# WJEC/Eduqas A Level Law Book 2 answers

## Chapter 1: The law of contract

### Activity 1.1 Legal authority

| Legal authority | Rule |
|---|---|
| *s9* | Services must be provided at a reasonable price. |
| *s10* | An unfair term is not binding on the consumer. |
| *s11* | The consumer's legal right to reject goods that are of unsatisfactory quality. |
| *s20* | Goods must be fit for purpose. |
| *s23* | Goods must be of satisfactory quality. |
| *s49* | If a service does not satisfy criteria, trader should redo the inadequate element at no extra cost. |
| *s50* | Where repeat performance of the service is not possible, the consumer can obtain a price reduction. |
| *s51* | Goods must be as described. |
| *s52* | Retailer must be given the opportunity to repair or replace defective goods outside the 30 days of purchase. |
| *s55* | Services must be undertaken with reasonable care and skill. |
| *s56* | Any information given to the consumer before the service is provided is binding. |
| *s62* | Services must be provided within a reasonable time. |

### Activity 1.2 Implied terms

These are mini scenarios for which the students can use the IDA structure to construct mini answers using the relevant statute provisions.

## Activity 1.3 Application question (*taken from WJEC/Eduqas SAMs material)*

1. The question is taken from WJEC/Eduqas sample assessment material. Refer to https://www.eduqas.co.uk/qualifications/law/A-level-Law-SAMs.pdf, page 35, for indicative content of a response.
2. Use the approach outlined in the SAM that covers Q1 to respond. Discus it with a classmate if you want to.

## Activity 1.4 Exclusion clauses

| Example | Exclusion clause successfully implemented? (Yes/No) | Reason and case example(s) |
|---|---|---|
| 1. A notice placed on the counter in a shop. | Yes | REASONABLE NOTICE: Notice was given at the time the contract was made.<br>***Parker v South Eastern Railway (1877)*** |
| 2. A notice in a signed contract. | Yes | SIGNATURE: Notice was incorporated regardless of whether the parties have read the terms.<br>***L'Estrange v Graucob (1934)*** |
| 3. A notice contained in a delivery note where the parties have regularly dealt on the same terms. | Yes | A PREVIOUS COURSE OF DEALING: It is assumed that the same exclusion clauses apply to subsequent transactions, even if they had not been incorporated in the same way.<br>***Spurling v Bradshaw (1956)*** |
| 4. A notice placed on a hotel bedroom wall. | No | NOT INCORPORATED: The notice was given too late to be classed as reasonable notice.<br>***Olley v Marlborough Court Ltd (1949)*** |
| 5. A notice contained in a receipt. | No | NOT INCORPORATED: A reasonable person would not expect it to contain contractual terms.<br>***Chapelton v Barry UDC (1940)*** |
| 6. A notice on the back of a cloakroom ticket. | Yes | REASONABLE NOTICE: Notice was given at the time the contract was made.<br>***Parker v South Eastern Railway (1877)*** |
| 7. A notice posted on the machine at the entrance to a car park. | Yes | REASONABLE NOTICE: Notice was given at the time the contract was made.<br>***Parker v South Eastern Railway (1877)*** |

## Activity 1.5: Importance of terms

| Term | Explanation | Supporting case(s) |
|---|---|---|
| Conditions | Terms that cannot be identified until the contract has been breached. | ***Hong Kong Fir v Kawasaki (1962)*** |
| Warranties | Major terms of a contract.<br>So important that a failure to perform would render the contract meaningless. | ***Poussard v Spiers & Pond (1976)*** |
| Innominate terms | Minor term of a contract.<br>A breach means the party can sue for damages but not reject the contract. | ***Bettini v Gye (1876)*** |

Using the relevant coloured highlighter, highlight in the following statement which terms are the conditions, warranties and innominate terms.

**I arrange for Jack to mow my lawn every Tuesday morning for £20 per week. This Tuesday evening, I am hosting a barbecue for my friends so I need the garden to look well kept.**

# 1.1 Quickfire questions

1. Terms = a statement made during contract negotiations that is intended to be a part of the contract, binding parties to it. Representation = a statement made during contract negotiations that is not intended to be part of the contract.
2. These are:
   - Importance of the statement – ***Bannerman v White (1861)***.
   - Knowledge and skill of the person making the statement – ***Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd (1965)***.
   - Timing of statement – ***Routledge v McKay (1954)***
3. A literal interpretation is favoured over a business sense because otherwise the language could be undervalued. Just because a contract has worked out badly for one party, it does not justify departing from the literal wording of the contract.
4. The Supreme Court in this case issued guidelines for the law in relation to whether a term is implied into a contract. This case overruled the business efficacy and the business necessity tests previously laid down in the case of ***Equitable Life Assurance Society v Hyman (2000)***.
5. Redress for different situations could be as follows.
   - **Date of purchase**: ***s20*** gives the consumer a legal right to reject goods of unsatisfactory quality, unfit for purpose or not as described to get a full refund, but this is limited to within 30 days of purchase.
   - **30 days**: ***s23*** provides that the consumer has to give the retailer one opportunity to repair or replace any goods outside the 30 days. If the attempt to repair is unsuccessful, the consumer can claim a refund or a price reduction.
   - **Six months**: If a fault is discovered within six months of purchase, it is presumed to have been there since purchase, unless the retailer can prove otherwise.
   - **If the fault is discovered after six months**, the burden is on the consumer to prove that the product was faulty at the time of delivery. The consumer has six years to take a claim to the small claims court.

6. ***s55*** – the trader should either redo the element which is inadequate or perform the whole service again at no extra cost. ***s56*** – where repeat performance is not possible, the consumer can claim a price reduction. This could be up to 100% of the original cost and the trader should refund the consumer within 14 days of agreeing that a refund is due.
7. These are as follows.
   - A description of the goods, services or digital content, including how long any commitment will last on the part of the consumer.
   - Total price of the goods, services or digital content, or how the price will be calculated.
   - All additional delivery charges and other costs.
8. Cancellation rights are more generous under this Act than if goods had been bought in a shop:
   - **Date of purchase**: the right to cancel starts the moment the consumer places their order and ends 14 days from the day the goods are received.
   - **14 days**: The consumer has a further 14 days to return the goods to the trader.
   - **28 days**: The trader has another further 14 days to give a refund from the date they receive the goods or from the date of the consumer providing evidence that they have returned the goods.
9. By signature: ***L'Estrange v Graucob (1934)***. By reasonable notice: ***Parker v South Eastern Railway (1877)***. By a previous course of dealing: ***Spurling v Bradshaw (1956)***.
10. This Act is a statutory control for exclusion and limitation clauses for non-consumer contracts only (business-to-business contracts).
11. A warranty is a term of a contract which is minor; breach of which gives the injured party the right to sue for damages only.

## Activity 1.6 What is misrepresentation?

| Misrepresentation is … | Case examples |
|---|---|
| … a statement of material fact … | ***Bisset v Wilkinson (1927)***<br>***Edgington v Fitzmaurice (1885)*** |
| … made by one party to a contract to the other party … | ***Peyman v Lanjani (1985)*** |
| … during the negotiations leading up to the formation of the contract … | ***Roscorla v Thomas (1842)*** |
| … which was intended to operate and did operate as an inducement … | ***JEB Fasteners Ltd v Marks Bloom & Co Ltd (1983)***<br>***Attwood v Small (1838)*** |
| … under the contract, and which was untrue or incorrectly stated. | ***Couchman v Hill (1947)*** |

## Activity 1.7 Types of misrepresentation

1. **Type of misrepresentation:** Innocent.
2. **Type of misrepresentation:** Negligent.
3. **Type of misrepresentation:** Fraudulent.
4. **Type of misrepresentation:** Fraudulent (if true).

## Activity 1.8 Mead v Babington (2007)

1. If the parties wish a statement to part of the contract, it must be incorporated. This is straightforward if it is written into the contract but can prove more complicated if it is not. statements leading up to a contract can be representations intended to persuade the other to enter into the contract. If the person making the statement has expert knowledge or skills, the courts will be more willing to interpret it as a term rather than a representation. The more time that elapses between the statement being made and the contract being concluded, the less likely the courts will be to consider the statement a term.
2. No.
3. Yes.
4. Yes.
5. The second statement could be innocent or negligent, as the estate agent had seen the Spanish developer at work and was entitled to take him at face value. It could therefore be seen as innocent misrepresentation.

   The third statement is most likely to be negligent misrepresentation, 'mere puff'.

## Activity 1.9 Sample scenario problem questions

No answers available.

## Activity 1.10 Misrepresentation and economic duress

No answers available.

# 1.2 Quickfire questions

1. A false statement in a contract that can cause the contract to be voidable.
2. A statement of material fact, made by one party to a contract to the other party, during the negotiations leading up to the formation of the contract, which was intended to, and did, operate as an inducement under the contract, and which was untrue or incorrectly stated.
3. Remedies:
   - Damages according to tort measure of negligence.
   - Damages under ***s2(1) Misrepresentation Act 1967***.
   - Equitable remedy of rescission.
4. Innocent, negligent and fraudulent.
5. Four factors:
   - Did the person claiming to be coerced protest?
   - Did they have any other available course of action?
   - Were they independently advised?
   - After entering into the contract, did they take steps to avoid carrying it out?

6. It makes the contract voidable and the claimant can rescind the contract or seek damages.
7. Not necessarily. Some misrepresentations are difficult to prove, and any contract clauses that exclude liability to misrepresentation or restrict remedies should be tested for reasonableness.
8. Silence (not mentioning something) is not normally seen as a false statement, but providing misleading information would be. If circumstances on which the contract depends change, and one party does not tell the other party, this could be regarded as misrepresentation.
9. A statement of material fact is not mere opinion or future intention.
10. Extreme coercion renders contract commercially unviable.

