royal College of Nursing v DHSS

Human Rights Act 1998

This is an extremely important statute which came into force in October 2000. It makes the **European Convention For The protection Of Human Rights and Fundamental Freedoms 1950** binding in the UK. Courts today are required to interpret Acts of Parliament so far as possible in a way which is compatible with it.

Judges are not be bound by a previous interpretation of legislation which does not take into account the Convention

More on the 1950 Convention

It was signed in 1950 **before the EU was even created** and came into force in 1953 under the auspices of the Council of Europe. There are now 47 signatories to the Convention and such states are required to uphold certain fundamental civil rights.

Before the implementation of the Human Rights Act 1998 (in October 2000), the Convention could not be directly enforced in UK courts. This meant that anyone who wanted to challenge a breach of their human rights had to take their case to **the European Court of Human Rights** in Strasbourg.

Now, there is a specific obligation on UK public authorities to act in a way that is compatible with the Convention (section 6 of the Human Rights Act 1998) and any breach of this obligation can be challenged in UK courts.

NB - public authorities include central government departments, the NHS, local authorities, courts, and police forces.

The two key provisions of the Human Rights Act 1998 are section 2 and section 3.

Section 2 when considering any issue which is connected with human rights, the courts must take into account case law of the European Court of Human Rights.

Section 3 domestic courts must, "as far as it is possible to do so", interpret domestic legislation so that it is compatible with the rights set out in the Convention. If the court finds that this is not the case, it may issue a declaration of incompatibility (section 4) to the relevant Government Minister who may (but is not obliged to) ask Parliament to amend the legislation.

Section 3 of the Human Rights Act requires judges to read **all** legislation 'so far as possible' so it is compatible with the European Convention on Human Rights.

Ghaidan v Godin-Mendoza

If this is not possible, courts can issue a **declaration of incompatibility** (section 4 of the Human Rights Act). Such a declaration indicates the need to ensure compatibility, but the legislation remains in force.

Think about the effect this has had on the balance of power between the judiciary and the legislature and the impact on Parliamentary sovereignty.

EU LAW

Historically UK law was not influenced by any external legal rules or legal forces. However, this changed following the UK's entry to the European Economic Community (now the European Union) in 1973. Post Brexit the situation will change but how it will change has yet to be decided by Parliament. Until then understand that:

The European Community was created in the 1950s by a series of treaties most importantly the Treaty of Rome, which created the European Economic Community. Its goal was to create a Common Market in Europe. The first members were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. The UK joined the EEC in 1974.

In order to join the EEC, the UK had to pass the European Communities Act 1972 under which the UK agreed to apply EU law in UK courts. But, the 1972 Act went further stating in the event of any conflict between EU law and UK law, EU law would take precedence. Until the UK leaves the EU and this 1972 statute is repealed this is still the position. The great Repeal Bill is the instrument which will pass through Parliament and ultimately repeal this 1972 statute and so bring back sovereignty to Parliament and dispense with our courts having to follow European law.

European Legislation

There are a number of different sources of EU law. **Treaties are the primary source of law**. These are agreements between counties and the UK is a party to many eg Treaty of Rome, Maastricht Treaty, Treaty of Lisbon (this contains the famous Article 50 which was in the news earlier this year). When looking at a treaty you will see they are written in paragraphs like a book. These paragraphs are known as **ARTICLES** (remember paragraphs in a piece of primary legislation created by Parliament are called sections)

The Treaty of Rome was signed in 1957 and contains over 300 Articles. They contain prohibitions on, for example, sex discrimination, free movement of goods, and competition rules.

The secondary legislation of the EU is contained in regulations, directives and decisions.

Regulations	These create uniformity of law throughout all 28 member states. They become part of each member state's body of law without the need for a member state's own parliament to pass their own law to bring the regulation in to force.

Directives	These differ from regulations as they require each member state to pass their own law to bring the directive in to force so each member state has the flexibility on how to achieve the goal stated in the directive.
Decisions	These are decisions of the Luxembourg based The Court of Justice of the European Union.

The Current Impact of European Law on our Domestic Law

By virtue of Section 3 of the European Communities Act 1972, courts must take account of the provisions of the EC Treaty and decisions of the European Court of Justice, (now called the Court of Justice of the European Union) and it is clear that the impact of EC law has reduced Parliamentary sovereignty.

Factortame Ltd v Secretary of State for Transport (No 2) (1991)

WEEK THREE

Case Law and Judicial Precedent (Stare Decisis)

Reading and Understanding Cases

CONTENT OF THIS LECTURE

- Doctrine of judicial precedent
- Reading and understanding cases
- Identifying the ratio of a case
- Other relevant terminology

Case law is the name given to the creation and refinement of law through judicial decisions and is often called common law not case law

Doctrine of Judicial Precedent

To understand this you need to understand the court hierarchy which we looked at in week 1 – go back to it to refresh your memory

This doctrine is the system adopted by judges to follow decisions made by in previous cases.

- Some precedents are **BINDING** (meaning they MUST be followed in later cases involving similar facts)
- Others are merely **PERSUASIVE** (meaning that a judges in a later case involving similar facts may choose to follow it but he/she is not bound to do so)

There are 3 factors to be considered in deciding whether a precedent is binding or persuasive:

(i) the hierarchy of the courts

(ii) ratio decidendi and obiter dicta

(iii) the material facts of the case

(i) The hierarchy of the courts

See lecture 1

As a general rule, the precedents of higher courts **bind** lower courts, but not vice versa.

Higher courts may follow decisions of lower courts but, if they do not the higher court is said to **overrule** the decision of the lower court.

Supreme Court

All courts beneath the Supreme Court in the hierarchy must follow its decisions when hearing future cases involving similar material facts.

It came in to being on 1st October 2009. It is housed in Middlesex Guildhall opposite the Houses of Parliament. It replaces the House of Lords as the highest appeal court in the UK. The judges are known as Justices of the Supreme Court and are appointed by the Queen on the recommendation of the Prime Minister. There are currently 11Justices of the Supreme Court.

It operates as the House of Lords did previously.

House of Lords

Until 1966 the House of Lords was bound by its own decisions, but in **1966 a Practice Statement** was issued by the House of Lords which stated:

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

Their Lordships nevertheless recognise that ***too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law****. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.*

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House."

The effect of this statement is that unlike other courts the Supreme Court is not bound to follow its own previous decisions or those of the House of Lords

Example of use of the 1966 Practice Statement

R v G (2003) where the House overruled its previous decision in ***R v Caldwell (1981)***. In ***Caldwell***, it was held that in determining the meaning of recklessness in a criminal damage

case, it did not matter whether or not the accused knew that what he or she was doing was dangerous.

The decision was heavily criticised so the House of Lords accepted this criticism in ***R v G*** and held that a person would only be guilty of criminal damage if he or she had the capacity to appreciate the risks of harm that their actions may cause.

Court of Appeal Civil Division

The Court of Appeal Civil Division is bound by:-

1. its own previous decisions;
2. House of Lords'/ Supreme Court decisions; and
3. Court of Justice of the European Union decisions.

It is **not bound** to follow its own previous decisions:

· if there are 2 conflicting CA decisions it is free to follow either of the earlier decisions;

· if since the previous CA decision it has been overruled by the HL/ Supreme Court;

· the previous CA decision was made per incuriam (with lack of care - without considering a relevant case or statute);

· if since the previous decision the Court of Justice of the EU has given an interpretation of EC law which is contrary to this CA decision; or

· if since the previous CA decision a statute has changed the law.

· the previous CA decision is in conflict with a later Privy Council decision; or

· the previous CA decision is in conflict with a decision of the European Court of Human Right or a European Convention right.

Decisions of the Court of Appeal are binding on all lower courts in the hierarchy.

Divisional Courts

- Divisional Courts' decisions are binding upon later Divisional Courts (subject to same Court of Appeal exceptions set out above).
- They are bound by the decisions of the House of Lords/ Supreme Court and the Court of Appeal.
- Their decisions are binding on the courts from which they hear appeals.

High Court

- They are bound by decisions of the House of Lords/ Supreme Court and the Court of Appeal.
- High Courts are not bound to follow its own previous decisions but they do have strong persuasive authority.
- Their decisions are binding on all courts beneath them in the hierarchy.

Crown Court

- They are bound by House of Lords/ Supreme Court, the Court of Appeal (Criminal Division) and Divisional Court

Magistrates' and County Courts

- The decisions of the County Courts and Magistrates' Court are not binding on any court.
- They are bound by decisions of courts higher in the hierarchy.

(ii) Ratio Decidendi and Obiter Dicta

The ratio decidendi is the legal reason given by a judge for their decision. It is capable of forming the binding precedent. It is a statement of law which is carried down to later decisions.

Warning – judges never say 'This is the ratio of the case' – ratios are only *distilled* by later judges.

Obiter dicta are statements made by a judge which are **NOT** part of the ratio.

