1 Discuss the advantages of using tribunals as a way of dealing with a civil dispute. [15 marks]

Tribunals were established to deal with specific areas of law generally concerning social and welfare legislation, e.g. employment rights. This means they are staffed by experts in these particular areas of law. They are an informal hearing of fact, in most cases heard in private, which makes them attractive in employment law for both parties’ sake. They are heard by a panel of three – in most cases consisting of a tribunal judge and two lay persons with expertise in the area in dispute; neither they nor the chairperson wears court dress. This lack of formality allows the parties to relax and present their case with confidence.

Tribunals are generally cheaper, and in many cases quicker, than going to court, saving the parties both time and money. The final hearing is usually completed within one day. Legal representation is not essential. Tribunals do not charge a fee and each party usually pays their own legal costs, rather than the losing party paying all the costs of both parties. Some legal aid is available, usually for human rights issues concerning immigration or mental health issues.

Most tribunals give reasons for their decisions. This allows the parties and the public to understand why a particular decision has been reached. But, because tribunals do not operate strict rules of judicial precedent and the strict rules of evidence, they have a greater degree of flexibility than the civil courts in their decision-making.

Finally, tribunals take a huge workload out of the courts, generating space in a very congested system.

2 Explain conciliation as a form of alternative dispute resolution. [10 marks]

Conciliation is a form of mediation, where a third party is active in raising ideas for compromise. This means the conciliator can intervene in the negotiations in order to suggest terms of settlement as well as comment
on terms put by one party to another. However, the conciliator is neutral and is not acting as a representative for either party.

The conciliator will organise the conciliation at a time and place convenient to all parties. The parties may attend with legal advisers if they choose to do so. The procedure is similar to mediation. The conciliator and the parties will meet, and the conciliator will listen to the grievances and will make suggestions as to how the problem can be resolved. If the parties agree then the agreement may be made legally enforceable as it is in mediation. If, however, no agreement is reached, the matter may be taken to court or a tribunal.

ACAS operates a conciliation scheme in industrial disputes, for example in employment tribunal cases. In a tribunal case ACAS will be sent a copy of the employee’s claim and the employer’s response. The ACAS representative is an expert in employment law and, with the parties’ agreement, can act as a conciliator in the dispute.

3 Describe the role of lay magistrates in criminal matters. [10 marks]

Lay magistrates sit as a bench of three magistrates and have a role in all criminal cases in some way, dealing with the entire criminal process for 95 per cent of all cases.

They can issue warrants and make decisions regarding bail and remand as well as the allocation of public funds for defendants.

Magistrates hear less serious criminal cases and commit serious cases to the Crown Court, where the case will be heard by a judge.

The least serious types of offences are summary offences and these are always dealt with in their entirety by magistrates. Defendants accused of offences triable either way will have their preliminary matters dealt with by the magistrates and then can elect, during a mode of trial hearing, to be tried there or committed to the Crown Court. The magistrates send indictable offences straight to the Crown Court.

The bench consists of a chairperson and two wingers, who are often less experienced than the chairman. As magistrates are not legally trained, they always have available to them the advice of a justices’ clerk or assistant clerk – a qualified lawyer who explains the relevant points of law, legal procedures and sentencing and is responsible for effective case management.

However, the magistrates alone decide on guilt or innocence based on the findings of fact they make. Similarly, they determine the sentence, but
the clerk will make sure the magistrates are aware of the latest guidelines and policies on sentencing and the limits of their powers.

Magistrates also sit in the Crown Court with a judge to hear appeals from Magistrates’ Courts against conviction or sentence; and proceedings on committal to the Crown Court for sentence.

Specially qualified magistrates sit in the Youth Court to hear charges against 10–17-year-olds.

4 Discuss the disadvantages of using juries in criminal cases. [15 marks]

Juries do not have to give reasoned verdicts which, although speeding up the process and reinforcing the secrecy of the jury room, means the individual jurors can give their verdict on a whim such as ‘going with the flow’ to get it over and done with or because of peer pressure.