# Chapter 2: The law of tort

## Activity 2.1 Private and public nuisance

| Private nuisance | | |
|---|---|---|
| **Element of tort** | **Law** | **Case** |
| **Valid claimant and defendant** | Claimant must be someone with a legal interest in the land.<br>Defendant is the creator of the nuisance or the occupier who continues the activities of the creator.<br>Landlords can be liable for actions of tenants if they authorise or approve the actions of the tenants. | ***Hunter v*** Canary Wharf: Claimants complained about dust and TV interference from building work. Some of the claimants were unable to pursue claims because they lacked any legal interest in the affected land.<br>Sedleigh-Denfield ***v O'Callaghan***: A trespasser installed a pipe in a ditch on defendant's land. Three years later, the pipe became blocked and the flooding damaged claimant's land. Defendant was liable, even though he had not installed the pipe, as he knew of its existence.<br>Tetley ***v Chitty***: Local council was liable for the noise and disturbances caused by a go-kart club, after the council had leased land to the club for the express purpose of developing a go-kart track. |
| **Interference** | Two types of interference:<br>Indirect (e.g. noise on one piece of land which affects the people living next door).<br>Direct interference (where the defendant has come onto the claimant's land).<br>The interference usually needs to be continuous, rather than one-off.<br>Physical damage to the land.<br>Loss of amenity: Claimant's ability to use or enjoy their land is restricted by the activities of the defendant (e.g. excessive noise preventing claimant from getting a good night's sleep; unpleasant smells and fumes preventing claimant from opening windows). | ***Holbeck Hall Hotel v*** Scarborough ***BC***: Claimant's hotel was built on the council's land, and it collapsed when there was a landslide. The council had not taken reasonable precautions to prevent the landslide but it was not held liable as the damage was not foreseeable. |

| Private nuisance | | |
|---|---|---|
| **Element of tort** | **Law** | **Case** |
| **Interference is unlawful** | It is unreasonable: people have the right to use their own land as they wish.<br>There is a limit beyond which activities become unlawful.<br>Court asks:<br>• Does the nuisance interfere with ordinary existence?<br>• Is the impact on the claimant so unreasonable that they should not be expected to put up with it?<br>Courts consider several factors when deciding if it is unreasonable, including the fact that certain activities are lawful in circumstances but not in others.<br>• Sensitivity: Claimants using their property for an extra-sensitive reason are not entitled to sue where a reasonable use would not need protection.<br>• Locality of the events.<br>• A nuisance claim is more likely to be successful if there is damage to property.<br>• Courts are more likely to consider a nuisance unreasonable if it lasts for a long time or is during unsociable hours.<br>• A single event can amount to a nuisance.<br>• Social utility of defendants' conduct: Just because something is considered useful to society does not mean that a remedy is not available in nuisance.<br>• If a nuisance is caused for malicious reasons, the claim is more likely to succeed (e.g. the defendant deliberately does something just to annoy the claimant).The defendant's malice can make unlawful something that might not otherwise be a nuisance. | ***McKinnon v*** Walker: Claimant could claim for the full damage caused to delicate orchids by gas emitted from defendant's factory. Even flowers of ordinary sensitivity would have been affected.Sturges ***v Bridgman***: 'What would be a nuisance in [quiet, residential] Belgrave Square would not necessarily be so in [industrial] Bermondsey'. ***St Helens Smelting v*** Tipping: Copper smelting, even in an industrial area, could be classed as a nuisance when it resulted in smuts damaging the claimant's shrubs. Bolton ***v Stone***: cricket balls were rarely hit out of field but caused damage to property. Nuisance occurred very infrequently so no breach of duty or nuisance.<br>Crown River Cruises ***v Kimbolton Fireworks***: a firework display that set fire to some moored barges was held to be a private nuisance.<br>***Dennis v*** MOD: Claimant lived in a large house in the country but his peace was regularly destroyed by RAF training jets flying overhead. Noise did amount to a nuisance and he was awarded damages, but no injunction as the flights were a necessary part of the country's defence preparations.<br>***Hollywood Silver Fox Farm v*** Emmett: Claimant farmed silver foxes. Defendant, as part of an ongoing feud, deliberately fired shotguns within the boundaries of his own land to startle the foxes and cause them to miscarry. Normally, firing a shotgun in the countryside would probably not be a nuisance, but here the malicious motive made it unlawful.<br>***Christie v*** Davey: The defendant lived next to a house used for piano and singing lessons. The defendant was annoyed and whistled, shrieked and banged tin trays on the walls during lessons. Injunction imposed against him because it was clear he deliberately aimed to disrupt and upset. The original music making was not held to be a nuisance. |

| Public nuisance | | |
|---|---|---|
| **Element of tort** | **Law** | **Case** |
| **Public nuisance** | Rarely used today as most activities under public nuisance are now covered by legislation.<br>Claimant must prove a class of people have suffered a common harm or injury.<br>Public nuisance case will reach court in one of three ways:<br>• By a criminal case. Most common. Investigated by police and prosecuted by CPS.<br>• The Attorney General seeks an injunction on behalf of the public.<br>• By a civil action brought by an individual who must show they suffered a special or particular damage, loss or injury beyond other members of their class. | ***Halsey v*** Esso Petroleum: Oil refinery discharged oily smuts which damaged the paintwork of the claimant's car, which was parked in the street outside his house. Other cars may have been affected but the claimant suffered damage beyond that of others and was able to claim for repairs to his car's paintwork. |
| **A class of people have been affected.** | It is not enough to show it affected one person.<br>A public nuisance is one 'which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects'.<br>It covers a section of the public, rather than individuals, and should involve a considerable number of people. | ***AG v*** PYA Quarries: Quarry owner argued the 30 houses affected by the dust and noise covered too few people to constitute a class. The court disagreed but declined to give guidelines on what number constituted a class.<br>***R v*** Madden: Defendant telephoned a bomb hoax to a steel works, which disrupted the business for about an hour. While a hoax telephone call falsely alleging that explosives had been planted could be an offence of public nuisance, few employees were on site and therefore there was not a sufficiently wide class of the public. |

| Public nuisance | | |
|---|---|---|
| **Element of tort** | **Law** | **Case** |
| **Common harm or injury.** | Affects a right, a common protection or a benefit enjoyed by the members of the affected class. | ***R v*** Rimmington: Defendant sent out 538 packages to different people containing racially offensive material. Some victims were chosen at random; others were picked because of their ethnic background. House of Lords held it was not a public nuisance as the actions of the defendant did not cause a common injury to a section of the public.<br>It is different if the defendant often blocks the highway for no good reason. ***Lyons v*** Gulliver: Defendant committed a public nuisance as he regularly allowed large queues of people seeking cheap seats to build up on the pavement outside his theatre, impeding access to claimant's shop. |
| **Highways** | Many public nuisances occur as a result of abuse of the right of passage over a highway.<br>A temporary obstruction is unlikely to amount to a public nuisance unless it is also unreasonable.<br>A person who trips over uneven paving stones will probably be able to obtain compensation. The duty has limitations. | ***Trent v*** Lee: Claimant tripped over a hosepipe laid across the highway by the defendant, who had no mains water connection to his premises. Claimant's action failed as the use by the defendant was regarded as reasonable.<br>***Noble v*** Harrison: Where premises adjoin the highway and damage is caused by something falling onto the highway, the landowner may be liable for public nuisance if evidence shows they knew or ought to have known of the danger.<br>***Wringe v*** Cohen: Dangerous premises which collapse onto the highway is public nuisance if the collapse is caused by lack of maintenance.<br>Sandhar ***v Department of Transport***: There is no general common-law duty to salt roads to prevent a built up of ice. |

## Activity 2.2 Applying Rylands v Fletcher

As well as using the notes provided, consider the cases and circumstances put forward in the 'Torts connected to land' chapter of *WJEC/Eduqas A Level Law Book 2.* Discuss your conclusions with your classmates.

# Activity 2.3 Sample answers for scenario question on nuisance and Ryland v Fletcher

## 1. Richard against Sam

### Private nuisance

Richard may file a claim against Sam using the law of private nuisance, claiming that Sam created a nuisance by interfering with his enjoyment of his land.

In order to establish Sam's liability for private nuisance, it must be shown that Sam's use of his land was unreasonable and that this caused an interference to Richard's enjoyment of his own land.

The first thing that has to be established is whether Richard has a right to make a claim. A claimant in a case of private nuisance must have an interest in the land affected by the nuisance, such as being an owner or a tenant, as illustrated in ***Hunter v Canary Wharf***, which explained that this is because the tort relates to how nuisance might impact on the value of the land. The scenario states that 'Richard bought the house next to Sam's shop' and, therefore, as an owner, Richard has an interest in the land.

The next thing to determine is whether Sam would be the appropriate defendant. Unlike the claimant, the defendant does not have to have an interest in the land but is usually the creator of the nuisance or the person who allows the nuisance to happen. In this scenario, Sam is the owner of the shop and Richard would argue he is therefore responsible for creating the smells and allowing the noise.

The nuisance must cause an interference to Richard's enjoyment of his land. This interference can be direct and indirect and would include things like smells and noise coming from commercial premises like Sam's shop. However, this interference must be 'unreasonable' in the way that it affects Richard. The question would be whether Sam does not have regard for his neighbours while he runs his business. Courts have laid down certain aspects of an interference that might make it unreasonable.

Firstly, the court will look at the locality of the nuisance – the character of the area, such as whether it is residential or not. The scenario states that the shop is in a 'quiet village' and so is probably residential.

Secondly, the court would assess the duration and time of the interference, which generally needs to be continuous and at unreasonable hours of the day, though ***Crown River Cruises Ltd v Kimbolton Fireworks Ltd*** did hold that a 20-minute fireworks display was a private nuisance, so there are exceptions to this rule. In the scenario, the noise and smells had continued for 'several months' and Sam 'increased his opening hours', suggesting that the interference might continue into night-time. The court would assess whether it has gone on long enough to meet this aspect of the test.

The third test is one of foreseeability. Sam may argue that Richard is being 'abnormally sensitive'. Recently, it has been suggested that 'abnormally sensitive' claimants are unlikely to succeed in a claim for private nuisance. ***Network Rail Infrastructure v Morris*** states that the test is one of 'foreseeability' instead. The question would be whether it was foreseeable that Sam's shop, selling curries

in a quiet village, could interfere with a neighbour's enjoyment of their land. It seems likely that a court would find that this interference is foreseeable. In this case, the noise would need to be substantial to affect a 'normal' claimant. It would be irrelevant if Richard was more sensitive to noise than other neighbours in the village. However, the scenario states that the noise is 'considerable' and the smells are described as 'strong', suggesting that it is substantial enough to meet this requirement.

The court would also look at whether Sam carried out any act of malice on behalf. An act of malice is a deliberately harmful act, as illustrated in ***Hollywood Silver Fox Farm Ltd v Emmett***, where a farmer deliberately fired a shotgun to interfere with his neighbour's business of breeding foxes. In the scenario, the court may find that Sam acted maliciously when he 'increased his opening hours' after Richard complained to him.

If the court finds that Sam is providing a benefit to the community, his conduct will not be seen as unreasonable, such as in ***Miller v Jackson***, when it was stated that using the ground for sport outweighed the private use of the claimant's enjoyment of their garden. Sam might claim that he provides a benefit to the community in supplying takeaway food. Though this may affect any remedy imposed by the court, it seems unlikely that this will negate liability altogether. Sam might also claim in his defence that Richard moved to live next to the nuisance. When Richard bought the cottage next to Sam's shop, he must have known about the shop and hence the likelihood of noise and smells. However, 'coming to the nuisance' is not a defence.

It seems highly likely that Richard would be able to establish that Sam's shop is causing a private nuisance, especially as the location is a quiet village, the noise is considerable and the smells are strong.

## 2. Sam against Richard

### Rylands v Fletcher

Sam may make a counter claim against Richard in relation to the destruction of his orchids using the rule laid down in ***Rylands v Fletcher***. This is when a person's property is damaged or destroyed by the escape of non-naturally stored material onto adjoining property.

Sam would need to establish that the lighter fluid had been collected and then kept on Richard's land. Sam would be able to establish this, as the scenario states that Richard kept it in his shed.

Secondly, Sam would need to prove that this amounted to a 'non-natural' use of the land. The courts have interpreted this as an extraordinary or unusual use of the land. Richard will argue that keeping lighter fluid for barbecues in a shed is not particularly unusual. However, the scenario implies that there was a great deal of fuel as it mentions 'cans' and hence this might amount to a non-natural use of land.