They are other statements, (words in passing) made by a judge such as hypothetical situations e.g. 'If the facts were different then my decision would not be the one I have made' or wide legal principles for example the judge might say what he would do if her was not bound by stare decisis or the judge was dissenting on a point.

Such statement are persuasive rather than binding. This means that in a later case a judge can take the statement into account (and usually will) when reaching his/her decision in the current case but there is NO obligation to follow the statement.

Obiter dicta statements might be used by barristers in a later case to try to persuade the judge on a particular point, or they might be referred to by the judge themselves.

Examples

- Where the judge makes a hypothetical pronouncement (e.g. "If the facts were different then my decision would be …").
- The judge might say what he would do if he was not bound by stare decisis.
- Because the judge was dissenting on this point.

- The judge is making a general comment on the area of law

(iii) Facts of the case

In order for precedent to be binding on a judge in a later case the material facts of the two cases must be the same, if they are significantly different, the precedent will only be persuasive .

Examples when a precedent will not be binding:

- it has been overruled by a higher court
- has been overruled by a subsequent statute
- was made without proper care (per incuriam)
- today's case can be distinguished from the earlier case i.e. the material facts differ

What are the advantages/disadvantages of our system of binding judicial precedent?

Demonstrating how to find a ratio

In case 1 *a man driving a Ford Escort ran over an old lady who was lawfully using the zebra crossing. The car was speeding, and the man was not looking where he was going. The old lady was injured. The weather conditions were excellent. The man was found guilty of reckless driving.*

In case 2 *a woman driving a BMW ran over an old man who was crossing the road. The car was speeding, and the driver was not looking where she was going. The old man is injured. The weather conditions were excellent.*

To find out whether case 2 has to follow the decision in case 1, we need to determine what the ratio of case 1 is. To do this we need to find the **MATERIAL FACTS**.

MATERIAL FACTS are those facts which are crucial to the determination of the case

Look at the facts from case 1, cross out those facts which are **not** MATERIAL FACTS

- A Ford Escort is being driven.
- By a man.
- The car was speeding.

- The driver was not looking where he was going.
- The car runs over a pedestrian.
- The pedestrian was an old lady.
- The pedestrian was on a zebra crossing when she was hit.
- The pedestrian was injured.
- The weather conditions were excellent.

Once you have identified the material facts you should be able to identify the ratio for case 1.

Identify the material facts in case 2:

Is there any difference in material facts between the two cases? If yes, then case 2 may be **distinguished**.

If you are the judge in case 2 and wish to follow case 1 then you will have to reframe the ratio from case 1. Further refinement may be possible in later cases.

READING AND UNDERSTANDING CASES

Throughout these lecture notes and in text books you will find examples of cases which have come before the courts. They create legal principles and as such will need to be included in your answers to seminar questions, your January coursework and answers to the May exam. They are the law and so vital to prove your answer is legally correct, not simply your uncorroborated opinion.

Law Reports and Citation

We know that judges have to follow a system of binding precedents but how do they get their hands on them?

Cases are recorded and published in law reports. Historically these were large voluminous books but today they are readily available on line. Anyone practising in the law including judges have access to these law reports and will refer to them to ensure the law if upheld.

To make it easier law reports may be categorised e.g. Environmental Law Reports, Family Law Reports or general reports listing cases simply in date order.

To help navigate through law reports all cases have the same two features:

- are known by a name (e.g. Donoghue v Stevenson); and
- have a citation – e.g. (2000) 2 ALL ER 456 or [2000] 2 ALL ER 456.

Where ( ) are used, the year inside the brackets indicates the year the case was decided. Where [] are used, the year inside the brackets indicates the year in which the case was reported.

How do you find a case by reference to its citation?

[2000] 2 ALL ER 456

This citation tells you to look at the All England Law Reports from the year 2000 (**[2000] 2 ALL ER 456**).

This series is obviously divided into more than one volume because there is a number before the name of the law reports (2 ALL ER). This means that you should look for volume 2 in the series of All England Law Reports from 2000.

The particular case that you are looking for will be at page **456** (the last number in the citation – **[2000] 2 ALL ER 456**) of the 2nd volume of the series of All England Law Reports from 2000.

Neutral citation system - Campbell v Mirror Group Newspaper [2002] EWCA Civ 1373 (indicates court where the case was heard. The number relates not to page number but docket number). The citation is neutral because it does not refer to a specific series of law reports.

The main features of a case report

- Indication of the Court which heard the case.
- Indication of the judges who heard the case.
- Hearing and judgment dates.
- Keywords.
- **Headnote** – written by the court reporter, not part of the case.
    - Summary of key facts.
    - Summary of decision (appears under **HELD**): if something of importance said in judgment will be indicated by **Per, or per curiam**. Also notes any **dissenting** judgments.

a) List of cases referred to judgment (and in the case of ICLR reports in arguments).

b) ICLR (except WLR) summary of counsel's argument.

c) Judges opinions.

d) At end of the report – summary of who won case

WEEK FOUR

Introduction to Contract Law

Contract Formation

CONTENT OF THIS LECTURE

- What is a contract?
- How is it formed
- Offer v invitation to treat.
- Consideration.

WHAT IS A CONTRACT?

It is not uncommon for those without any knowledge of law to think that it is only businesses which make contracts or that if we make them ourselves then they have to be about something important such as buying or renting property or employment and that they must be in writing. Infact we are all making contracts all of the time and, with a few exceptions the contract does not have to be in writing. It may be written (and this will often be helpful in the event of a dispute), but contracts may also be made verbally or even by conduct.

Some examples of everyday contracts:

Buying a jar of coffee

Using a taxi

Going to the cinema

Opening a bank account

Travelling by bus

Buying petrol

Signing up to a mobile phone contract

Signing up to a university course

Getting your hair cut

Using the internet in a café or library

Buying a sandwich

As well as making contracts regularly we also make agreements which are not contracts such as arranging to meet a friend for lunch or agreeing to buy a relative a particular book for his birthday.

These agreements are not contracts because they do not contain all the essential elements needed to create a contract.

So what do lawyers mean by a contract? Simply, they mean a legally binding agreement.

To make a contract it has to contain all these essential elements:

- Offer + Acceptance which combine to make an AGREEMENT
- Consideration (i.e. exchange of something of value)
- Intention to create legal relations
- Capacity to form a contract
- Legality

If all these elements are present a contract is made and will be LEGALLY BINDING on those who made it.

If one or more of these essential elements is missing no contract can be made and the courts will not uphold what was agreed.

In this lecture we will concentrate on the first three requirements- offer, acceptance and consideration.

Offer & Acceptance

For a contract to come into existence one person, the **offeror,** must make an **offer** that is accepted by the other person, the **offeree**.

Offer + Acceptance = Agreement.

The Offer - What is an offer in contract law?

An offer is a promise made by the offeror to be bound by that promise if accepted by the offeree– therefore it must be capable of being accepted.

An offer may take the form of a statement (either oral or written), or it could be made by conduct that is capable of acceptance.

An offer can be made to one particular person, a group of people, or to the world at large (see unilateral contracts above).

Statements that are not offers

Offers should not be confused with statements that are simply made in order to supply information in response to a query.

Harvey v Facey [1893]

Offers also need to be distinguished from statements/conduct that are incapable of being accepted, but which might induce a person to make an offer.

These are known as **invitations to treat**.

What does this phrase mean?

To treat = to enter in to business negotiations

An invitation to open negotiations about the price for example

Invitations to treat are statements made to others by way of an invitation to them to make an offer.

Such statements are **not offers** and cannot be accepted as such.

There are some everyday situations which generally give rise to invitations to treat.

(i) Advertisements in magazines/ newspapers

Partridge v Crittenden [1968]

(ii) Display of goods in a shop

Fisher v Bell [1961]

Boots v Pharmaceutical Society of Great Britain [1953]

BUT – BE WARNED - some advertisements can be a **unilateral offer not an invitation to treat** - see later note on UNILATERAL CONTRACTS

Do offers have an expiry date?

Yes!

An offer can be terminated, or brought to an end, in various ways.

(i) **Rejecting an offer and making a counter offer**

An offer is terminated if it is rejected. It is also terminated if the offeree tries to vary the terms of the original offer e.g. by offering less money of trying to change the subject matter of the contract (this is known as a counter offer).

Hyde v Wrench (1840)

But a statement requesting further information will not constitute a counter-offer.

Stevenson v McLean (1880)

(ii) **Expiry of specified time period**

An offer is terminated if the offeror set a specified period during which the offer would remain open and it is not accepted within that period.

(iii) **Expiry of reasonable time period**

Even if a particular time period is not stated, an offer **will not** remain open indefinitely; it will lapse after a reasonable time.

Ramsgate Victoria Hotel v Montefiore (1866)

(iv) Withdrawal of offer, provided it was communicated by offeror

The offeror may withdraw or revoke his offer at any time before acceptance by the offeree. However, to be effective this must be brought to the attention of the offeree before acceptance.