Because juries deliberate in private and no one can inquire into what happened in the jury room, the only insight is given when a juror complains, and this leads to a retrial. In R v Young (1995), it emerged that the jury consulted a Ouija board during their deliberations in this murder trial.

The jury represents the public, but many are excluded as being disqualified or ineligible. It is likely the jury will have a higher proportion of older people and jury vetting may also affect the representative make-up of the jury.

It is often suggested that jurors do not really understand the nature of the proceedings in a criminal trial. Lawyers who make a point of ensuring the evidence is given in such a way that all jurors will understand the case are often seen as trying too hard, and jurors become suspicious that they are not really being told the truth. The real problem is in long and complex fraud trials where it is now possible for a judge to sit without a jury, in order to avoid these issues.

Some cases can be very distressing for jurors and so Crown Court juries struggling to cope with horrific cases are put in touch with the Samaritans through court staff. Contact numbers and leaflets are available in jury rooms following the launch of the partnership between the Samaritans and the Courts Service.

It can be slow and therefore expensive. Having to explain points of law increases the time taken and cost of the judges and legal personnel.
The compulsory nature means many jurors would rather not serve due to the impact on their working or family life.

The accessibility of media and social media coverage can influence jurors and provide them with easy opportunities for research – see AG v Dallas (2012). Or jurors can be ‘nobbled’ – see R v Twomey (2010).

The decision is made in secret and no reason is given for the decision, or bizarre methods are used to reach decision – see R v Young (1994).

Due to the complex nature of the law, it is possible juries do not follow the issues clearly, especially in long and complex fraud trials.

5 Describe the graduate routes to qualifying as a barrister. [10 marks]

There are three stages to becoming a barrister. These are: the academic stage, the vocational stage and pupillage.

The academic stage is to graduate with a qualifying law degree. The requirements of a qualifying law degree are set out by the Bar Council and the Law Society jointly, as required by the Courts and Legal Services Act 1990.

If a person’s degree is not ‘qualifying’, a one-year conversion course must be completed. This conversion course is either the Common Professional Examination (CPE) or an approved Graduate Diploma in Law.

Before starting the vocational stage, a person must join one of the four Inns of Court: Lincoln’s Inn, Inner Temple, Middle Temple and Gray’s Inn. The Inns are societies that provide various activities and support for barristers and student barristers. Admission to an Inn is required before registration on the Bar Vocational Course.

The Bar Vocational Course provides the skills and knowledge of procedure and evidence. The course runs for one academic year full time or for two years part time.

The final stage is pupillage, where a pupil barrister undertakes practical training under the supervision of an experienced barrister. This is divided into two parts: the first six months is non-practising, so pupils shadow, and work with, their supervisor. During the second six-month period, pupils, with their supervisor’s permission, can carry out legal services and have rights of audience in court.

As with most professions, there is a requirement for continuing training and updating. Barristers need to constantly update their legal knowledge.
and improve their skills, and the Bar Council sets minimum standards for this.

6 Discuss the main challenges facing a graduate wishing to become a barrister. [10 marks]

A graduate will already have a student loan and will now have to consider how to pay for the academic stages of training to be a barrister – this often requires a further loan to be taken.

There is great competition for pupillage, and so a very good degree from a leading university will be necessary to compete in this crowded market. Also, a mini-pupillage is often required – this is a short period of work experience in a set of chambers. Some chambers require applicants to undertake an assessed mini-pupillage as part of the recruitment process, and others use it as one of their selection criteria.

All of this takes place without any income, so many trainees will have to take on paid employment to support themselves. As the workload for a trainee is vast, taking on paid work can be difficult in terms of time commitment. Furthermore, even fully qualified barristers can expect to earn very little in their first year, so barristers often come from families who can support them, or enter the profession with large debts to pay.

7 Discuss the importance of judicial independence. [15 marks]

The idea of the independent judiciary comes from the doctrine of the separation of powers. In this country power is held by the government, Parliament and the judiciary.

The traditional theory of separation of powers comes from philosophers such as Montesquieu and Locke, and deals with three areas of power: legislative power – the power to make law; executive power – the power to carry the law into effect and enforce it; and judicial power – the power to make judgments and to apply the law.