Next, Sam would need to prove that the fuel was likely to cause mischief if it escaped and that it did indeed escape, causing the damage. The rule is one of foreseeability, and ***Cambridge Water Co Ltd v Easter Counties Leather plc*** stated that the foreseeability relates to the type of damage caused, following the ***Wagon Mound*** ruling. Hence, the question would be whether it was reasonably

foreseeable that lighter fluid leaking onto Sam's orchids might cause damage. It seems likely that the answer would be yes. Richard might argue that this damage was not reasonably foreseeable because the plants were 'delicate and rare' but Sam could successfully argue that it is reasonably foreseeable that any plants would die if fuel contaminated their soil. As the scenario states that the fuel leaked into Sam's garden, it was the fuel that escaped and caused the damage.

### 3. Rhys's parking

**Public nuisance**

In relation to the obstruction by Rhys with his van, motorists may claim that this is creating a public nuisance. This is defined in ***AG v PYA Quarries Ltd*** as 'something which materially affects the reasonable comfort and convenience of a class of Her Majesty's subjects'. It is where a number of people are affected by the use of land in the locality.

It first needs to be established that Rhys's parking affects a representative number of people. Although no precise number is laid down by the courts, ***AG v PYA Quarries*** stated that it needs to be 'widespread in its range'. As the scenario states 'motorists', meaning more than one, and the problems are described as 'severe' it seems likely that the court will accept that the nuisance is sufficiently 'widespread'.

Secondly, it needs to be proved that the claimants suffered special damage. This might include loss of enjoyment of land, damage to goods or even financial loss. The scenario does not state the precise nature of the loss and consequently it seems likely that any claim under public nuisance would fail.

## Activity 2.4 Nuisance law

No answer available.

## 2.1 Quickfire questions

1. The item brought onto land must have escaped and caused damage. These may not equate to being dangerous.
2. An item leaves the land and goes onto another person's land. In ***Read v J Lyons & Co Ltd (1947)*** there was no liability under ***Rylands v Fletcher*** as the explosives did not leave the factory they were in.
3. Defences may include:
   - consent
   - vis major or an act of God
   - act of a stranger
   - statutory authority
   - contributory negligence.
4. Key elements:
   - claimant must have an interest in the land
   - must be unreasonable use of the land which is the source of the nuisance
   - claimant must suffer some harm or inconvenience

5. One definition in relation to trespass may be preventing someone from enjoying the benefits of their land. Direct interference may be physical entry, throwing something onto the land or, if given the right to enter the land, remaining there when the right has been withdrawn. Indirect interference, such as allowing branches of a tree to overhand someone's garden, is more likely to be classed as a private nuisance.
6. In deciding whether the use of land is unreasonable, the courts will consider several factors:
   - The sensitivity of the claimant.
   - The duration and time of the nuisance.
   - The character of the area.
   - The reasonable foreseeability of the type of damage.
   - Any act of malice on the part of the defendant.
7. Four essential elements:
   - Direct interference with the land.
   - Interference must be voluntary.
   - No need for defendant to be aware they are trespassing.
   - No need for claimant to experience harm or loss.

## Activity 2.5 Vicarious liability

Vicarious liability is the term used to explain the liability of one person for the torts committed by another. There must be a legal relationship between the two parties and the tort should be connected to that relationship. It mostly arises in employment when an employer might be liable for the torts of their employee. Vicarious liability is a form of joint liability, where an employer can be liable for the actions of their employees, even though the employer is not at fault in any way. Strict liability has the potential to be unfair but there are justifications for the imposition of such liability. For example, if someone over whom an employer has a degree of authority makes a mistake, then the employer bears some responsibility for this.

Vicarious liability has become a practical tool to help compensate victims, as employers are often insured against such losses. Vicarious liability is, therefore, a form of strict liability. This means that both the person who committed the tort, and their employer, can be sued (though in practice it is usually only the employer that is sued, because they are most likely to have insurance).

There are two questions to determine if vicarious liability applies to an employer:

1. Is the person who committed the tort an employee?

2. Was the tort committed in the course of that person's employment?

Of course, there primarily has to be a tort committed by the employee and, therefore, the claimant must prove the elements of whichever tort is alleged. For example, if the claimant is suing for negligence, they need to establish duty, breach and resulting damage.

## Activity 2.6 Elements of vicarious liability crossword

**Across**

**4.** independent contractors
**7.** multiple
**8.** control
**11.** payment
**12.** organisation

**Down**

**1.** control test
**2.** Cox
**3.** freelance
**5.** employee status
**6.** frolic
**9.** commuting

## Activity 2.7 Reasons for imposing vicarious liability

It is also important to be able to evaluate the law in this area. Some of the main justifications for vicarious liability are given below. Draw lines to match the reason with its corresponding explanation.

| Reason | Explanation |
|---|---|
| Insurance | Employers are in control of the conduct of employees and so should be responsible for their actions. Problems with this argument arise when considering more modern and flexible working arrangements. |
| Employer responsibility | Employers have control over who they employ and are in control of who is dismissed. They should be deterred from employing those known to create a 'risk'. |
| Profit | Employers profit from the work done by their employees so arguably should be liable for their torts and losses. |
| Control over risk | Employers are in a stronger financial position to pay compensation, and they will usually be insured. |
| Possibility of taking precautions | Employers are encouraged to take care to prevent accidents and to provide a safe working environment and good health and safety practices. |

## 2.2 Quickfire questions

**1.** The liability of one person for the torts committed by another
**2.** It is sometimes justified by the idea that, if someone for whom an employer has a degree of authority over makes a mistake, then the employer bears some responsibility for this.
**3.** Strict liability.
**4.** These could be as follows.
   **1.** Is the person (who committed the tort) an employee?
   **2.** Was the tort committed in the course of that person's employment?
**5.** Five reasons could be as follows.
   - Employer finances.
   - Employers in control of conduct of employees.
   - Employers profit from work of employees.
   - Employers should take care when recruiting.
   - Employers encouraged to provide a safe work environment / policies.

## Activity 2.8 Consent (*volenti non fit injuria)*

**Use the words below to fill in the blanks to complete this sumMarla of *volenti non fit injuria*.**

The Latin term *volenti non fit injuria* translates as: 'there can be no injury to one who consents', although it is often said to mean 'voluntary assumption of risk'. The principle behind this defence is that if the claimant consented to behaviour that carries a risk of harm then the defendant is not liable in tort. Successfully claiming this defence means that the defendant is not liable for any of the claimant's losses. It is a complete defence, therefore, and the claimant receives no damages.

The use of this defence can be seen in the case of ***Morris v*** Murray ***(1991)***. On appeal, the defence successfully argued that as the claimant was aware of the risk he was taking and consented to it; there was no liability in negligence.

In order to argue the defence, it must first be shown that the defendant has committed a tort. Once this is proved, the defendant must then prove that the claimant knew of the risk involved (the nature and extent of the risk) and that he voluntarily accepted that risk (it was claimant's own free choice).

### Passengers in vehicles

The courts have been reluctant to allow the *volenti* defence in cases of negligent driving, even if a passenger accepts a lift with an obviously drunk driver. Section ***149(3) Road Traffic Act 1988*** states: 'The fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negating any such liability of the user.'

There may, instead, be a defence of contributory negligence.

### Sporting activities

Individuals who voluntarily participate in a sporting activity, by implication, consent to the risks involved in that particular sport. These will vary with different sporting activities, for example, rugby tackles, cricket balls, boxing, etc. The general principle is that, provided the activity is within the rules of the game, an injured player cannot sue, as in Smoldon ***v Whitworth and Nolan (1997).***

There are also some sports that carry risks for the spectators, such as, being hit by a rugby ball while watching a match. The approach by the courts seems to be that an error of judgement or lapse of skill does not give rise to liability, as the spectator has accepted the risks by going to watch the live activity.

## Activity 2.9 Contributory negligence

Unlike *volenti,* which is a complete defence, the defence of contributory negligence allows a court to apportion blame (and therefore damages) between the two parties. It means that the claimant and defendant are partly to blame for the damage suffered, for example, if a negligent driver hits someone who had stepped into the road without looking.

***Section 1(1) of the Law Reform (Contributory*** Negligence***) Act 1945*** states:

*'where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage*

*shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.'*

This means that the claimant can still make a claim against the defendant, but any damages awarded will be reduced by the amount the claimant was to blame. This can be seen in the case of Sayers ***v Harlow UDC (1957)***, where the claimant's damages were reduced by 25% for her own 'blameworthiness' for standing on the toilet-roll holder.

For a defence of contributory negligence to succeed it must be proved that the claimant:

- failed to take care of their own safety in a way that at least partially caused their injuries **and**
- failed to recognise that they was risking their own safety even though 'the reasonable person' would do so.

## 2.3 Quickfire questions

1. The defendant is not liable for any of the claimant's losses. The claimant receives no damages.
2. Damages.
3. The defence of contributory negligence allows a court to apportion blame (and therefore damages) between the two parties. It means that the claimant and defendant are both partly to blame for the damage suffered. For example, a negligent driver hits someone who had stepped into the road without looking. In order for a defence of contributory negligence to succeed it must be proved that the claimant failed to both:
   - take care of their own safety in a way that at least partially caused their injuries
   - recognise that they were risking their own safety even though the reasonable person would do so.
4. 'There can be no injury to one who consents' although it is often said to mean 'voluntary assumption of risk'. The principle behind this defence is tha,t if the claimant consented to behaviour that carries a risk of harm, then the defendant is not liable in tort.
5. Individuals who voluntarily participate in a sporting activity, by implication, consent to the risks involved in that particular sport. The 'risk' will vary with different sporting activities, for example, rugby tackles, cricket balls being hit, boxing, etc. The general principle is that provided the activity is within the rules of the game, then an injured player cannot sue, as in Smoldon v Whitworth and Nolan (1997).

   There are also some sports that carry risks for spectators, such as, being hit by a rugby ball while watching a match. The approach by the courts seems to be that an error of judgement or lapse of skill does not give rise to liability as the spectator has accepted the risks in going to watch the live activity.

# Chapter 3: Criminal law

## Activity 3.1 Actus reus of murder

A person is a human being when they can exist independently of their mother. Therefore, a person who kills an unborn child may be criminally liable under the law but not homicide. There is much controversy over what constitutes 'dead' but it seems that the courts favour the definition of 'brain-dead' and this was confirmed in the case of ***R v Malcherek and*** Steel ***(1981)***.

It must then be proved that the defendant caused the death both in fact and in law. These are known as factual and legal causation.

**Factual causation** is decided using the 'but for' test. This asks 'but for' the conduct of the defendant, would the victim have died as and when they did? If the answer is no then the defendant will be liable for the death. This test is demonstrated in the case of ***R v*** White, where the defendant poisoned his mother but she died of a heart attack before the poison had a chance to take effect. He was not liable for her death.

Another part of factual causation is the de minimis rule. This test requires that the original injury caused by the defendants' action must be more than a minimal cause of death. This is demonstrated in the ***R v*** Pagett case, where the defendant's action was more than a minimal cause of death, even though the police fired shots between the defendant shooting and the victim dying.