An offer cannot continue indefinitely – once withdrawn it cannot be accepted

Routledge v Grant (1828)

Revocation of an offer by the offeror is not effective until the revocation is received by the offeree

Bryne v Van Tiehoven (1880)

(v) **Death of offeror (relevant only in contracts for personal services)**

If the offeror dies and the offer involved personal services, the offer terminates on his death. If the offer involved non-personal services, it might survive if it can be performed by the offeror's personal representatives.

Acceptance - What is acceptance in contract law?

"*… a final and unqualified expression of assent to the terms of an offer."* Treitel 2003

It is up to the person making the offer to stipulate how it should be accepted.

An acceptance must be the 'mirror image' of the offer (otherwise it will be a **counter-offer)**. It is the unconditional agreement by the offeree to all the terms of the offer.

The acceptance must also be firm (i.e. unconditional) and must be communicated to the offeror (otherwise how will he know that an agreement has been formed?)

The general rule of acceptance is that it must be communicated in writing, verbally, or by conduct to the offeror and received by him before it is effective

Entores v Miles Far East Corp (1955) and reaffirmed

by the House of Lords in ***Brinkibon v Stahag Stahl (1983)***

As a general rule, communication means that the offeror has received the acceptance and is aware of it.

> "Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned out by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract he must wait until the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound…."

Per Denning LJ in ***Entores v Miles Far East Corp*** [1955] 2 QB 327

There is then an agreement and if the other elements of the contract are present the parties are bound – they may no longer pull out or change their minds.

Silence will therefore **not** be acceptance

Felthouse v Bindley (1862) **11 CB (NS) 869**

THE EXCEPTION TO THE *ENTORES* RULE OF ACCEPTANCE is …….

The Postal Rule created in *Adams v Lindsell (1818) 1 B & Ald 681*

Acceptance of an offer by post is valid as soon as it is posted

This rule **ONLY** applies to acceptance – the general rule of communication applies to offers and revocations of offers ie must be received by the other party.

It must be reasonable to use the post and the letter must be validly stamped and correctly addressed.

The acceptance sent by post will create a valid and binding agreement even if the letter is never received.

Household Fire Insurance v Grant (1879) 4 Ex D 216

The offeror can avoid this risk by stating in the offer that some other method of acceptance must be used.

Let's think about how we communicate with one another in today's instantaneous world and does this rule from 1818 have any relevance?

What does instantaneous mean? Having a face to face conversation or talking on the telephone?

Entores v Miles Far East Corporation [1955] 2 QB 327

Brinkibon v Stahag Stahl [1983] 2 AC 34

Both say acceptance is valid when received but when an offeror and offeree are communicating through email does the general rule in ***Entores*** apply or does the Postal Rule apply?

Difficult question – is email instantaneous like the telephone, or is it more like posting a letter when we click send? If the latter, then there is an argument that the postal rule should apply.

See the Deveral Capps article on Moodle and in the library also find ***Thomas v BPE Solicitors [2010] EWHC 306 Ch***

Emails should be treated as NON instantaneous and NOT subject to the postal rule

What about making a contract through a web site?

The Electronic Commerce (EC Directive) Regulations 2002 state that electronic orders/acknowledgements of orders "are deemed to be received when the parties to whom they are addressed are able to access them"

These Regulations DO NOT apply to forming a contract through an exchange of emails

- Websites are usually considered to be shop windows = invitations to treat. The offer is made by the purchaser and the seller has the option to reject.
- Where an agreement is made on the internet the service provider must electronically acknowledge receipt.
- Acceptance depends upon the wording on the electronic communication sent back to the purchaser. It may be when the seller accepts the order or when he dispatches the goods.
- Contract made on-line is considered to be in writing
- An electronic signature is acceptable

The Other Type of Contract – The Unilateral Contract

Bilateral contracts occur when all the essential elements are present and each party takes on some sort of obligation usually promising to do something in return for a promise to do something by the other party

Example: I promise to give you £20 and you promise to wash my car (two promises).

Most contracts are bilateral BUT they are not the only type of contract

Unilateral contracts occur when only one party promises to do something in return for the completion of a specified act by the other party BUT that other party DOES NOT promise to perform that specified act

Examples

I promise to pay you £20 if you find my pet dog;

I promise to pay £50 to anyone who finds my lost dog

Carlill v Carbolic Smoke Ball Co [1893]

Unilateral Offer = an offer made by one person to 'the whole world'

The Carbolic Smoke Ball Co placed ads in newspapers offering a reward of £100 to any person who used the smoke ball three times per day as directed but still contracted influenza, colds, or any other disease. To prove they were serious, a substantial sum of money was deposited in an account. Held: this ad **was not an invitation to treat, but a unilateral offer**. Mrs Carlill, who caught flu, was entitled to damages as the Smoke Ball Company were in a legally binding agreement with Mrs Carlill made when she bought the smoke ball.

To decide if an advert is or is not an invitation to treat the courts will look at what the advertiser's intentions were. How would a reasonable person interpret what was said in the advert.

Withdrawal of unilateral offers

There are special rules regarding the withdrawal of unilateral offers.

The offeror cannot withdraw his offer if a person has begun to do something on the strength of that offer.

Errington v Errington & Woods (1952)

Also, since the nature of a unilateral offer means that the offeror cannot guarantee that he's communicated notice of the withdrawal to everyone who saw the offer, he must simply take reasonable steps to give such notice and should ensure that he communicates notice of the revocation in the same form as he communicated the original offer.

Acceptance of a unilateral offer

Unilateral offers, which are made to the world at large and accepted by conduct – no communication of acceptance by the offeree to the offeror is necessary

Other vital elements needed to create a contract

1. Intention to create legal relations

Contract law exists to enforce the parties' bargains – if the parties never intended the agreement to have legal force, there cannot be a contract.

However, consider the difficulties in proving what a party actually intended when he made an agreement – and how easy it might be to claim no legal intention if a contract becomes inconvenient at a later stage.

For this reason, the courts have developed some **presumptions** about where legal intention is likely to be present.

Social and domestic arrangements

The presumption here is that there is no legal intention – but it can be rebutted. Courts will look at the context, the content and the certainty of the agreement.

Balfour v Balfour [1919] 2 KB 571

Merritt v Merritt [1970] 1 WLR 1211

Commercial agreements

Here the presumption is the opposite – that the parties did have legal intention. There must be clear evidence to rebut this presumption.

Jones v Vernon's Pools Ltd [1938] 2 All ER 626

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256

Esso Petroleum v Commissioners of Customs & Excise [1976] 1 ALL ER 117

2. Capacity

Persons under the age of 18 are only capable of entering legally binding contracts for necessaries (Sales of Goods Act 1979, s3(2)). This has been held to include food, shelter, ordinary (and not fancy clothing), and even the cost of a funeral for a spouse.

Mentally disabled persons of full age are able to enter any legal contract even if they did not understand it, although the courts will treat the contract as void and of no effect if the other party to the contract was aware of their mental condition.

3. Formalities

Most contracts can be agreed in any form (written, oral, or inferred from conduct). However, there are a limited number of contracts that need to take a certain form in order for them to be enforceable by the courts – this may include they must be in writing, they must be signed by both the offeror and the offeree and even that signatures are witnessed by a lawyer.

4. Consideration - what is consideration in contract law?

English law does not enforce gratuitous promises. A promise must be backed up by consideration if there is to be a contract.

In *Currie v Misa (1875)*, consideration was defined as something that constitutes a benefit to one party or a detriment to another and this was affirmed by the House of Lords in ***Dunlop v Selfridge (1915)*** where it was described as.

> "An act of forbearance or the promise thereof is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

There are **two types of consideration:**

- **Executory** – a promise to perform an act at some future date.

  Example I will clean your windows next week if you pay me five pounds

- **Executed –** a promise which only becomes enforceable when the offeree actually performs the required act - see unilateral contracts and ***Carlill v Carbolic Smokeball Co (1891)***

NB - The **promisor** is the person who makes the promise, the **promisee** is the person to whom the promise is made.

A number of rules should help you remember how courts determine whether consideration is present in particular scenarios.

A. Past consideration is not good consideration

If valuable benefit has already been given, before the contract is entered into, then this is not valid consideration and there will be no contract.

Re McArdle (1951)

B. Performance must be legal

A promise to pay for an illegal act is not enforceable.

C. Performance must be possible

A promise to perform an impossible act is clearly unenforceable.

D. Consideration must be sufficient (but need not be adequate)

Courts will not intervene to ensure that the parties make a good bargain, but the consideration must have some value (sufficiency).

Thomas v Thomas (1842)

Chappell v Nestle (1959)

E. Performing an existing duty

Performance of an existing duty **does not** constitute valid consideration for a new contract.