There is obviously going to be some overlap between the three areas, but since the Constitutional Reform Act 2005, which limited the Lord Chancellor’s role in the appointment of judges and replaced the House of Lords’ judicial functions with the Supreme Court, judges are effectively independent.

Whenever there has been any suggestion of a lack of independence it has been dealt with effectively, as was seen in the House of Lords’ case involving the extradition fight of Chile’s former head of state, General.
Pinochet. The claim was made that Lord Hoffmann was biased against General Pinochet because of his links with the human rights group Amnesty International. Arrangements were made for the case to be reheard by an appeal committee of the Law Lords, so as to ensure there was no hint of possible bias. The original decision showed no trace of bias, but justice through a truly independent judiciary had to be seen to be done.

Since the European Communities Act 1972 and the Human Rights Act 1998, judges have had the power to declare that UK legislation does not comply with these laws. The effect of this is to strengthen the independence of the judiciary, as judges can now, in certain circumstances, treat parliamentary-made law as ineffective.

8 Discuss the disadvantages of conditional fee agreements as a method of funding civil disputes. [15 marks]

These agreements are a mix of financial and legal matters and are not always clearly understood by the client. There is evidence consumers are sometimes induced into signing conditional fee agreements inappropriately. The Citizens Advice Bureau argues that conditional fee agreements instead of legal aid has created a system of high legal costs and delays. In some cases, potential clients are subjected to high-pressure sales tactics, and inappropriate marketing and sales practices suggest that solicitors are becoming ‘ambulance chasers’.

The risks of conditional fee agreements are not always clearly explained at the outset. People are misled into thinking the system will be genuinely ‘no win, no fee’, but there are often hidden costs. The insurance against the costs of losing the case is often financed with an expensive loan that further erodes any compensation gained. The alternative of self-representation is often regarded as impossible, so genuine claims are not made through fear of these costs.

Victims are not being helped to resume a normal life in either society or the workplace as the compensation culture brought about by conditional fees encourages an adversarial rather than a conciliatory situation.

Conditional fee agreements create incentives for some solicitors to cherry-pick high value cases with high chances of success. A cab-rank principle for such cases would be better, so that solicitors will not refuse to take on good small claims.

The regulation of conditional fee arrangements provides little protection on both quality of advice and costs. In particular, the activities of claims
management companies seem to fall largely outside the system of regulation, yet they are increasingly the starting point for many claimants.

Chapter 2 Criminal law

1 Explain what is meant by mens rea in criminal law. [10 marks]

*Mens rea* (MR) is the mental element of a crime and can be translated as the ‘guilty mind’. It is measured in degrees of fault and different crimes will require different levels.

The highest level of fault is direct intent. This is where the *actus reus* (AR) is the defendant’s aim and purpose. In *R v Mohan* (1976), the defendant was seen to accelerate towards the police officer, thus showing it was his aim to cause him harm.

Next, there is oblique intent. This is where the AR is virtually certain and the defendant appreciates this. This comes from *R v Woollin* (1998) where D, in an attempt to stop his baby crying, threw it against a wall.

The next level of fault can be found in subjective recklessness. This comes from *R v Cunningham* (1957) where the defendant, in an attempt to steal a gas meter, poisoned a neighbour. Because he could not ‘appreciate the risk’ of this happening, he was not guilty.

Finally, some offences have no MR and these are known as strict or absolute liability offences, where simply committing the AR will be sufficient for a successful prosecution.

2 Rival supporters Sue and Tara are going to a football match. Sue decides to trip Tara up, as she is annoyed by Tara’s loud singing and chanting. Sue sticks out her foot and Tara does trip, but she falls headlong into some bushes to which she suffers an allergic reaction which lasts several days.

Advise how the law relating to non-fatal offences against the person will apply to Sue. [10 marks]

Sue will be charged with ABH.

This comes from s 47 of the Offences Against the Person Act 1861.

The AR of this offence is an assault or battery that causes ABH.