**Legal causation** asks whether the injury at the time of death is still the operating and substantial cause of death. This is demonstrated in the case of ***R v*** Smith, where a soldier had been stabbed, was dropped twice while being taken to hospital, was delayed in seeing a doctor and subsequently given poor medical treatment. The court held that these other factors were not enough to break the chain of causation. At the time of death, the original wound was still the 'operating and substantial' cause of death. An alternative outcome where the original wound had almost healed was seen in the case of ***R v*** Jordan***.*** An act that breaks the chain of causation is known as a novus actus interveniens.

Another part of legal causation is the 'thin-skull' test. This means that a defendant has to take their victim as they find them, meaning that if the victim dies of some unusual or unexpected physical or other condition, the defendant is still responsible for the death. This is demonstrated in the case of ***R v*** Blaue. In this case, the defendant stabbed a woman who happened to be a Jehovah's witness. As a result of her beliefs, she refused a blood transfusion which would have saved her life. The defendant argued he should not be responsible for her death as the procedure could have saved her life and she refused it. The court disagreed and said he must take his victim as he finds them.

## Activity 3.2 Mens rea of murder crossword

**Across**

**1.** Woolin
**5.** malice aforethought
**7.** oblique
**8.** assisted suicide
**9.** Moloney
**10.** premeditated

**Down**

**1.** life imprisonment
**3.** virtual certainty
**4.** guilty mind
**6.** GBH

## Activity 3.3 Reforms and criticisms of murder convictions

### Criticisms

**1.** The mandatory life sentence.

**2.** No precise definition of when 'death' occurs.

**3.** Intention includes an intention to cause GBH but the conviction is the same (murder).

**4.** No clear definition of intention. Problems with oblique intent.

**5.** Cases of euthanasia.

### Reform proposals

These have been put forward by the Law Commission.

**1.** Three tiers of homicide: first-degree murder, second- degree murder and manslaughter.

**2.** Different sentences for the three tiers: mandatory life imprisonment for murder and a discretionary life sentence for the other two tiers.

**3.** Replace the common-law approach to intention with a statutory definition, therefore clarifying the position regarding oblique intent and the virtual certainty test.

## Activity 3.4 Voluntary manslaughter

### Loss of control: *s54 Coroners and Justice Act 2009*

| Element | Explanation | Supporting case |
|---|---|---|
| Loss of self-control | Defendant must have lost their self-control at the time of the actus reus. It need not be sudden, which means that women with a 'slow-burn' reaction will not be treated less fairly.<br><br>Cumulative loss of self-control may be possible. | ***R v Dawes, Hatter and Bowyer (2013)*** |
| Qualifying trigger | ***s55 Coroners and Justice Act 2009*** suggests that this can be from 'a fear of serious violence from the victim'.<br><br>This was a new concept to protect women who have been subjected to continuous domestic violence by their abusive partners, and homeowners who protected their property by killing a burglar.<br><br>The test is subjective, which means it is how the *defendant* fears, not how the reasonable person or someone else in their position would fear, serious violence. It has been suggested, however, that the victim must be the source of violence, and the defendant has to fear that the violence is directed towards them.<br><br>Things said or done must be of an extremely grave character, causing the defendant a justifiable sense of being seriously wronged.<br><br>This is a narrow approach because, although the sense of being wronged is subjective, it has to be justified, which is an objective test and one which can only be determined by the jury. | The Court of Appeal in ***R v Clinton, Parker and Evans (2012)***, confirmed that this requires an objective evaluation. |
| Would another reasonable person have acted in the same way? | Objective test that asks whether a person of the defendant's sex and age with an ordinary level of tolerance and self-restraint might have acted in the same or a similar way to the defendant under the same circumstances (***s54(1)(c)***). | The new defence seems to have followed ***A-G for Jersey v Holley (2005)*** since the guidance in ***s54(1)(c)*** suggests that the defence is only available if a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the same circumstances as the defendant, might have reacted in the same way as the defendant. |

## Diminished responsibility: *s52 Coroners and Justice Act 2009*

| Element | Explanation | Supporting case |
|---|---|---|
| Abnormality of mental functioning | It is thought that some abnormalities of the mind under previous law may not succeed under the new defence because they are not recognised medical conditions. | ***R v Martin (Anthony)(2001)*** would probably have succeeded under this defence because the defendant was suffering from a paranoid personality disorder when he killed an intruder into his home. |
| Arising from a recognised medical condition | This is a narrow definition but is a much more modern approach which takes into account an understanding of mental health issues. | ***R v Martin (Anthony)(2001)*** would probably have succeeded under this defence because the defendant was suffering from a paranoid personality disorder when he killed an intruder into his home. |
| The abnormality of mental functioning must be a significant contributory factor to the killing | This means that the abnormality must cause, or at least be a significant contributory factor, to the killing. | If the case of ***R v Dietschmann (2003)*** were to be decided under the new defence, it is unclear whether it would have got past the first hurdle of depression being recognised as a medical condition. However, it does not seem to matter if drink or drugs are involved; the key question is whether the medical condition overrides that and is a significant contributor to the killing. |
| The abnormality of mental functioning must have substantially impaired the defendant's ability to understand the nature of their conduct; or form a rational judgement; or exercise self-control | This is a much more specific element of the crime and it makes clear what aspects of the mental functioning must be affected. | The word 'substantial' was considered in the case of ***R v Golds (2014)***. |

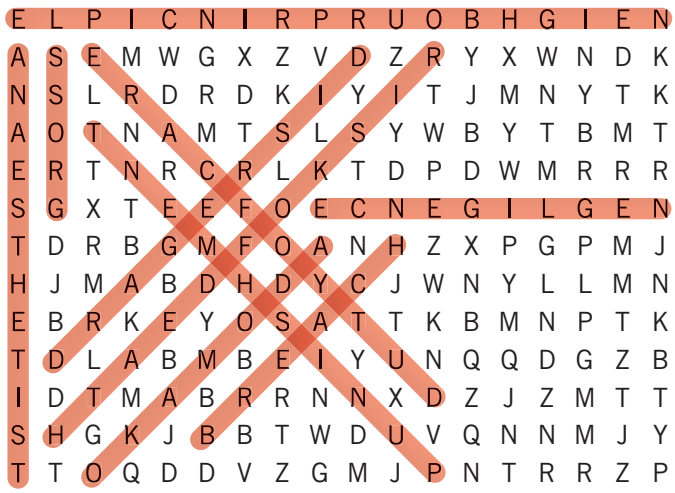
## Activity 3.5 Constructive manslaughter (unlawful and dangerous act manslaughter)

The actus reus of constructive act manslaughter requires there to be an unlawful act rather than an omission (***R v Lowe***). In addition, it must be a criminal wrong rather than civil, as decided in the case of ***R v*** Franklin. The act must also be dangerous by the standards of the 'reasonable person'. This was decided in the case of ***R v*** Church.

The defendant must have the same knowledge as a sober and reasonable person. In the case of ***R v Dawson***, the victim was a 60-year-old with a serious heart condition. Neither the defendants nor a sober and reasonable person could have known this. Therefore, the act cannot be dangerous. However, in the case of ***R v*** Watson, the victim was an 87-year-old. The court held that the defendants should be reasonably expected to know that the man would be frail and easily scared; therefore the act was dangerous.

Then, it must be established that the unlawful and dangerous act was the cause of the death. If the victim intervenes into the chain of causation with a voluntary act, then this will be sufficient to break the chain of causation – for example, in ***R v Cato***. The mens rea for this offence is the mens rea of the unlawful act. For example, if the unlawful act was in ***s18 Offences Against the Person Act 1861***, then the mens rea would be intention.

## Activity 3.6 Gross negligence manslaughter wordsearch



## Activity 3.7 Which offence? Application preparation

### Example scenario 1

| Person / incident | Offence | Actus reus | Mens rea | Cases | Possible defence or other issues (e.g. causation) |
|---|---|---|---|---|---|
| David punches Marla as hard as he can, knocking her unconscious | Murder | Death<br>Human being<br>Causation | Malice aforethought – an intention to kill or cause GBH | ***AG Ref no 3 1994***<br>***Malcherek v Steel***<br>***R v White***<br>***R v Jordan***<br>***R v Pagget*** | Chain of causation<br>Continuing act<br>Transaction of events |
| Sets fire to heap of rags to kill Marla but make it look like arson | Unlawful act manslaughter | Unlawful criminal act (arson) | Mens rea of that offence | ***R v Smith*** | Novus actus interveniens |
| Ambulance crash | Does it break the chain of causation (*novus actus interveniens*) and reduce David's liability for GBH? Unlikely | n/a | n/a | ***R v Kennedy No 2 (2007)***<br>***R v Roberts*** | Was the original wound still the operating and substantial cause of death? |

Use the tables on the following page to respond to example scenarios 2 and 3 in a similar way.

### Example scenario 2

| Person / incident | Offence | Actus reus | Mens rea | Cases | Possible defence or other issues (e.g. causation) |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |
| | | | | | |

### Example scenario 3

| Person / incident | Offence | Actus reus | Mens rea | Cases | Possible defence or other issues (e.g. causation) |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |
| | | | | | |

## 3.1 Quickfire questions

1. It is available only to a person charged with murder and reduces the charge to manslaughter.
2. Mandatory life imprisonment.
3. Unlawful killing of a human being under the Queen's peace. Causation in fact and in law.
4. When they have an existence independent of their mother (***AG's Reference No 3 of 1994***).
5. ***Coroners and Justice Act 2009***.
6. All the elements of murder plus duty of care, gross negligent break of that duty, risk of death.
7. It is whatever the mens rea is for the offence that makes up the 'unlawful act'.
8. Virtual certainty test – ***R v Woolin***.
9. The main problems with the law on homicide include the following.
   - The mandatory life sentence.
   - No precise definition of when 'death' occurs.
   - Intention includes an intention to cause GBH but the conviction is the same (murder).
   - No clear definition of intention. Problems with oblique intent.
   - Cases of euthanasia.
10. The Law Commission published a consultation paper in 2005 entitled A New Homicide Act for England and Wales? to review the law on murder. Its proposals are currently being considered by the Home Office.
    - It is proposed that there would be three tiers of homicide.
    - Replace the common-law approach to intention with a statutory definition. This would change the law slightly from ***R v Woollin*** because the jury will be able to use intention as part of the substantive law, and not just part of the evidence.
    - There was also a proposal to abolish the mandatory life sentence in order to deal with cases where the defences were being too leniently applied in order to give the judge discretion when sentencing the defendant. The government is reluctant to abolish the mandatory life sentence and this reform is unlikely to be implemented.

## Activity 3.8 Actus reus of theft – 'appropriation'

This element is defined in ***s3(1) Theft Act*** 1968:

'Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.'

This means that the defendant has physically taken an object (for example, a handbag or tablet computer) from its owner. The defendant is **assuming some or all of their rights.** This aspect has been interpreted widely and includes assuming any rights of the owner, such as moving, touching destroying or selling. In other words, they are doing something with the property that the owner has a right to do ('bundle of rights') and that no one else has the right to do without the

permission of the owner. One right is sufficient, as in **R v** Morris **(1923)**, where the defendant switched the price on an item, intending to pay the lower price. Even though he did not make it to the checkout, the price switch and the placement of the goods in his trolley was considered to be an 'appropriation', as the owner has the right to price their own goods.