Collins v Godefroy (1831)

If you are already in a contract you cannot use the promise you made in that to make a fresh contract

Stilk v Myrick (1809)

Hartley v Ponsonby (1857)

But what if the promisor does more than his duty?

Harris v Sheffield United FC (1987)

Williams v Roffey Bros (1990)

F. Part payment of a debt

Rule in *Pinnel's case (1602)*

Payment of a lesser sum than that owed on the due date in satisfaction of a greater sum cannot be satisfaction for the whole

But note - payment of a lesser sum at the creditor's request before the due date IS GOOD consideration for a promise from the creditor to forgo the balance.

WEEK FIVE

Contents of a Contract

CONTENT OF THIS LECTURE

- Puffs, Terms and Representations
- Types of terms
- Implied terms

When a contract is being formed many statements are made by the parties to one another. Some of these statements become part of a legally binding contract as **terms of the contract.** Others are not considered to be part of the contract and are mere representations or puffs.

PUFFS

These are neither representations nor terms. For the purposes of attracting custom, tradesmen may make vague exaggerated claims in adverts. Such statements are essentially statements of opinion or "mere puff" and are not intended to form the basis of a binding contract eg “our butter is the creamiest”

REPRESENTATIONS

Some pre-contractual statements which are made as part of the negotiation process, and which might have encouraged the other party to enter into the contract, may have legal status as **representations**.

Terms are part of a contract and may be enforced; they are promises that the parties have contracted to undertake. Representations are not part of a contract but legal remedies may be available if they turn out to be untrue.

If a **term is untrue** then innocent party has an **action for breach of contract**. If a **representation is untrue** then innocent party has an **action for misrepresentation**.

TERMS

Terms have been described as the duties and obligations that each party assumes under the agreement.

There are 2 main types of terms: **express** (those agreed by the parties) and **implied** (those which form part of the contract even if they were not agreed by the parties!).

HOW TO DIFFERENTIATE BETWEEN A TERM AND REPRESENTATION

It can be difficult to differentiate between a term and a representation. However, the courts have developed certain tests to guide them when making the decision.

1. **Importance of the statement** – where one party has indicated that the statement is of such major importance they would not have entered into the agreement without it; it will constitute a term**.**

Bannerman v White (1861)

2. **Strength of statement** – the more definitive the statement, the more likely it is to be a term, ***Schawel v Reade [1913] 2 IR 81*** where it was held that the seller's statement "…the horse is perfectly sound. If there was anything wrong I would tell you" was a term.

3. **Ability of statement maker to verify truth of statement** and/or ability of person to whom the statement is made to verify the truth (i.e. **relative knowledge and skill of the parties)**.

Dick Bentley v Harold Smith (1965)
compared with ***Oscar Chess v Williams (1957)***

4. **Timing** – statements made just before the conclusion of a contract are more likely to be terms; statements made some time before completion are likely to be representations.

Routledge v McKay (1954)

5. **Agreements reduced to writing** – if a statement is not included in the final contractual document, then it is likely to be representation.

Routledge v McKay (1954)

TYPES OF TERMS

There are 2 main types of terms: express and implied.

EXPRESS TERMS

Express Terms are the terms actually referred to explicitly by the parties, either verbally or in writing.

IMPLIED TERMS

These are terms which are deemed to form part of the contract even though they may not have been specifically stated or agreed (or even thought of) by the parties. **They can be implied by statute or common law (the courts) or very rarely by local custom.**

Terms implied by statute

E.g. the Sale of Goods Act 1979 implies certain terms into contracts for the sale of goods ('goods' includes items a business might buy e.g. computers, printers, vehicles and uniforms etc).

section 12(1)	implied term that the seller owns the property he is selling
section 13	implied term that the goods sold correspond to any description given
section 14	implied terms that the goods sold are of satisfactory quality and are fit for purpose

Terms implied by the courts

- **Where the term is necessary to give business efficacy to the contract**

Sometimes the courts will imply terms into a contract in order to give **business efficacy** to the contract. To do this, the courts rely on the 'officious bystander' test – if the term is so obvious that when asked if it was included the parties would have said, "Oh, of course" (Mackinnon LJ ***in Shirlaw v Southern Foundaries (1939) it will be implied.***

The Moorcock (1889)

Note, however, that the courts will not rewrite contracts.

- **Where the term is necessary in contracts of a certain type**

These are terms implied by the court where they believe it is necessary in a certain type of contract.

Irwin v Liverpool City Council [1977] AC 239.

Terms implied by custom

Certain terms are implied into contracts by custom but such terms will not be implied where they conflict with an express term of the contract.

Smith v Wilson (1832) '1000 rabbit skins meant 1200'

CLASSIFICATION OF TERMS ACCORDING TO THEIR SERIOUSNESS/IMPORTANCE

This distinction is sometimes made by statute, sometimes by case law and sometimes by the parties themselves – although this is not always conclusive.

The significance of these distinctions is in the available remedies if they are breached.

Not all terms whether express or implied are of equal importance.

There are 3 classifications of terms.

- Conditions
- Warranties
- Innominate terms

Conditions are the **important obligations** which go to root/heart of any contract.

Breach of a condition entitles the innocent party to a variety of remedies:-

(i) To terminate the contract,

(ii) **To refuse to perform their part of the contract,**

(iii) **To carry on with the contract and ignore the breach and claim damages**.

Poussard v Spiers & Pond (1876) 1 QBD 410

The terms implied by Sections 13 and 14 of the Sale of Goods Act 1979 are 99% of the time treated as **conditions** but see S.15A for when they will be treated as **warranties – see below**.

Warranties are the **minor obligations** which are not vital to the overall contract. Breach of a warranty only entitles the innocent party to the remedy of claiming **damages**. There is **no** right to terminate the contract, the contract must continue.

NB: not to be confused with guarantees which are also called warranties – such as you may get with a toaster or a car.

Bettine v Gye (1876)

Innominate terms - The addition of this third type of term allows for greater flexibility and fairness, but can bring uncertainty.
The difficulties of such a rigid system of labelling terms as either conditions or warranties led the Court of Appeal to develop this third type of term.

If there is nothing to indicate whether a particular term in a contract is a condition or a warranty, if that term is breached and very serious losses are suffered as a result of the breach the court will award the same remedies as are available for a breach of condition. If only minor losses are sustained then the court will award the remedy available for a breach of warranty.

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26

If the claimant has been substantially deprived of the whole benefit of the contract then he may be allowed to treat the contract as at an end and/or claim damages – ie same as a breach of condition.
If not, then he may claim only damages ie same as a breach of warranty.

To put it another way……..

Some terms are incapable of being classified either as a condition or as a warranty because there can be serious and trivial breaches of the particular term. **The remedy for these innominate terms depends upon the seriousness of the breach.** Serious breach permits termination of the contract; minor breach only gives rise to damages.

To determine whether the breach is sufficiently serious, the courts consider whether the "innocent" party has been **deprived of substantially the whole benefit of the contract**. If so, he will be entitled to terminate the contract; if not, he will only be entitled to damages.

Cehave NV v Bremer (The Hansa Nord) (1976)

In a dispute <u>the court</u> decides whether a term is a condition or a warranty or an innominate term

<u>NOTE</u>

S.15A Sale of Goods Act 1979 provides a buyer will have to treat a breach of condition as a breach of warranty if the breach is <u>so slight</u> that it would be unreasonable to allow the buyer to reject the goods. What do the words 'so slight' mean in practice? Minor scratch which is hardly visible or a microscopic deviation from the contract.

Next week is week 6 and that means it is Consolidation Week – so no lecture or seminar

We resume for week 7, Monday 5th November

WEEK SEVEN

Statutory Controls on Exemption Clauses and Unfair Terms

CONTENT OF THIS LECTURE

- Exclusion clauses and limitation clauses
- Judicial (or common law) controls on exclusion clauses
- Statutory controls on exclusion clauses

EXCLUSION AND LIMITATION CLAUSES

An **exclusion clause** seeks to prevent a party from claiming compensation for any loss or damage caused by the other party.

> Portsmouth Wholesale Fashions does not accept liability for any loss or injury suffered by any customer as a result of the supply of defective goods or for any failure by them to perform their contractual or other legal duties.

A **limitation clause** seeks to restrict or limit the extent to which one party can seek compensation for loss or damage caused by the other party. A party's liability may be limited financially or by reference to certain types of loss/damage.

> Portsmouth Wholesale Fashion's total liability arising out of this contract shall be limited to a maximum of £1,000

Why are exemption clauses useful tools for businesses?

Why is it necessary to control the use of exemption clauses?

CONTROLS ON EXEMPTION CLAUSES

The courts and Parliament are aware that these clauses are often used as standard terms by big business and smaller businesses with less bargaining power may end up at a disadvantage as negotiations are not on a 'level playing field'.