In this case tripping Tara up will amount to a battery, i.e. the application of unlawful force without the victim’s consent – *R v Ireland* (1997).
The ABH element is defined as ‘some harm, calculated to interfere with health or comfort’ (*R v Miller* (1954)), not permanent, but not so trivial as to be wholly insignificant (*R v Chan Fook* (1994)). An allergic reaction will certainly interfere with Tara’s health and comfort.

The next question is whether the battery caused the harm. Certainly but for Sue tripping Tara, she would not have suffered the reaction – *R v White* (1910), so factual causation is satisfied. However, there is a new and intervening act (NAI) between the battery and the reaction in the form of the fall into a bush. An NAI will not break the chain of causation if it is reasonably foreseeable – in *R v Roberts* (1971) a victim escaping was reasonably foreseeable, so a fall from a trip most certainly will be too. In addition, however, Tara has an allergy – in legal causation this will be referred to as a ‘thin skull’. The thin skull rule states that defendants must take victims as they find them, therefore they cannot use a victim’s underlying condition to remove or reduce their own liability – this was the case in *R v Blaue* (1975) where the victim refused a blood transfusion on religious grounds. Therefore Tara’s allergy will not break the chain of causation between the trip and the harm.

The MR of ABH simply requires the MR of the original assault or battery; there is no additional MR required for the additional harm suffered. In *Roberts* it was irrelevant that the defendant did not intend the victim’s injuries as he intended to batter her when he placed his hand on her leg. Therefore, it is irrelevant in this case that Sue did not intend to harm Tara; as we are told she ‘decides’ to trip her up, this is evidence of direct intention for battery and is therefore sufficient.

Therefore, Sue will be guilty of ABH.

3 Angela’s brother Bob and his friend Charlie were sailing. Bob fell in the water and died. Angela believes Charlie could have saved Bob. Angela is depressed and her doctor has prescribed medication. The instructions state she must take one pill a day and not drink alcohol. At Bob’s funeral, Angela is wearing a brooch he gave to her. She hears Charlie say that Bob was a dangerous sailor who ‘had it coming’.

Angela is upset and takes one of her prescribed pills, washed down with a glass of sherry. An hour later, Charlie comes and hugs her. She runs off and falls, breaking her brooch. Angela sees Charlie laugh. She grabs a sharp knife from the lunch table and stabs Charlie several times, killing him.
Advise whether Angela can avoid liability for murder by using the defences of loss of control or diminished responsibility.[25 marks]

Loss of control is defined in s 54 of the Coroners and Justice Act 2009. There is a three-stage test: the defendant must lose control, because of a qualifying trigger, and a person of their sex and age, with a normal degree of tolerance, might have reacted in the same way in the same circumstances.

In R v Jewell (2014), Lady Justice Rafferty held: ‘Loss of control is considered by the authors of Smith and Hogan 13th edition to mean the loss of an ability to act in accordance with considered judgment or a loss of normal powers of reasoning.’ Clearly, when Angela stabs Charlie several times, she has lost her normal powers of reasoning.

Section 55 defines what is meant by ‘qualifying trigger’. It can be the defendant’s fear of serious violence from the victim, though this is clearly not the case here – there is nothing to suggest Angela feared Charlie.

Alternatively, the trigger can be something done and/or said by the victim that constituted circumstances of an extremely grave character and caused the defendant to have a justified sense of being wronged. This is for the jury to determine, having applied an objective test. This is known as the ‘anger trigger’.

While it is clear that Angela is very angry about Charlie’s behaviour, that behaviour can hardly be described as being of a ‘grave character’ and giving Angela a ‘justified sense of being wronged’, so it is likely this partial defence will fail at this point, particularly as the defence is not available to those who act in a considered desire for revenge (s 54(4)).

The final element from s 54(1)(c) requires that a person of the defendant’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or similar way. This is a question for the jury to decide.