***Section 3(1)*** also covers situations where someone does not steal property (for example, they are lent a bracelet by a friend) but then assumes the rights of the owner by refusing to return it. The 'appropriation' takes place once the person decides to keep it.

An appropriation can still take place even if the victim consents to the property being taken, as in the case of Lawrence ***v MPC (1972)***. This principle was followed in ***R v*** Gomez ***(2000)***.

In the case of ***R v Hinks (2000)***, the defendant's charge of theft was upheld regardless of it being a gift, as the defendant had 'appropriated' the money. This rule has the advantage of protecting vulnerable people.

## Activity 3.9 Actus reus of theft – 'property'

This element is defined in ***s4 Theft Act 1968***:

*'Property includes money and all other property, real or personal, including* things *in* action *and other* intangible *property.'*

'Property' may seem easy to define at first but there are some issues that need to be considered in further detail.

### Things that can be stolen

The following amount to property:

- Money (its physical existence rather than its value).
- Personal property.
- Real property.
- Things in action.

**Real property** includes land and buildings, although ***s4(2)*** provides that land and things forming part of the land and severed from it (e.g. flowers, picked crops) cannot normally be stolen, except in the circumstances laid down in ***s4(2)***.

**Intangible** property means property that does not exist in a physical sense, such as copyright and patents.

A **'thing in action'** (also known as a 'chose **in action'**) is a technical term for property that does not exist in a physical sense but which provides the owner with legally enforceable rights. Examples include a bank account in credit (where the bank refuses the customer their money), investments, shares and intellectual property such as patents. People have legal rights over these 'things' but they cannot physically hold them.

The courts have, however, decided that some things are not 'property' within the definition. In Oxford ***v Moss (1979)***, it was held that seeing unopened exam questions was not theft as they were not 'property' but 'information'.

Electricity is treated separately under the Act. It is considered intangible property that cannot be stolen but, if a person (***s11***) 'dishonestly uses electricity without authority or dishonesty causes it to be wasted or diverted' then they may be liable for an offence.

### Things that cannot be stolen

Things that cannot be stolen are set out in sections ***4(3)*** and ***4(4)*** of the Act and cover people picking mushrooms, flowers fruit or foliage growing wild on land. This is not to be treated as theft unless it is done so for reward, sale or other commercial purpose ***(s4(3))***. ***Section 4(4)*** relates wild animals, tamed or untamed.

A human body cannot normally be stolen. ***R v Kelly and Lindsay (1998)*** held that, although a dead body is not normally property, the body parts in this case could be regarded as property because their 'essential character and value has changed'.

## Activity 3.10 Actus reus of theft – 'belonging to another'

This element is defined in ***s5*** Theft ***Act 1968***:

'*Property shall be regarded as belonging to any person having* possession *or control of it, or having in it any proprietary right or interest.'*

It includes where a person owns the property but also where they have **possession or control** over it or where they have a proprietary **right or interest over it**. It includes property belonging to someone under civil law and covers mere possession without rights of ownership. For example, a rented wedding suit is not owned by the person renting it but they are in control of it at the time they are in possession of it. If someone takes the rented suit from the renter, they can be said to have appropriated property belonging to the renter, even though the renter does not actually own the suit.

A person can, therefore, be **liable for stealing their own property.** In ***R v*** Turner ***No.2 (1971)***, Turner had taken his car to a garage to be repaired. After the repairs had been completed, he drove the car away without paying from where it had been parked outside the garage. The garage, being 'in possession' of his car at the time he took it meant that he was consequently liable for stealing his own car.

Even if property is legally obtained, there is still an **obligation to use it in a** particular **way** under ***s5(3)***. For example, if you gave your lecturer a payment to buy a book but they spent that money on a class trip, they have not 'used the money in the right way' so it is theft.

What about situations where property is passed to the defendant by mistake, for example, the overpayment of wages? ***Section 5(4)*** provides that property which is passed to the defendant by mistake is to be treated as 'belonging to' the original owner and, therefore, once the defendant realises the mistake and refuses to return the property, a theft takes place. The failure to return the property on realising the mistake must be deliberate (see ***Attorney General's*** Reference ***(No 1 of 1983) (1985)***).

## Activity 3.10 Actus reus of theft – 'belonging to another'

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A person can, therefore, be **liable for stealing their own property.** In ***R v*** Turner ***No.2 (1971)***, Turner had taken his car to a garage to be repaired. After the repairs had been completed, he drove the car away without paying from where it had been parked outside the garage. The garage, being 'in possession' of his car at the time he took it meant that he was consequently liable for stealing his own car.

Even if property is legally obtained, there is still an **obligation to use it in a** particular **way** under ***s5(3)***. For example, if you gave your lecturer a payment to buy a book but they spent that money on a class trip, they have not 'used the money in the right way' so it is theft.

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## Activity 3.11 Mens rea of theft

**Across**

**5.** subjective
**6.** Lloyd
**7.** permanent
**8.** Ghosh
**9.** joyriding

**Down**

**1.** Velmuyl
**2.** TWOC
**3.** dishonesty
**4.** Genting

## Activity 3.12 Robbery actus reus and mens rea

| Actus reus | Explanation with supporting legal authority |
|---|---|
| Appropriation | This element is defined in ***s3(1) Theft Act 1968***:<br><br>*'Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.'*<br><br>This means that the defendant has physically taken an object from its owner (e.g. a handbag or tablet computer). The defendant is assuming some or all of their rights. This aspect has been interpreted widely and includes assuming any rights of the owner, e.g. moving, touching, destroying, selling, etc. In other words, doing something with the property that the owner has a right to do ('bundle of rights') and that no one else has the right to do without the permission of the owner. One right is sufficient – ***R v Morris (1923)***. In this case, the defendant switched the price on an item, intending to pay the lower price. Even though he did not make it to the checkout, the price switch and the placement of the goods in his trolley was considered to be an 'appropriation', as the owner has the right to price their own goods.<br><br>***Section 3(1)*** also covers situations where someone does not steal property (e.g. they are lent a bracelet by a friend) but then assumes the rights of the owner by refusing to return it. The 'appropriation' takes place once the person decides to keep it.<br><br>An appropriation can still take place even if the victim consents to the property being taken, as in the case of ***Lawrence v MPC (1972)***.<br><br>Viscount Dithorne said: 'Parliament by the omission of these words (consent) has relieved the prosecution establishing that the taking was done without the owner's consent.'<br><br>Keith LJ said: 'An act may be an appropriation notwithstanding that it is done with the consent of the owner.' This principle was followed in ***R v Gomez (2000)***.<br><br>In ***R v Hinks (2000)***, the defendant's charge of theft was upheld regardless of it being a gift, as the defendant had 'appropriated' the money. This has the advantage of protecting vulnerable people. |

| Actus reus | Explanation with supporting legal authority |
|---|---|
| Property | This element is defined in ***s4 Theft Act 1968***:<br><br>*'Property includes money and all other property, real or personal, including things in action and other intangible property.'*<br><br>Property may seem easy to define at first but there are some issues that need to be considered in further detail.<br><br>**Things that can be stolen:** the following amount to property:<br>• Money (physical existence rather than its value).<br>• Personal property.<br>• Real property.<br>• Things in action.<br><br>Real property includes land and building, although ***s4(2)*** provides that land and things forming part of the land and severed from it (e.g. flowers, picked crops) cannot normally be stolen, except in the circumstances laid down in the section.<br><br>Intangible property means property that does not exist in a physical sense, e.g. copyright, patents, etc.<br><br>A 'thing in action' (otherwise known as a 'chose in action') is a technical term used to describe property that does not exist in a physical sense, but which provides the owner with legally enforceable rights, for example, a bank account in credit (where the bank refuses the customer their money), investments, shares and intellectual property such as patents, etc. People have legal rights over these things but they can't physically hold them.<br><br>The courts have, however, decided that some things are not 'property' within the definition. In ***Oxford v Moss (1979)***, it was held that seeing unopened exam questions was not theft as they were not 'property' but 'information'.<br><br>Electricity is treated separately under the Act. It is considered intangible property that cannot be stolen but if a person ***(s11)*** 'dishonestly uses electricity without authority or dishonesty causes it to be waster or diverted' then they may be liable for an offence.<br><br>There are some things that cannot be stolen. They are set out in sections ***4(3)*** and ***4(4)*** of the Act and cover situations where a person picks mushrooms, flowers fruit or foliage growing wild on land. This is not to be treated as theft unless it is done so for reward, sale or other commercial purpose (***s4(3)***). ***Section 4(4)*** relates wild animals tamed or untamed.<br><br>A human body cannot normally be stolen. The case of ***R v Kelly and Lindsay (1998)*** held that, although a dead body was not normally property, the body parts in this case could be as their 'essential character and value has changed'. |

| Actus reus | Explanation with supporting legal authority |
|---|---|
| Belonging to another | This element is defined in ***s5 Theft Act 1968***.<br><br>'*Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest.'*<br><br>It includes where a person owns the property but also where they have possession or control over it or where they have a proprietary right or interest over it. It includes property belonging to someone under civil law and covers mere possession without rights of ownership. For example, a rented wedding suit is not owned by the person renting it but they are in control of it while they are in possession of it. If someone takes the rented suit from the renter, they can be said to have appropriated property belonging to the renter, even though the renter does not actually own the suit.<br><br>A person can, therefore, be liable for stealing their own property (***R v Turner No.2 (1971)***). In this case, Turner had taken his car to a garage to be repaired. After the repairs had been completed, he drove the car away without paying from where it had been parked outside the garage. The garage was 'in possession' of his car at the time he took it, so he was consequently liable for stealing his own car.<br><br>Even if property is legally obtained, there is still an obligation to use it in a particular way. ***Section 5(3)*** states: '*where a person receives property from, or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property shall be regarded (as against him) as belonging to the other.'* For example, if you gave your teacher a deposit for a class trip but the teacher spent that money on a set of textbooks for the class, they have not 'used the money in the right way' so it is theft. This section also covers things like charity collections. In ***Hall (1972)***, the Court of Appeal said each case depended on its facts. In this case, there was no obligation to use the deposit money in a particular way as it was paid into a general account.<br><br>***Section 5(4)*** provides that property which is passed to the defendant by mistake is to be treated as 'belonging to' the original owner and, therefore, once the defendant realises the mistake and refuses to return the property, a theft takes place. The failure to return the property, on realising the mistake must be deliberate – ***Attorney General's Reference (No 1 of 1983) (1985)***. |
| Force or threat of force | This element distinguishes robbery from theft. Examples of 'force' include shoving someone in order to take their handbag, punching someone to take their mobile phone, etc. A threat of force is also sufficient, for example, waving a knife at someone and demanding they hand over their wallet. However, the force must be used in order to steal **and** be immediately before or at the time of the theft. Once the theft is complete, there is a robbery. This was confirmed in the case of ***Corcoran v Anderton (1840)***, where, had the theft not been completed (e.g. the woman kept hold of her bag and did not let the attackers take it), there is only an attempted robbery. |