Both the courts and Parliament have created controls on these clauses:-

- **Judicial controls**

- Incorporation
- Construction

· **Statutory controls**

- Unfair Contract Terms Act 1977 (UCTA)

Therefore today a party wishing to rely on an exemption clause will have to pass three main hurdles if they wish to rely on it:

a) Has the exclusion clause been **incorporated in to the contract?**

b) Is it written in such a way as to actually cover what happened **(construction**)?

c) Is there **legislation** against this type of clause?

a) Has the exclusion clause been incorporated in to the contract?

All terms must be successfully incorporated in order to become part of a contract and have legal effect.

There are three main ways in which a term may be incorporated into a contract:

1.By signature

There is a general rule that a term is incorporated if it is contained in a written contract signed by the other party.

L'Estrange v Graucob [1934] 2 KB 394

2.Reasonable Notice

Is the document contractual in nature?

Chapelton v Barry UDC [1940] 1 KB 532 at 538

Has enough been done to bring it to the attention of the other party? The party wanting to add the exemption clause to the contract must do all that is reasonably necessary to bring it to the attention of the other party before the contract is made - ie not bury it in the small print.

Parker v South Eastern Railway [1877] 2 CPD 416

Thompson v L M & S Railway [1930] 1 KB 41

Timing is crucial - notice must have been given before or at the time of making the contract. The more onerous the exemption clause the greater the degree of notice required.

Olley v Marlborough Court [1949] 1 KB 532

Thornton v Shoe Lane Parking [1971] 2 QB 163

3. Previous consistent course of dealing

If parties have dealt regularly and consistently (namely on the same terms and conditions) with each other over a sufficient period of time, then a term may be incorporated in this way.

Spurling v Bradshaw [1956] 1 WLR 461

McCutcheon v David MacBrayne [1964] 1 WLR 125

b) Is it written in such a way as to actually cover what happened (construction)?

i) The next question to ask is whether the clause actually covers the loss/damage that the party is trying to exclude/limit? The main rule used by the courts to help them determine this issue is the **Contra Proferentem Rule** ie do the words in the exemption clause cover the fault that has occurred?

ii) This rule states that the courts should interpret any ambiguity in an exclusion clause against the party seeking to rely upon it.

Andrews v Singer (1934)

Hollier v Rambler Motors [1972] 2 QB 71

c) Is there legislation against this type of clause?

Even if a clause satisfies the various judicial tests (i.e. it has been incorporated into the contract and the wording of the clause covers the particular loss/damage), it might still be rendered unenforceable by virtue of the Unfair Contract Terms Act 1977

Unfair Contract Terms Act 1977 (UCTA)

The effect of UCTA is to render some exemption clauses entirely **void** (without effect) and some others only **valid if a court believes them to be reasonable**.

UCTA's title is misleading – the Act covers both exemption clauses, limitation clauses and warning notices in non contractual situations i.e. negligence (see later lecture).

Some important sections of the Act

Section 2(1)	A party cannot, by use of a contractual term or notice, exclude his liability for negligently causing death or personal injury. This term or notice will be **void.**
Section 2(2)	A party cannot, by use of a contractual term or notice, exclude his liability for negligently causing any other type of loss or damage (i.e. other than death or personal injury) unless that term or notice satisfies the reasonableness test.
Section 6 (1A)	A seller cannot by use of a contractual term exclude his liability under the statutory implied terms (ie S.s 13 -14 Sale of Goods Act 1979) unless that term satisfies the reasonableness test.

Under Section 11(5) UCTA the burden of proving that a clause is reasonable falls on the party who seeks to rely on it – the seller

How can we tell if a court would say an exemption clause or notice is reasonable?

Section 11	Provides that the inclusion of the term or notice must have been 'fair and reasonable' in light of all of the circumstances at the time.
Schedule 2	If the term is one relating to S.6 (1A) the court will also take into account Schedule 2, which lists: I. The strength of the bargaining positions of the parties II. Availability of an alternative contract without the clause III. Any inducements given to agree to the clause IV. Other party's awareness and understanding of the term V. Whether the goods were being provided as a special order

WEEK EIGHT

Misrepresentation

CONTENT OF THIS LECTURE

a) Misrepresentation
b) Remedies available

INTRODUCTION

As you know from your study of contract law, the courts will uphold bargains which satisfy the various requirements of contract formation on the basis that they are an expression of the parties' own free will. However, here we are concerned with situations where certain factors have "vitiated" (or invalidated) consent i.e. there is no genuine consent or free will.
The vitiating factors recognised under English law are listed below.

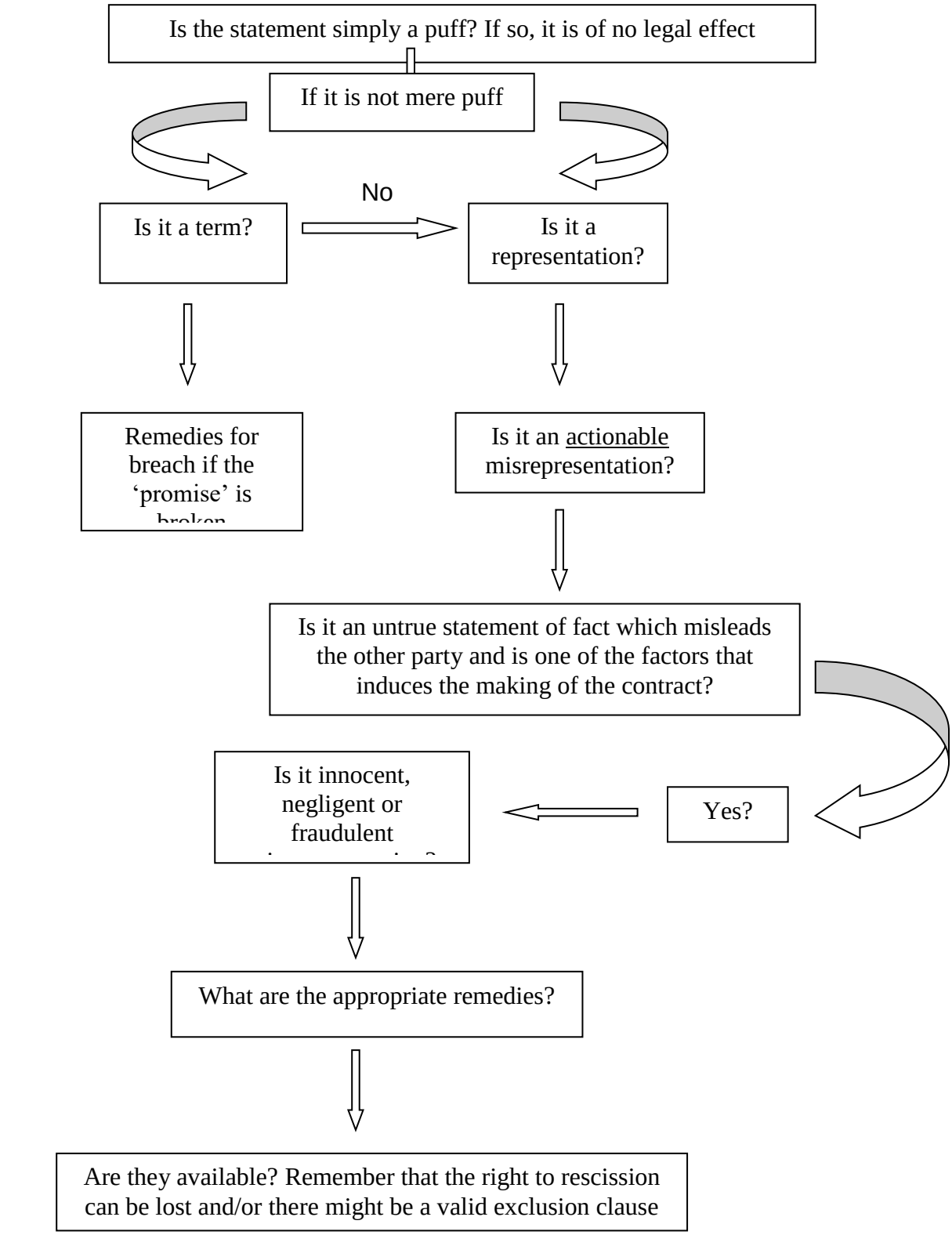
- Misrepresentation
- Mistake
- Duress
- Undue Influence
- Illegality

We are only going to look at one, MISREPRESENTATION

If misrepresentation has occurred the contract will not have been made with a free will and so the contract is said to be **VOIDABLE**
Before we look in detail at misrepresentation we need to understand two key legal terms.

Void	=	there was never a contract in the first place which means that neither party can enforce the agreement (it is unenforceable).
Voidable	=	a contract came into existence in the first place but, as a result of the vitiating factor, the innocent party can decide whether or not to end the contract.

Misrepresentation Flow Chart



Misrepresentation affects the validity of a contract. If misrepresentation has occurred, it makes the contract **VOIDABLE**

Look back at lecture 5 to refresh your knowledge of contractual terms, representations and puffs.