Additional characteristics may be relevant when assessing the circumstances of the defendant, although under s 54(3) circumstances that relate to the defendant’s general capacity to exercise tolerance and self-restraint are to be disregarded. Therefore, again it is likely Angela will fail this test as a person with normal tolerance and self-restraint would not stab someone to death in these circumstances, and Angela’s depression and consumption of alcohol and drugs will not be taken into account.

Therefore, she may have more success with the partial defence of diminished responsibility.
This comes from s 52 of the Coroners and Justice Act 2009, which provides a four-stage test: whether the defendant was suffering from an abnormality of mental functioning; if so, whether it had arisen from a recognised medical condition; if so, whether it had substantially impaired their ability either to understand the nature of their conduct or to form a rational judgement or to exercise self-control (or any combination); and thus provide an explanation for their behaviour.

Abnormality of mental functioning means a state of mind so different from that of ordinary human beings that the ‘reasonable person’ would term it abnormal. It covers the ability to exercise willpower or to control physical acts in accordance with rational judgement. It is a question for a jury – \textit{R v Byrne} (1960). Angela’s response to Charlie may be regarded as an abnormality of mental functioning.

This must arise from a recognised medical condition. These can be found in the World Health Organization’s International Classification of Diseases. However, \textit{R v Dowds} (2012) states that just because a recognised medical condition appears in the lists does not necessarily mean that it is capable of being relied upon to show an abnormality of mental functioning. Depression will satisfy this, but Angela’s state due to the alcohol and prescription drugs may not, as \textit{Dowds} illustrates.

The abnormality of mental functioning must have substantially impaired Angela’s ability to: understand the nature of her conduct, or form a rational judgement, or exercise self-control.

Angela understood what she was doing, but perhaps her impairment was in the exercise of self-control. However, that impairment must be substantial.

‘Do we think, looking at it broadly as common-sense people, there was a substantial impairment of his mental responsibility in what he did? If the answer is “no”, there may be some impairment, but we do not think it was substantial.’ \textit{(R v Golds (2014))}

Abnormality of mental functioning must provide an explanation for Angela’s actions; it must be more than a merely trivial factor.

The defence will not succeed if Angela’s depression made no difference to her behaviour, but the alcohol did.

Given this, it is likely Angela will fail on both partial defences and will be convicted of murder.

\textbf{4 Dave and his friend Ernie approach Farah, who is using a mobile phone to show directions. Dave puts his fingers in his pocket to look like a gun and Ernie pulls the phone from Farah. Farah tries}
to hold on but Ernie knocks her to the ground and runs off with the phone. Dave has a key to his neighbour’s flat and the next day he decides to sell his neighbour’s television. Dave and Ernie go to the flat but once inside they discover that the television is missing. Ernie is angry and drinks a bottle of vodka belonging to Dave’s neighbour.

Advises whether Dave and Ernie are guilty of robbery and burglary, including any defences they may raise. [25 marks]

In relation to Farah, Dave and Ernie are advised that they are likely to be charged with robbery. This comes from s 8 of the Theft Act 1968:

‘A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.’

The AR of this offence requires a theft to be committed — pulling the phone from Farah and running off amount to the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it (s 1 of the Theft Act 1968), so a theft has taken place.

The defendant must apply force to the victim or threaten to apply force to the victim in order to steal. In R v Dawson and James (1976) the defendant pushed the victim so that the victim lost balance, and then defendant 2 could take his wallet. Here gun fingers, the pull and the knocking over amount to force, so this element is also satisfied.

The use or threat of force must be in order to steal. Here there is no question of the timing of the force being calculated to effect the theft.

The MR of robbery requires the MR of theft, i.e. dishonesty and intention to permanently deprive. This is clearly evidence in Dave and Ernie’s actions. There must also be the intention to use force to steal, again this is evident from their behaviour.

In relation to the neighbour, Dave and Ernie will be charged with burglary. This comes from s 9 of the Theft Act 1968 and requires the defendant to enter any building or part of a building as a trespasser and, for s 9(1)(a), with intent to commit theft, criminal damage or GBH.