| Actus reus | Explanation with supporting legal authority |
|---|---|
| In order to steal | Whether there is sufficient force (or threat of force) to steal is a question for the jury to decide. It can include a small amount of force, as in ***Dawson and James (1976)*** and confirmed in ***Clouden (1987)***.<br><br>Force can be indirectly applied to the victim, for example, if applied via property. In ***R v Clouden (1987)***, the defendant had wrenched a shopping bag from the victim's hand. This conduct was sufficient to amount to force for the purposes of the offence of robbery.<br><br>However, it may not be considered to be 'force' as required by robbery if, e.g. a mobile phone fell out of a person's hand or if the defendant grabbed a laptop from a person's lap. In ***P v DPP (2012)***, it was held that snatching a cigarette that the victim was holding would not amount to force.<br><br>It is not a requirement that the force be applied – a mere fear of force through a threat or gesture is sufficient. Saying 'I have a knife which I will stab you with unless you give me your wallet' would be sufficient for fear of force.<br><br>It is important to remember that the force (or threat of such) must be used in order to steal, for example, if a defendant pushes a woman to the ground intending to rape her and she offers her designer watch if he stops. If he takes the watch, there is both force and a theft but it would not amount to robbery. This is because the force used was intended to rape her and not to steal. |
| Immediately before or at the time of stealing | The question of how 'immediate' is immediate has been debated in courts. The courts confirmed in ***Hale (1979)*** that if the act of theft is continuing when the force is used then it can be a robbery. In this case, two defendants forced their way past a woman into her house. One put his hand over the victim's mouth while the other went upstairs and took a jewellery box. Before they left the house, they tied up the woman. The Court of Appeal held that there was force (defendant putting his hand over the victim's mouth) immediately before the theft (taking the jewellery box). They also considered that, as a continuing act, tying up the woman before leaving the house with the jewellery box could also constitute force for the purposes of robbery. The 'appropriation' was ongoing. This rationale was followed in the case of ***Lockley (1995)***. |
| On any person | The theft does not have to happen from the person actually being threatened. For example, in an armed bank robbery, a random customer in the bank at the time would be in fear of force being used against them but the money stolen would be the bank's property. This would still be a robbery. |
| Mens reus | Explanation |

| Actus reus | Explanation with supporting legal authority |
|---|---|
| Intention to permanently deprive | The defendant must intend to permanently deprive the other of the property, regardless of whether the other is actually deprived of the property. This is covered in ***s6 Theft Act 1968***.<br><br>*'A person … is regarded as having the intention of permanently depriving … if his intention is to treat the thing as his own to dispose of regardless of the other's rights … [B]orrowing or lending … may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.'*<br><br>Borrowing without permission (e.g. joyriding a car) without the intention to permanently deprive is not theft. There are other offences dealing with situations like this, for example, the offence of 'taking without consent' (TWOC).<br><br>***Section 6 (1)*** covers situations where the property is 'borrowed' temporarily. This is not normally a theft because there is no intention to permanently deprive. But, in the case of ***Lloyd (1985)***, the court held that borrowing could fall within ***s6*** if the property was borrowed '*until the goodness, the virtue, the practical value …has gone out of the article.*' In this case, the defendant, who worked in a cinema, removed films in order to make pirate copies. He returned the films a few hours later, after the copying had taken place. The 'temporary deprivation' of the films, in this case, was not sufficient for a conviction of theft.<br><br>However, in the case of ***Velmuyl (1989)***, the defendant was convicted after he, without lawful authority, took cash from his employer's safe and lent it to his friend, intending to repay the cash. Before the money was returned, a spot check took place. He was convicted of theft on the basis that he intended to permanently deprive the owner of the exact notes and coins, despite intending to return items of the same value. |

| Actus reus | Explanation with supporting legal authority |
|---|---|
| Dishonesty | ***Section 2*** does not define dishonesty but gives examples of what is not dishonest***. Section 2(1)*** 'Dishonestly':<br><br>A person's appropriation of property belonging to another is not to be regarded as dishonest:<br><br>(a) if they appropriate the property in the belief that they have in law the right to deprive the other of it, on behalf of themselves or of a third person; or<br><br>(b) if they appropriate the property in the belief that they would have the other's consent if the other knew of the appropriation and the circumstances of it; or<br><br>(c) (except where the property came to them as trustee or personal representative) if they appropriate the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.<br><br>***Section 2 (2)***: A person's appropriation of property belonging to another may be dishonest notwithstanding that they are willing to pay for the property.<br><br>All the tests, above, are subjective, meaning they are decided on the basis of what the defendant believes, rather than the reasonable person (objective).<br><br>If none of the above apply, the test for dishonesty outlined in ***R v Ghosh (1982)*** which provides the test for the jury on what is to be regarded as dishonesty. However, it has been amended following ***Ivey v Genting Casinos***.<br><br>**1.** Has the defendant been dishonest by the standards of the ordinary, honest and reasonable person?<br><br>**2.** If the answer is yes, then, did the defendant realise that they were dishonest by those standards?<br><br>Under ***Ghosh***, if the answer is 'yes' to both questions, the defendant can be legally dishonest. If the answer to either question is 'no', the defendant is not dishonest.<br><br>The second limb of ***Ghosh*** is now considered bad law ***Ivey v Genting Casinos***. It has now changed to:<br><br>is the conduct dishonest by the **objective** standards of reasonable and honest people? and; if yes<br><br>did the defendant realise (**subjective***)* that the conduct would be regarded as dishonest when judged by those standards? |
| Intention to use force in order to thieve | Must show that the defendant intended to use force in order to thieve. |

# Activity 3.13 Burglary

## Burglary under *s9(1)(a)*

A person is guilty of burglary under ***s9(1)(a)*** if they enter a building or any part of a building, as a trespasser, with intent to commit theft, inflict GBH on any person in the building or commit criminal damage.

The actus reus has three elements:

- entry
- building or part of a building
- as a trespasser.

The two elements of mens rea are:

- intention or recklessness as to trespass
- ulterior intent (the intention to commit theft, GBH or damage to the building or its contents).

## Burglary under *s9(1)(b)*

A person is guilty of burglary under ***s9(1)(b)*** if, having entered a building or part of a building as a trespasser, they steal, attempt to steal anything in the building or inflict or attempt to inflict GBH on any person therein.

The actus reus has four elements:

- entry
- into a building or part of a building
- as a trespasser
- actus reus of theft or grievous bodily harm, or attempt theft/grievous bodily harm therein

The mens rea has two elements:

- intention or recklessness as to trespass
- mens rea for theft or grievous bodily harm or attempted theft/grievous bodily harm therein.

The main difference of the two offences of burglary is that, under ***s9(1)(a)*****,** the intention must be formed by the defendant at the time of entry, whereas under ***s9(1)(b)*****,** the intent to commit the ulterior offence can come later; what the defendant intends on entry is not relevant. Also ***s9(1)(a)*** covers unlawful damage, whereas ***s9(1)(b)*** does not.

## Activity 3.14 Actus reus of burglary word search


| Word | Definition |
|---|---|
| Entry | To go in to. |
| Building | A fairly permanent structure. It will also apply to an inhabited vehicle or vessel, whether they are there or not. |
| Trespasser | A person unlawfully entering someone's land or property without permission. |
| Effective | The entry must enable the theft to take place. |
| Substantial | More than merely minimal. |
| Completed theft | The theft must have actually taken place and the owner must have been permanently deprived of their property. |
| R v Collins | This case held there had to be an 'effective and substantial entry'. |
| Inhabited | To live in or occupy. |
| Vessel | A structure or part of a structure occupied as a person's home or as other living accommodation, for example, a caravan. |
| Permission | Allowed to do something or be somewhere. |
| Exceeds | Beyond the permission granted. |
| Walkington | Walkington was allowed to be in the shop but not in the cordoned off area. At this point, he became a trespasser. |
| Ulterior | The offence that happens in the future; beyond what was originally intended. |
| Attempted | An undertaking to do a criminal act that entails more than mere preparation but does not result in the successful completion of the act. |

## Activity 3.15 Which offence? Application preparation

### Example scenario 2

Use the table below and the example answer for example 1.

| Person/event | Offence | Actus reus | Mens rea |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |

## 3.2 Quickfire questions: theft

**1.** Appropriation, property, belonging to another.
**2.** Dishonesty, intention to permanently deprive.
**3.** It changed the second limb to an objective test.
**4.** The use of force.
**5.** The main difference between the two offences of burglary is that, under ***s9(1)(a)***, the intention must be formed by the defendant at the time of entry, whereas under ***s9(1)(b)*** the intent to commit the ulterior offence can come later; what the defendant intends on entry is not relevant. Also, ***(a)*** covers unlawful damage whereas (b) does not.
**6.** Yes. Electricity is treated separately under the Act. It is considered intangible property that cannot be stolen but if a person ( ***s11***) 'dishonestly uses electricity without authority or dishonesty causes it to be wasted or diverted' then they may be liable for an offence.
**7.** Issues could include the following.
- Words used in the law of theft – e.g. appropriation, property, belonging to another.
- Amendment to the second limb of ***Ghosh***.
- Robbery – degree of force issues.
- No distinction between types of robbery.
- Sentence jump for robbery.
- Increase in robberies.
- Burglary – words used in offence e.g. entry, trespasser, building no clear definition.

**8.** Suggested reforms could include the following.
- Theft dishonesty test has recently been reformed in ***Ivey v Genting Casinos***.
- Robbery should have different degrees and sentences.
- Theft Act could be updated and refined with key terms better defined.
- Law Commission Report 2002 on property offences.

## Activity 3.16 Applying defences to problem scenarios

### Insanity

- A defendant (D) may be able to claim the defence of insanity. The criteria is set by case law: the M'Naghten rules state that, at the time of committing the act, 'the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'.
- The first element is defect of reason, meaning the defendant's powers of reasoning must be impaired, based on an inability to use them, not just a failure to do so. Temporary confusion or absent mindedness does not amount to a defect of reason, as in the case of Clarke.
- In this scenario, D clearly shows that their ability to reason was impaired because [**give evidence from scenario**].
- The second element, 'disease of the mind', is a legal definition, not a medical one. The law is concerned whether D can be held liable for their act, not their medical condition.

- A disease of mind must be physical, not brought on by external factors, e.g. drugs.
- In this scenario, D's [**give evidence from scenario**] can be seen as a 'disease of the mind', as in Burgess **/** ***Sullivan/***Kemp***/ Hennessey***.
- The final element is that it must be proven that D either did not know the nature/quality of their conduct, or that they knew what they were doing but not that it was legally wrong. Here, D [**give evidence from scenario]**, so it can be seen that D knew the nature/quality of their act, as illustrated by the case of Windle where the D said 'I suppose they'll hang me for this'.
- For insanity, the burden of proof rests with the defence to prove that D was suffering from insanity at the time of the offence, on the balance of probabilities. It is therefore likely/not likely that D will be able to prove insanity and be deemed 'not guilty by reason of insanity', and given a special verdict. [**Give evidence from scenario**.]