If a representation turns out to be untrue then the innocent party should consider making a claim for misrepresentation and if successful, the contract is **VOIDABLE**

WHAT IS MISREPRESENTATION IN LAW?

It is a false statement of fact, not opinion made by one party to the contract, which is not part of the contract but which induced the other party upon hearing it to go ahead and make the contract.
The statement must have been **false, be one of fact,** have been made with the intention to be acted upon and has actually **induced the other party** to make the contract

To put it another way:-

A misrepresentation is a false statement of fact, made in the course of negotiations, which induces (or causes) the person who hears or reads it to enter into the contract.

1. What is a statement of fact?

A statement that can be proved (objectively) to be either true or false.

What is not a statement of fact?

(a) Fact, not opinion
The general rule is that a statement of opinion cannot give rise to a misrepresentation.
Bisset v Wilkinson (1927)

But a statement of opinion may imply a statement of fact.
Smith v Land and House Property Corporation **(1884)**

Also, where the statement maker is an expert, or where it is intended that the statement will be relied on, it may constitute a statement of fact.
Esso v Mardon **(1976)**

(b) Fact, not intention

A statement of future intention, and not of fact, will not be a misrepresentation.
However, a person's present state of mind, or intention, constitutes a fact. If a person says that they intend to use money for a particular purpose when in actual fact they intend to use it for something different, this will constitute a misrepresentation.

***Edgington v Fitzmaurice* (1885)**

Compare ***Inntrepreneur Pub Co v Sweeney (2002)***
In this case, a statement made by the landlord of a pub predicting that the tenant would be released from a beer tie (a contract restricting what makes + types of beers the tenant could sell) by the end of March 1998 was held **not** to be a statement of fact. It was a statement of future intention (honestly held) and was based on good grounds in line with the defendant's current policy.

(c) Fact, not sales talk

***Dimmock v Hallett* (1866)**

A piece of land was described by the vendor as 'fertile and improvable'. This was held to be mere sales talk (or marketing puff); it was not a representation of fact.

The statement must be false factually and this includes half truths and statements which become false after they are made.

Can silence constitute a misrepresentation?

What if a party doesn't actually make a statement, but simply keeps quiet about a fact which would (if known) dissuade the other party from entering into the contract?
The general rule is that mere silence or non-disclosure does not give rise to an actionable misrepresentation, even if the silent party knows that the other party has misunderstood.
Silence will not usually amount to misrepresentation. See ***Fletcher v Krell (1873).***
However there are some exceptions

- Contracts of utmost good faith such as insurance contracts
- Where there is a fiduciary relationship between the parties
- Where a PARTIAL TRUTH is given – this is where you tell someone only part of the story and the information you do not share with them would influence their decision on whether to enter in to a contract
- Change of circumstances where a statement becomes inaccurate

***With v O'Flanagan (*1936)**

Spice Girls Ltd v Aprilia World Service (2002)

The statement must induce the party to enter into the contract

However, the statement doesn't have to be the sole reason for the other party's decision to enter into the contract.

If he checks the truth of the statement, he cannot say later that the statement induced him to make the contract – the fact that he checked the statement proved that he did not rely on it.

Attwood v Small (1862)

Museprime Properties Ltd v Adhill Properties Ltd (1990)

Types of Misrepresentation

There are three types of misrepresentation.

- Fraudulent Misrepresentation
- Negligent Misrepresentation
- Innocent Misrepresentation

Fraudulent misrepresentation – a statement made:

1. knowing that it was false;
2. without believing it to be true; or
3. being reckless as to whether or not it was true.

Note the element of dishonesty.

Fraudulent misrepresentation enables the misled party to rescind (see below) the contract and claim damages in the tort of deceit.

Negligent misrepresentation - where the statement maker believes the statement to be true, but has no reasonable grounds to support this belief.

Negligent misrepresentation gives the misled party the right to rescind the contract, and claim damages under S 2(1) Misrepresentation Act 1967.

Innocent misrepresentation - where the statement maker honestly believes the statement to be true, and has reasonable grounds to do so. Innocent misrepresentation enables the innocent party to rescind the contract (damages are not available as of right).

Further details on the remedies for misrepresentation

There are two principal remedies for misrepresentation.

I. **Damages** – these are not always available depending upon the type of misrepresentation (see above). The amount of damages the innocent party is entitled to receive is the sum which will put him in the position he would have been in had the misrepresentation not been made.

II. **Rescission** – all three types of misrepresentation give the innocent party the right to **rescind** the contract. Rescission gives the innocent party the right to set the contract aside within a reasonable time and the parties will be restored to their pre-contractual position **I.E**. **give the goods back and get your money back in full with no discount for use of goods prior to discovering the misrepresentation.**

(Alternatively, the innocent party might decide to **affirm** the contract, which means that the contract will carry on and there will just be a claim for damages)

There are occasions when rescission will not be permitted:-

i. **Contract is affirmed** - a party could affirm a contract expressly or impliedly by their conduct
ii. **Lapse of time** – the contract could be affirmed through lapse of time.
iii. **Restitution impossible** (restitutio in integrum) - if it is impossible to return the parties to their original positions.
iv. **Third party gains rights** - if a third party gains rights to the subject matter of the contract before the contract is rescinded, the right to rescission will be lost.

NOTE
If there is an exclusion clause in the contract protecting one party from any misrepresentations they made during negations of the contract then see S.3 UCTA'77 which states **such a clause will be valid if reasonable!**

WEEK NINE

Discharge of Contract

Remedies for Breach of Contract

CONTENT OF THIS LECTURE

- How a contract comes to an end
- Remedies for breach of contract

DISCHARGE OF CONTRACT

When a contract is discharged, the parties are relieved of their contractual obligations. A contract may be discharged in four main ways.

1. Agreement.
2. Performance.
3. Frustration.
4. Breach.

1. Agreement

Since a contract is formed by agreement it makes sense that it may be ended by agreement. In the original agreement there may be a term that sets out the circumstances in which the agreement will come to an end.

3. Contract for fixed term.
4. Term allowing notice.
5. Term which brings contract to end if certain events happen.

If there is no such term in the contract, the parties may agree to bring the contract to an end provided that the agreement is supported by consideration.

2. Performance

This is the most common method of discharging obligations under a contract and takes place when both parties have performed their contractual obligations. Generally, complete and exact performance is required before the contract will be discharged.

Cutter v Powell (1756)

However, **part performance** may be permissible in certain circumstances.

- Divisible contract (e.g. building contract).
- Partial performance has been accepted by the other party.
- Performance has been prevented by the other party.
- The contract is capable of being fulfilled by substantial performance.

Hoenig v Isaacs (1952)

3. Frustration

Frustration is something which occurs after the contract was made, but which makes the contract impossible to perform or makes performance fundamentally different to that contemplated by the parties at the time the contract was concluded.

Frustration discharges both parties from their liabilities under the contract.

Circumstances giving rise to frustration

- Destruction of subject matter of the contract

Taylor v Caldwell (1863)

- Government interference or supervening illegality prevents performance

Morgan v Manser (1947)

- A particular event, which was the sole reason for the contract does not actually ever take place.

Krell v Henry (1903)

- The death or illness of one of the parties.

Condor v The Barron Knights (1966)

Limitations to the doctrine of frustration

I. An alternative method of performance is still possible.

II. The supervening event must not be self-induced. If it is, then it is a breach of contract NOT a frustrating event.

Maritime National Fish Ltd v Ocean Trawlers Ltd (1935)

III. If the supervening event is provided for in the contract, the court will accept the provisions made and will not apply the doctrine of frustration - note the effect of **force majeure clauses** which are agreed "up front" by the parties and provide for what should happen if a particular event takes place or certain circumstances arise.

IV. If the event was, or should have been, foreseen by one party, that party cannot rely on frustration.

V. Performance simply becoming more difficult or costly is not frustration.

Davis Contractors Ltd v Fareham UDC (1956)

Effects of frustration

The effects of frustration are governed by the **Law Reform (Frustrated Contracts) Act 1943.**

- Any money paid is recoverable (Section 1(2)).
- Any money payable ceases to be payable (Section 1(2)).
- A court **may** allow the parties to recover any expenses that have been paid (Section 1(2)).
- A party who has gained a valuable benefit from the contract before the frustrating event **may** be required to pay for the benefit on a quantum meruit basis (Section 1(3)).

4. Breach of Contract

Breach of contract occurs when one party fails to comply with its contractual obligations.

- Fails to perform its contractual obligations.
- Performs its contractual obligations defectively.

- States that it will not perform its obligations.

Any breach of contract entitles the innocent party **to sue for damages**, regardless of the severity of the breach.

Furthermore, one party **may** be discharged from his obligations under the contract because of breach by the other. However, this is not an automatic right and only arises where there has been a breach of a **condition** (also known as a primary obligation i.e. a major term going to the heart of the contract – see week 5 on this topic) or where the other party has **repudiated (**ended) the contract before performance is due or fully compete.

Note that there are two different kinds of breach: **actual and anticipatory**.

Actual breach

The breach might occur by reason of:

- non-performance; or
- defective performance

Anticipatory breach

The breach occurs when one party indicates in advance (i.e. before the performance date) that they will not be able to perform the obligation. The breach might be express or implied.

Remedies for breach of contract

The main remedies for breach of contract are.

- Damages.
- Specific Performance.
- Injunction.

Damages (compensation)

They aim to put the innocent party in the position he would have been had the contract been fully performed ('expectation damages').

Not all losses are recoverable, only those that satisfy the **remoteness of damages** test created in

Hadley v Baxendale (1854)

Victoria Laundry Ltd v Newham Industries Ltd (1949)

Koufos v Czarnikow Ltd (The Heron II) (1969)

Today damages are only payable for:-

- Loss/damage arising as a natural consequence of the breach **OR**
- Loss/damage which both parties would reasonably have contemplated when the contract was made as a probable result of any breach.

But note the party in breach maybe liable for consequences which although were a type in the contemplation of the parties turned out to be far more serious than expected

H Parsons (Livestock Ltd) v Uttley Ingham (1978)

The claimant is under a duty to **mitigate his loss** i.e. to take reasonable steps to reduce it. He must take reasonable steps to minimise his losses, and not deliberately increase the loss unreasonably.

However, the claimant is only required to take reasonable steps to mitigate his loss; he need not go beyond what a reasonable person in business would be expected to do.

Liquidated damages

The parties may agree in the contract itself what is to be paid in the event of a breach. This type of term will stand if it is a genuine pre-estimate of likely loss. If not, it may be regarded as a penalty. The court will then assess compensation itself in the usual way.

What is a penalty?

Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd (1915)

If the sum payable is "extravagant and unconscionable" by comparison with the greatest loss which might be caused by the breach, it is likely to be viewed as a penalty.

If the breach consists of non-payment of money and the amount payable under the clause exceeds the amount recoverable for the breach then the clause will be a penalty.

There is a presumption of penalty if the contract provides for the same amount to be payable as damages in the event of several different types of breach regardless of the severity of the breach.

NB – just because the parties themselves have called the clause a penalty does not make it so.

Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd (1933, AC)

Specific Performance

The court may order the defendant to perform his part of the contract in accordance with its terms. This is known as specific performance. The order is subject to the court's discretion and is subject to the restrictions listed below.

a) It will only be awarded where damages would be an inadequate remedy.

b) It will not be granted if the courts cannot supervise enforcement.

c) It will not be granted where the claimant acted improperly (because it is an **equitable** remedy).

Injunction

An injunction is a court order. It may take two forms – a court order that stops a person doing something is called a 'prohibitory injunction' and an order that requires him to do something is called a 'mandatory injunction'.

Warner Bros Inc v Nelson (1937)

Page One Records Ltd v Britton (1968)

STATUTORY LIMITATIONS ON BRINGING A CLAIM FOR BREACH OF CONTRACT

The Limitation Act 1980 imposes limitation periods in respect of certain contracts**.**

Claims cannot be brought after the relevant limitation period has expired.

Section 5	the claim must be started within **6 years** from the date of the breach if it relates to a **simple contrac**t (i.e. one not made by Deed).
Section 8	the claim must be started within **12 years** from the date of the breach if it relates to a contract **made by Deed**.

WEEK TEN

Introduction to Torts and the Law of Negligence

CONTENT OF THIS LECTURE

- Introduction to tort law
- Negligence

THE NATURE OF TORT

"*The province of tort is to allocate responsibility for injurious conduct*".

Lord Denning

Definition

A tort is often defined as a civil wrong which is not a breach of contract.

A tort is a breach of duty fixed by law (either common law or statutory law), committed against an individual (including companies), which gives rise to an action for damages.

Generally, a tort involves the defendant doing something (**act**), or not doing something (**omission**), which **causes harm or loss or damage** to the claimant. A tort also involves an element of **fault** on the part of the defendant.

Tort law gives rights to individuals (either natural people like us or legal entities like companies).

We enforce these rights using the civil, rather than criminal, court system and we do not need to point to a contract in order to enforce our rights. This can be useful when there is no direct contract link between us (the claimant) and the person who actually caused the liability. We cannot sue them for breach of contract (there is no contract) but we still want to hold someone liable for the loss/injury that we have suffered.

Example

A manufacturing company purchases some equipment for its machinery from a wholesaler. The company's contract is with the wholesaler.

Imagine that the equipment is defective and the defect is caused by the manufacturer's negligence. The defective equipment causes the company's equipment to set fire and its warehouse burns down.

Imagine that the wholesaler subsequently becomes insolvent so there is no point in the company bringing an action against it even if it has breached the contract by supplying defective goods. What can the company do?

The company did not contract directly with the manufacturer so can't sue for breach of contract. The company cannot take advantage of the contract between the manufacturer and the wholesaler either because the rules of privity of contract say that only those who are a party to the contract can sue on it. However, since the damage was caused by the manufacturer's negligence, the company can sue the manufacturer in tort and, if it is successful, it can recover damages.

How and why does tort liability arise?

Tortious liability arises when one party breaches a legal duty that is owed to another party. That legal duty might arise under the common law i.e. a duty created by the judges in case law or under statute i.e. a duty set down in legislation. If the duty has been breached and loss has been suffered, there will be a claim for damages.

Tort and Contract

- Both contract and tort law fall under the umbrella of private law.
- Both contract and tort law also seek to compensate the innocent party, rather than punish the wrongdoer. However, the way that they do that is different.
- In tort law, the aim is to compensate the innocent party for wrongful interference with his rights i.e. damages aim to put him in the position he was in before his rights were interfered with.
- However, damages in contract law aim to compensate the innocent party for the fact that his expectations have not been fulfilled i.e. the other party has not performed in accordance with their agreement. Therefore, damages in contract law aim to put the innocent party in the position he would have been in had the contract been performed correctly i.e. as if his expectations had been fulfilled.

- In tort, duties are fixed by law rather than by agreement as they are in contract law.
- In contract law, the only people who are entitled to sue in the event of a breach of contract are the people who were actually a party to the agreement. It doesn't matter if someone else has suffered loss, only the parties can sue under a contract. This is not the case in tort law where rights are fixed by law and any person can sue any other person for wrongful interference of those rights.

It is also worth noting that a party might well breach its contractual obligations and cause liability under tort law at the same time. For example, this would be the case where a party breached his contractual promise to take reasonable care in manufacturing goods and also incurred liability in negligence for breaching the general duty of care owed to anyone who used those goods.

There are many different torts recognised in law including negligence.

THE 3 ESSENTIALS ELEMENTS OF A NEGLIGENCE CLAIM

1. **The Defendant owes the claimant a duty to take reasonable care; and**
2. **The Defendant is in breach of this duty by being negligent; and**
3. **Due to the defendant's breach the claimant has suffered loss or injury which is not too remote from the defendant's actions.**

1. Defendant owes the claimant a duty to take reasonable care

How do you establish a duty of care? The fundamental test is that of reasonable foresight according to the 'neighbour principle' of Lord Atkin in

Donoghue v Stevenson (1932)

If the claimant is not a foreseeable victim/beyond the area of reasonable foreseeability there is no duty of care.

Due to the volume of case law following ***Donoghue v Stevenson*** establishing a duty of care in most areas of domestic and commercial life have been tested in the courts.

For a situation which has not been before the courts today the courts apply a three part test (see ***Caparo Industries v Dickman [1990] 1 All ER 568*****)** to see if a duty of care is owed to the claimant by the defendant:-

- Foreseeability of harm.

- Sufficient proximity between defendant and claimant.

- Just, fair and reasonable to impose such a duty.

2. Defendant is in breach of their duty of care by being negligent

In order for a claim to be successful a claimant must not only prove that a duty of care existed but also that the duty was breached by the defendant failing to take reasonable care.

The test for establishing a breach of duty is an objective one set out in

Blyth v Birmingham Waterworks Co (1856)

which stated a breach of duty occurs if the defendant '*fails to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or does something which a prudent and reasonable man would not do*.'

The reasonable man is not expected to be skilled in any particular trade or profession but if the defendant does possess such skills or qualifications he will be expected to act as a reasonable person would do with that same expertise (***Wiltshire v Essex Area Health Authority***).

If the defendant is disabled, he will be expected to have acted as a reasonable person would do with the same disability

The following principles have been established by case law to help determine if the duty has been breached by the defendant's behaviour:

1. Likelihood of injury – ***Bolton v Stone [1951],*** the higher the probability the higher the standard of care ***Miller v Jackson (1977);***

2. Seriousness of injury – ***Paris v Stepney BC [1951],*** if the potential injury is serious then the more the defendant must do to protect the claimant;

3. Importance of object to be attained or the usefulness of wrongdoer's actions – ***Watt v Hertfordshire CC [1954]***. Was a greater good served by the defendant's actions which would effectively provide a defence for his otherwise negligent act?