## Automatism

- D may be able to claim the defence of automatism. This was defined in Bratty as 'an act done by the muscles without any control of the mind.'
- There are two elements of this defence. The first is that D must have experienced a total loss of voluntary control and that this was caused by an external factor.
- Here, D [**give evidence from scenario**], which shows they lost voluntary control. This must be a total loss, as shown in ***AG Ref No2 1992,*** where the D was unable to use automatism, as the fact he was driving meant he had not lost all control.
- In the scenario, D's actions could be said to be self-induced, as D knew their conduct was likely to lead to an automatic state. As in ***Bailey***, where D had been reckless, here also D has [**give evidence from scenario**].
- D's automatic state was/was not caused by external factors due to [**give evidence from scenario]** and they would therefore be able/unable to plead the defence of automatism.

## Consent

- D may attempt to use the defence of consent. To succeed, the consent must be both valid and informed. For consent to be valid, the victim must be deemed to have the capacity to consent. Children and those with a mental illness are deemed unable to give valid consent.
- Also, the victim must know the nature and quality of the act they are consenting to – they must be aware of what exactly they are consenting to. This was shown in the Dica case, where consenting to sex did not include consenting to contracting a sexually transmitted disease. Additionally, consent cannot be gained through fraudulent means, displayed in the case of Tabassum.
- As a general rule, people cannot consent to any hurt which would include offences under ***s47, s20*** and ***s18***, unless the injury/activity fits within a recognised exception such as sport, surgery, rough horseplay etc, as in the case of Wilson, where branding was seen to be the same as tattooing.

- D could attempt to use the exception of 'rough horseplay' as [**give evidence from scenario**]. This is like in the case of Jones, in which the victim sustained a broken arm and ruptured spleen after his classmates threw him in the air. Despite the serious injuries, consent was allowed as the boys had treated the incident as a joke and there was no intention to cause injury. In the scenario, [**give evidence from scenario**].
- D could attempt to rely on the element of consent in relation to sports, due to [**give evidence from scenario**]. Consent applies to normal sports activities which are properly conducted and supervised within the rules and regulations of that sport. Here, [**give evidence from scenario**], so D did/did not go beyond this, as in the case of Barnes.]
- Therefore, D would/would not be able to plead the defence of consent.

### Self-defence and crime prevention

- D may be able to use the defence of self-defence. There are two types – self-defence and prevention of crime – under ***s3 Criminal Law Act 1967***. For the defence to apply, D must satisfy two elements; firstly, whether the force was necessary and, secondly, whether it was reasonable. The prosecution must prove beyond reasonable doubt that either D wasn't acting in self-defence or that the force was excessive.
- Jury decides whether the force was necessary based on the facts. However, as in the case of Hussain, where the attacker was running away, force is unlikely to be necessary. In the scenario, [**give evidence from scenario**], so it can be said the force was/wasn't necessary.
- Where D has made a mistake, jury decides whether force was necessary in the circumstances that D honestly believed existed, as shown in ***Williams***. In this scenario, [**give evidence from scenario**], so it can be said the force was/wasn't necessary in the circumstances.
- D can rely on the defence even if they have made a pre-emptive strike, as shown in ***AG No2 1993***. [**Give evidence from scenario**]
- Whether the force was reasonable and not excessive is covered by ***s76/77 Criminal Justice and*** Immigration Act 2008, and clarifies that a person acting for a legitimate purpose may not be able estimate the exact measure of necessary action. In this scenario, the force could be seen as reasonable/excessive, [**give evidence from scenario**], as in ***Clegg/Martin***.
- Therefore, D would/would not be able to plead the defence of self-defence.

### Intoxication

- D may be able to use the defence of intoxication due to [**give evidence from scenario**.]
- Intoxication can be voluntary or involuntary. Voluntary intoxication is where D chose to take an intoxicating substance and involuntary intoxication is where D did not know they were taking an intoxicating substance, including taking prescription drugs which unexpectedly made them intoxicated. In this scenario, the intoxication can be seen to be voluntary/involuntary because [**give evidence from scenario**].

- Where D was voluntarily intoxicated and charged with a specific intent offence, voluntary intoxication can negate any mens rea if D was so intoxicated they did not form the mens rea for the offence. Here, [**give evidence from scenario**], as in Sheehan ***and Moore***, where the Ds were too drunk to have formed the intent to cause GBH or murder and so were not guilty of murder. If D has formed the mens rea despite being intoxicated however, they are still guilty.
- Where D was voluntarily intoxicated and charged with a basic intent offence, intoxication is not a defence under the ruling in Majewski because D took a reckless course of conduct in getting intoxicated. This recklessness is the intent for a basic intent offence and so D cannot rely on this. Here, [**give evidence from scenario**].
- Where D was involuntarily intoxicated but had the necessary mens rea when committing the offence, they will be guilty, as shown in Kingston. This is because D's intoxicated state has not impacted on their ability to form mens rea.

## Activity 3.17 Insanity and automatism

Draw lines to match the cases to the correct facts.

| | |
|---|---|
| ***R v Clarke (1972)*** | Hardening of the arteries was within the rules of insanity as his condition affected his mental reasoning, memory and understanding. |
| ***R v Kemp (1956)*** | A defendant who injured his girlfriend while he was asleep fell within the definition of insanity as it was an internal cause. |
| ***R v Sullivan (1984)*** | A diabetic who failed to take his insulin fell within the definition of insanity. |
| ***R v Hennessy (1989)*** | Mere absent mindedness or confusion is not insanity. |
| ***R v Burgess (1991)*** | Defendant was suffering from a mental disorder and killed his wife, but admitted that he knew what he had done was legally wrong. |
| ***R v Quick (1973)*** | A defendant who injured his friend during an epileptic fit was deemed insane as it included any organic or functional disease, even where it was temporary. |
| ***R v Windle (1952)*** | A diabetic who failed to eat after taking his insulin was not insane as the cause was external. |

## Activity 3.18 Consent

Research the cases and identify the facts and point of law.

| Category | Case | Facts | Point of law |
|---|---|---|---|
| True consent | ***Richardson (1999)*** | Defendant was a dentist who continued to perform surgery even after being dismissed by her professional body. | Victims had only been deceived about her status as a practising dentist – the nature and quality of the acts performed were exactly those consented to: therefore, true consent. |
| True consent | ***Tabassum (2000)*** | Defendant persuaded several women to undress and felt their breasts by pretending he was showing them how to carry out a self-examination for signs of breast cancer. | Victims had believed he was medically qualified, so had agreed to something that they would not have agreed to, given the true facts. The conviction for indecent assault was upheld. |
| Informed consent | ***Dica (2004)*** | consent was given to sexual intercourse without knowledge of the fact that the defendant was HIV positive. | The Court of Appeal held that there was no consent to the risk of the infection. |
| Informed consent | ***Gillick (1986)*** | A mother of several daughters sought assurance that doctors could not provide contraceptive advice or treatment to girls under 16 (the age of lawful sexual intercourse). | Provided the girl understood advice and the decisions she made were in her best interests, she was able to decide to use a contraceptive pill without her parents input. Created a legal principle called Gillick competence. |
| Implied consent | ***Collins v Wilcock (1984)*** | A police officer grabbed a woman's arm to stop her walking away while he was questioning her. She scratched him but her conviction for assaulting a police officer was quashed because the officer's attempt to restrain her was said to amount to battery. | By saying any touching, no matter how trivial, is battery, the court has to qualify this in some way with the use of implied consent (otherwise we would all be guilty of a crime). |
| Mistaken belief in consent | ***Jones (1986)*** | Two schoolboys were convicted of GBH after two other boys were injured when they threw them into the air. Their convictions were overturned when it was established that the injured boys had consented to the activities before and had not been injured. | Consent to rough and undisciplined horseplay (messing about) is a defence if the defendants believed the other participants had given their consent. |

| Category | Case | Facts | Point of law |
|---|---|---|---|
| Mistaken belief in consent | ***Aitken (1992)*** | For fun, some RAF officers set fire to colleagues wearing fire-resistant clothing. The first two occasions ended without injury but the third person sustained serious burns. The defendants were court martialled and convicted of GBH but this was overturned. | If those who set the person alight believed that person had consented, it was deemed to be an honest mistake. |
| Mistaken belief in consent | ***Richardson and Irwin (1999)*** | Drunken students dropped their friend from his balcony and he was severely injured. | The court decided that the jury should take into account the effect of alcohol on horseplay. |
| Properly conducted games and sports | ***Barnes (2004)*** | An amateur footballer was charged with GBH after injuring an opponent. | The conviction was quashed because it didn't meet the requirements of s20. Participants in sport were deemed to have accepted the risk of injury, and sports have their own rules. |
| Body art | ***Wilson (1996)*** | A woman asked her husband to brand her buttocks with a hot knife and subsequently needed medical treatment. | It was not in the public interest to prosecute, as she had given her consent and it was regarded as similar to tattoing. |
| Horseplay | ***Jones (1986)*** | Two schoolboys were convicted of GBH after two other boys were injured when they threw them into the air. Their convictions were overturned when it was established that the injured boys had consented to the activities before and had not been injured. | Consent to rough and undisciplined horseplay (messing about) is a defence if the defendants believed the other participants had given their consent. |

## Activity 3.19 Automatism case law

Research cases and fill in the table to show how the law is applied.

| Case | Facts | Decision/Point of law |
|---|---|---|
| **1. The loss of control must be total** | | |
| ***Broome v Perkins (1987)*** | A diabetic driver was charged with driving without due care and attention after his driving became automatic and reckless as a result of his condition. | Automatism was rejected as a defence because the driver had been able to control his car for several miles. |
| ***Attorney General's Ref No. 2 1992*** | A lorry driver crashed and killed two people. His defence was automatism because he said his brain had switched off after driving a long distance on boring roads. | 'Driving without awareness' was not accepted as automatism, as the driver must have maintained some control over his vehicle to have driven so far. |
| **2. The cause of the automatism must be external** | | |
| ***Hill and Baxter (1958)*** | Defendant was in a collision and claimed he had been overcome by an unknown illness. | 'A person should not be made liable at the criminal law who… through no fault of his own, becomes unconscious when driving, as, for example, a person who has been struck by a stone or overcome by a sudden illness, or when the car has been put temporarily out of his control owing to his being attacked by a swarm of bees.' |
| ***R v T (1990)*** | A defendant charged with armed robbery could not remember details of her offence. It was later found that she had been raped three days earlier and was diagnosed with post-traumatic stress disorder. She submitted a defence of non-insane automatism. | It was accepted that exceptional stress can be an external factor which may cause automatism, although the defence was not successful in this case. |
| **3. Self-induced automatism is a defence to specific but not basic intent crimes** | | |
| ***Bailey (1983)*** | The diabetic defendant was in a hypoglycaemic state as he had taken his insulin but not eaten. He then attacked his ex-girlfriend's new boyfriend with an iron bar. | It was ruled that he knew the risks, as he had been feeling unwell, so his actions were regarded as reckless, and there was insufficient evidence to successfully raise the defence of automatism. |
| **4. If defendant does not know their actions are likely to lead to an automatic state, they have not been reckless and can use automatism** | | |
| ***Hardie (1984)*** | The defendant had taken Valium, which would normally have a calming effect but instead it made him very agitated, and he set his ex-girlfriend's flat on fire. | He was allowed to use the defence of automatism as he had thought that the Valium would calm him down, which is its normal effect, so therefore he had not been reckless. |

## Activity 3.20 Automatism scenarios

Can the defendants rely on automatism as a defence? Refer to relevant cases in your answers.

| |
|---|
| **1.** Lucy is cycling home from work one day when a branch falls from a tree and hits her on the head. She is concussed and, rather than cycle down the road, ends up cycling inside a busy shop, causing damage to it. |
| **Case:** ***Hill and Baxter (1958)*** |
| **Application:** The cause of Lucy's autonomism was external, so it could be argued that her behaviour as a result of her injuries are not her fault. |
| **2.** John takes some sleeping pills to help him get a good night's sleep. He wakes in the morning on top of a neighbour's car. During the night he has scratched the car bonnet with a key. |
| **Case:** ***Hardie (1984)*** |
| **Application:** John may be allowed the defence of automatism as the sleeping pill had the opposite effect to the one he expected. |
| **3.** Anna is diabetic. While her blood-sugar level is out of balance, she crashes her car, damaging a street lamp. |
| **Case:** ***Broome v Perkins (1987)*** |
| **Application:** Diabetes is seen as an internal factor, which is not applicable to automatism. It could also be argued that low blood sugar would cause only partial loss of control, as Anna has been able to drive her car up to that point. |

## Activity 3.21 Insanity key facts

**1.** It is available to all crimes except those of strict liability.

**2.** The basic presumption is that every person is sane.

**3.** The burden of proving insanity is on the defendant (or the defence).

**4.** If evidence of the defendant's insanity is raised during the trial, then the judge or even the prosecution could raise the issue.

**5.** That the defendant is not guilty by reason of insanity.

**6.** ***The Trial of Lunatics Act 1883***.

**7.** Daniel M'Naghten had become so obsessed with the Prime Minister, Robert Peel, that he decided to shoot him, but he missed and shot and killed the Prime Minister's secretary, Edward Drummond, instead. M'Naghten was found to be suffering from extreme paranoia, and was found not guilty by reason of insanity.

The important quote from the case is that he 'was labouring under such a defect of reason from disease of the mind as to not know the nature and quality of the act he was doing, or if he did know it, not to know that it was wrong.'

8. 1. Defect of reason. 2. Disease of the mind. 3. Not knowing the nature and quality of the act or not knowing that it is wrong.
9. It means that the defendant isn't capable of reasoning at all. If the defendant is capable of reason and doesn't use it, this is not insanity.
10. Clarke was accused of theft from a supermarket, but it was said that she was acting absentmindedly due to depression and diabetes, so had no mens rea for her actions. The court said the rules on insanity do not apply to those who retain the power to reason but don't use it in moments of confusion or absentmindedness.

## Activity 3.22 Disease of the mind

***Kemp (1956)***

This case illustrates physical impairment as a 'disease of the mind' in the law on insanity. The defendant acted out of character by attacking his wife with a hammer. It was found that a medical condition had affected his brain and thus his reasoning ability, so the judge directed the jury towards a defence of insanity, not automatism.

***Sullivan (1984)***

A man kicked his friend in the head during an epileptic fit and was charged with assault. This was rejected, as the judge regarded epilepsy as a disease of the mind due to the defendant's impaired mental faculties during a fit, which caused a defect in reasoning as he did not know what he was doing.

***Hennessy (1989)***

A man was convicted of dangerously driving a stolen car but later collapsed and was taken to hospital. He was diabetic and hadn't taken his insulin for several days, after his wife left him. Although he used the defence of automatism, the judge said he should have used the defence of insanity. His conviction was upheld because his behaviour was caused by the internal factor of diabetes and not the external factor of an insulin injection.

***Burgess (1991)***

A man attacked a woman while he was sleepwalking and was found not guilty by reason of insanity. He appealed, preferring the defence of non-insane automatism, but the appeal dismissed. Lord Lane LC said: 'We accept that sleep is a normal condition, but the evidence in the instant case indicates that sleepwalking, and particularly violence in sleep, is not normal.' It was therefore a disease of the mind.

## Activity 3.23 Self-defence and the Criminal Justice and Immigration Act 2008

A discussion of these questions may include the following points:

Was force necessary and was it reasonable force?

These subsections of ***s76 Criminal Justice and Immigration Act 2008*** relate to the subjective question of whether reasonable force was necessary for the purposes of self-defence.

***(3)*** The question whether the degree of force used by the defendant was reasonable in the circumstances is to be decided by reference to the circumstances as the defendant believed them to be, and ***subsections (4) to (8)*** also apply in connection with deciding that question.

***(4)*** If the defendant claims to have held a particular belief as regards the existence of any circumstances. (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but (b) if it is determined that the defendant did genuinely hold it, they are entitled to rely on it for the purposes of ***subsection (3),*** whether or not (i) it was mistaken, or (ii) (if it was mistaken) the mistake was a reasonable one to have made.

***(5)*** But subsection ***(4)(b)*** does not enable the defendant to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

The degree of force used in self-defence is judged objectively. It is not easily measurable – i.e. there is no formula for saying this much force is too much or just enough.

These subsections of ***s76 Criminal Justice and Immigration Act 2008*** relate to the objective question of whether it was reasonable force.

***(6)*** The degree of force used by the defendant is not to be regarded as having been reasonable in the circumstances as the defendant believed them to be if it was disproportionate in those circumstances.

***(7)*** In deciding the question mentioned in subsection (3), the following considerations are to be taken into account (so far as relevant in the circumstances of the case): (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

***s76(7)*** outlines some factors to consider:

- When acting for a legitimate reason (with a justifiable excuse) it is not always possible to calculate the level of force before you use it.
- Has the person done 'only what they honestly and instinctively' thought was necessary? Was the action done to neutralise a threat or with some other purpose in mind?

The ruling in ***Williams*** is now part of our statute law. ***s76 Criminal Justice and Immigration Act 2008*** states that force can only be regarded as reasonable in the circumstances 'by reference to the circumstances as the defendant believed them to be'. If the defendant's belief was a 'mistaken belief', they can still use the defence, if the jury agree it was a mistake the reasonable person would make in the circumstances.

One limitation on ***s76*** is that the defendant cannot rely on a drunken mistake so, if they act in self-defence because they are intoxicated, there is no defence.

## Activity 3.24 Self-defence, pre-emptive strike or excessive force?

| Case | Facts | Ratio decidendi |
|---|---|---|
| R v Williams (Gladstone) (1987) | The defendant witnessed what he thought was a fight and intervened, saying he was a police officer trying to make an arrest. In fact, one of the people involved had just mugged a woman and the other was trying to arrest him. The defendant was prosecuted for assaulting the victim. | The defendant had a genuine mistaken belief which may or may not have been reasonable. |
| Attorney General's Reference (No 2 of 1983) | During riots, the defendant's shop had been targeted by looters several times. He stayed inside the shop overnight and prepared homemade petrol bombs to use against looters. | It was held there is no obligation to wait until you are under an immediate threat. A pre-emptive strike is permitted as part of self-defence. |
| R v Clegg (1995) | A soldier on checkpoint duty during the conflict in Northern Ireland tried to stop an approaching car. When it sped off past the checkpoint, he fired at it and killed a passenger. | The defendant's final shot, which killed the person, was fired when the car was no longer a threat. Use of lethal force was therefore excessive in the circumstances. |
| R v Martin (Anthony) (2002) | The defendant lived on an isolated farm which was prone to burglaries. He was woken in the night by people breaking in and using a shotgun fired at them as they ran away. | On the basis that the burglars were fleeing the crime scene, they were no longer a direct threat and therefore use of the gun was excessive. |

## Activity 3.25 Pre-emptive strike or excessive force?

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| Williams (Gladstone) (1987) | The defendant witnessed what he thought was a fight and intervened, saying he was a police officer trying to make an arrest. In fact, one of the people involved had just mugged a woman and the other was trying to arrest him. The defendant was prosecuted for assaulting the victim. | The defendant had a genuine mistaken belief which may or may not have been reasonable. |
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## 3.3 Quickfire questions

1. The defendant should be presumed sane unless, at the time of the offence, they can prove they were:
   - **a.** labouring under such a defect of reason
   - **b.** caused by a disease of the mind
   - **c.** that they did not know either the nature and quality of the act or, if they did know it, that they didn't know what they were doing was wrong.
2. In ***R v Quick***, the condition was caused by an **external** factor, the drug insulin. Therefore, the defendant could rely on the defence of automatism and **not** insanity. In ***R v Hennessy***, the judge ruled that the condition was caused by an **internal** factor, diabetes. Therefore, the defendant should have relied on the defence of insanity and **not** automatism.

3. Automatism as a defence is unlikely to be available if the accused caused the automatism themselves, for example after drinking alcohol or taking drugs. The cases of ***R v Bailey (1983)*** and ***R v Hardie (1984)*** are used to illustrate this.
4. Generally, if a person is voluntarily intoxicated and commits a crime, there is no defence. Intoxication is relevant as to whether the defendant has the required mens rea for the offence. If the defendant does not have the required mens rea because of their intoxicated state, they may not be guilty; however, this depends on whether the intoxication was voluntary or involuntary and whether the offence charged is one of specific or basic intent.
5. According to ***s3 Criminal Law Act 1967***, self-defence is a statutory defence. It states: 'A person may use such force as is reasonable in the circumstances in the prevention of crime or in assisting in the lawful arrest of offenders or suspected offenders, or of persons unlawfully at large.'
6. Duress by threats consists of direct threats to the defendant to commit a crime or face death or serious personal injury to themselves or another. Duress of circumstances consists of external circumstances that the defendant believes constitute a serious threat.
7. The defendant had driven while disqualified from driving. He claimed he did so because his wife threatened to commit suicide if he did not drive their son to work. His wife had previously attempted suicide and the son was late for work and she feared he would lose his job if her husband did not get him to work. Martin pleaded guilty to driving while disqualified following a ruling by the trial judge that the defence of duress of circumstances was not available to him. On appeal, his conviction was quashed as the defence of duress should have been available to him. It did not matter that the threat of death arose through suicide rather than murder.
8. The amount of force used to defend oneself or another must be reasonable. If the force is excessive the defence will fail. The amount of force that can be used in self-defence, defence of another or in the prevention of crime is set out in ***s76 Criminal Justice and Immigration Act 2008***. Factors taken into account when deciding whether the force used was reasonable in the circumstances include evidence of someone having only done what they honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose. If there is evidence that the person 'honestly and instinctively' thought the level of force was reasonable to protect themselves or another, or to prevent a crime, this is strong evidence that the action was reasonable in the circumstances. However, if the force is used after all danger is over (e.g. for revenge or retaliation), this defence is not available.
9. Internal.
10. The courts have to consider the seriousness of the harm that the accused has been threatened with and the criminal behaviour they commit. In deciding if the defence should succeed, the jury should use a two-stage test:
    1. **Subjective test**: Did the defendant feel they had to act the way they did because they reasonably believed they would face death or serious personal injury?
    2. **Objective test**: Would a sober person of reasonable firmness with the same characteristics as the defendant respond in the same way as the defendant?