4. Practicality of precautions, cost of making sure no harm would be caused – ***Latimer v AEC [1952]*** if the cost of eliminating the risk entirely is disproportionate to the threatened injury and probability of injury the defendant does not have to eliminate the risk entirely

5. State of medical or scientific knowledge at the time of the incident – ***Roe v Minister of Health [1954]***

6. Common practices – see ***Bolam v Friern Barnet HMC [1957],*** will be ignored if in the opinion of the court the common practice itself is negligent, see ***Bolitho v Hackney HA [1998]***

7. lack of training or the peculiarities of the defendant are NOT relevant Therefore the standard of skill expected from a trainee accountant is the same as that of any reasonable accountant - ***Nettleship v Weston (1971)***

More on negligence next week and in the last week of term

WEEK ELEVEN

NEGLIGENCE PART II

CONTENT OF THIS LECTURE

- Third essential element of a negligence claim
- Negligent misstatement

3. Due to the defendant's breach the claimant has suffered loss or injury which is not too remote from the defendant's actions

Taking the first part of this element '**due to the defendant's breach the claimant has suffered'**

This is about causation - the cause of the claimant's loss or injury is due to the defendant breaching his duty

The defendant is only liable if the claimant can prove on the balance of probabilities that 'but for' the BREACH there would have been no injuries.

Barnett v Chelsea & Kensington HMB [1969]

Taking the remainder of this element **'loss or injury which is not too remote from the defendant's actions'**

There will be no liability if the damage/ loss caused to the claimant is too remote from the actions of the defendant (damage not reasonably foreseeable).

Wagon Mound (No1) (1961)

When applying this rule the court use an objective test – the defendant is ONLY responsible fort the damage which a reasonable man would foresee as a likely consequence of his actions.

If the particular type of injury/loss was a foreseeable consequence of the defendant's breach of duty the defendant will be liable for all the damage/injuries of that type no matter what the extent

Hughes v Lord Advocate [1963]

Jolley v London Borough of Sutton (2000)

Note the "thin skull rule" in ***Smith v Leech Brain (1962) and Haley v London Electricity Board (1965)*** which provides an exception to the principle established in Wagon Mound.

Novus Actus Interveniens (If the chain of events is broken by an intervening event)

This includes actions by the claimant or a someone else who the defendant has no control over. In such cases the court has to decide whether this 'new event' is sufficiently serious to be the cause of the injury rather than the actions of the defendant

If the defendant injures a claimant who has already been injured by someone/ thing else the defendant will only be liable for the increased injury ie the exacerbation NOT the original injury

Remember what the Unfair Contract Terms Act 1977 has to say about notices which try to exclude liability for negligent acts and ommissions:

Section 2(1)	A party cannot, by use of a contractual term or notice, exclude his liability for negligently causing death or personal injury. This term or notice will be **void.**
Section 2(2)	A party cannot, by use of a contractual term or notice, exclude his liability for negligently causing any other type of loss or damage (i.e. other than death or personal injury) unless that term or notice satisfies the **reasonableness** test.

The Tort of Negligent Misstatement

The tort of negligent misstatement is part of the wider tort of negligence. It has evolved to ensure those suffering only a financial loss with NO PHYSICAL INJURY have a right in law to sue the defendant for their loss of £££££ £££££

A person might suffer economic loss by relying and/or acting upon negligently prepared advice or information. The tort of negligent misstatement operates to provide a right of action for such people so that they can be compensated for their financial losses

For a claimant to succeed in an action for negligent misstatement, it must be established that the defendant:

- owed the claimant a duty to take reasonable care; **AND**
- acted in such a way so the duty was breached; **AND**
- this resulted in the loss suffered by the claimant.

Hedley Byrne v Heller [1963]

An advertising agency was given a reference from a client's bank which said that the client was credit worthy. The House of Lords held that there was a duty of care not to make a statement carelessly (the reference) which causes economic loss to another.

In 2018 to prevent unlimited claims, in order for a duty of care to be established it is not enough that an adviser can reasonably foresee that negligence **could result** in a claimant suffering financial loss. It is necessary for the adviser and recipient (the claimant – the one who has suffered the financial loss) to be in a **'special relationship'**. This is to prevent someone being liable for large group of potential claimants for an indeterminate period eg potential investors in a public floatation on the stock market.

This **special relationship** exists if:-

1. The statement maker has professional skills and expertise which the claimant can show they relied upon

   AND

2. It was reasonable in the circumstances for the claimant to rely on the statement

   AND

3. The defendant. The statement maker knew or should have known the claimant would rely on the statement

This criteria for deciding whether a duty of care arises was set out in

Caparo Industries plc v Dickman [1990]

The claimant was a company which owned shares in another company called Fidelity plc. The defendant was a firm of accountants.

The accountants prepared accounts for Fidelity plc. The accountants negligently stated in the accounts that Fidelity plc had profits of £1.3 Million when in fact it had made a loss.

Claimant relied on accounts and increased its shareholding in Fidelity plc. In fact, it later took over the company completely before discovering that the company was in fact worth far less than it had been led to believe.

The House of Lords held: no duty of care existed between the accountants and the claimant. House of Lords was influenced by the fact that the purpose of the accounts was to help shareholders decide how to vote at the AGM, not to aid their decision as to whether or not to increase their investment in the company.

To recap : Did the defendant…….

- reasonably anticipate how advice would be used?
- know the destination of the advice?
- could D have reasonably anticipated that claimant would act upon the advice without seeking further clarification/independent advice?

For More See Pages 358 – 363 in the text book

What can you claim in damages if you are the victim of a negligent misstatement?

Economic loss – "loss independent of physical injury to person or property"

NB Pure economic loss not recoverable - what is 'pure economic loss?

Weller & Co v Foot and Mouth Disease Research Institute [1965]

Consequential economic loss **is** recoverable

Spartan Steel and Alloys v Martin [1972]

WEEK TWELVE

Vicarious liability, defences and remedies

CONTENT OF THIS LECTURE

- Vicarious liability.
- Defences in tort.
- Remedies in tort.

VICARIOUS LIABILTY

Vicarious liability is where one person is made liable for a tort committed by another person.

An employer is vicariously liable for the tortious acts of his employees committed during the employees' course of employment – doing the job

However, a company is not usually vicariously liable for the acts of independent contractors.

Who is an employee?

Historically, any person who was under the control of another was found to be a **servant (employee).**

However, this test was found to be inadequate and today the courts look at all the circumstances surrounding a particular case to ascertain whether or not a person is an employee. Giving someone the label of employee is not sufficient. Equally, calling someone a contractor does not avoid vicarious liability; the courts look at the reality of the situation.

Ready Mixed Concrete v Minister of Pensions (1968)

Essentially, provided that the activity which led to the tort was sufficiently closely connected with the employee's contractual employment duties, the employer will be vicariously liable. It does not matter that the employee was disobeying orders or acting negligently.

Century Insurance v The NIRTB (1949)

Note that there must be some connection between the actions of the employee and his job.

Beard v London Omnibus Co (1900)

Note the impact of public policy in determining the extent of proximity when assessing vicarious liability.

Lister v Hesley Hall (2001)

The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools [2012]

DEFENCES

1. **Volenti non fit injuria**

This is also known as consent. The defence is available if:

- the claimant knew of the risk; and
- he freely consented to it.

ICI v Shatwell (1964)

This defence is rarely available to employers, as employees are often under pressure to do dangerous work

Smith v Baker (1891)

The defence is NOT available if the claimant was injured whilst rescuing someone from a situation that was created by the negligence of the defendant. In such circumstances, the claimant is not deemed to have consented to the risk because 'danger invites rescue'.

Sylvester v Chapman (1935)

2. Contributory negligence

See **The Law Reform (Contributory Negligence) Act 1945**

This is only a **partial defence**, which reduces the amount of compensation that is payable to the claimant on the basis that the claimant failed to take reasonable care with respect to his or her own safety, i.e. the claimant contributed to their own injuries/ loss

Sayers v Harlow UDC (1958)

Stone v Taffe (1974)

3. Illegality

When a person is injured while he is participating in an unlawful activity, and the injury is directly related to that illegality, this provides an absolute defence ***Ashton v Turner [1980]*** - 2 burglars A + B having committed a robbery got in to their get-away car driven by C. Due to C's negligent driving B was injured. B attempted to sue C for negligence. Held B could not sue C as **NO** duty of care arises in the commission of a crime.

REMEDIES IN TORT

The remedies for tortious claims are damages and/or injunction - see last week's lecture with rules on remoteness of damage set out in the

Wagon Mound (No 1) (1960)

Note - The claimant is under a duty to **mitigate his losses**.