The neighbour’s flat clearly amounts to a building or part of a building and by going in they clearly effect an entry. However, as Dave has a key, the question will be if they are entering as trespassers, defined under the civil law of tort as a person who enters without permission. The person must know or be reckless as to whether they are trespassing. A person can become a trespasser if they exceed the permission given. In R v Jones
and Smith (1976) defendant 1 and defendant 2 took two TV sets from defendant 2’s father’s house. The father argued that the defendant had permission to enter, but the Court of Appeal upheld convictions as both defendant 1 and defendant 2 had exceeded their permission, or ‘licence’ to enter. This is likely to apply here, as Dave and Ernie did not have permission to enter to either take the TV or drink the vodka.

So in relation to the TV, they have the AR of the s 9(1)(a) offence.

Under s 9(1)(b), a person is guilty of burglary:

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

This means although Ernie did not intend to steal the vodka when they entered the property, having found it and drunk it (which amounts to appropriation) he did commit the AR of s 9(1)(b) once inside the flat.

The MR of burglary requires the defendant to know they are trespassing or to be subjectively reckless as to whether they are trespassing. Ernie would know he was trespassing and Dave would be reckless to the fact.

In addition, under s 9(1)(a), the defendant must have intended to commit one of the three ulterior offences; here they both intended theft of the TV.

For s 9(1)(b) to apply, the defendant must have the MR for theft or GBH when they commit or attempt to commit the AR of either of these two offences. When Ernie drank the vodka he was both dishonest – there was no reasonable belief he had permission to do such a thing – and intended to permanently deprive the neighbour of his vodka.

Therefore, both are likely to be convicted of burglary.

5 ‘Reform for non-fatal offences is long overdue.’ Discuss the extent to which this statement is accurate. [25 marks]

The Offences Against the Person Act 1861 consolidated, but did not rationalise, the definitions of non-fatal offences in this area. There was no attempt to set out a new and coherent set of offences leaving ambiguities in the definitions.

The hierarchical order of seriousness of offence according to injury does not run in chronological order. The least serious offence of ABH is charged under s 47, the next serious offence is charged under s 20, while the most serious is charged under s 18.
The Criminal Justice Act 1988 does not provide a statutory definition of common assault. Judges have defined common assault in far greater clarity than the other non-fatal offences.

There remains confusion to the lay person over the word ‘assault’. The public perception of an ‘assault’ is a physical attack and not, as it is under law, a threat. The media use the word ‘assault’ as a generic term to simplify a news article and is a common misconception.

Words alone can constitute a technical assault. So, for example, a letter or an email can be sufficient. A silent telephone call can be a technical assault because the courts have allowed a ‘fear of violence at some time, not excluding the immediate future’, stretching the definition of ‘immediate’ to a significant degree.

There are conflicting cases over whether there must be hostility by the defendant to satisfy a battery. The normal jostling or brushing past in everyday life does not amount to a battery; to move physical contact up to a criminal offence there must require a degree of hostility. Therefore, potentially, low-level incidents are seen as lawful even when the defendant’s intention or recklessness was to act unlawfully.

Regarding s 47, assault occasioning actual bodily harm, the Offences Against the Person Act does not provide a statutory definition under this section and the language used is antiquated. The offence is historic and the literal definition is more than the physical touching of a battery as there must be actual harm to the body but which falls short of grievous. The lack of specific definition has led to confusion and the necessary introduction of common law and CPS guidelines.

In ss 18 and 20, malicious wounding or inflicting grievous bodily harm, the Act does not provide a statutory definition and the language used is antiquated. The Act appears to differentiate the method of carrying out the offences under each section by using ‘inflict’ in s 20 and ‘cause’ in s 18. Lord Hope stated in Burstow that for all practical purposes there is no difference between the two words. If the words are synonymous, why didn’t the legislators in 1861 use the same word? Lord Hope did qualify his opinion in Burstow by saying ‘inflict’ suggests something unpleasant, while ‘cause’ may not do so.

In respect of sentencing, there is a huge jump from a maximum of six months’ imprisonment for common assault to five years’ imprisonment for the next serious offence under s 47. Sections 47 and 20 carry the same maximum sentence of five years, while ss 20 and 18 carry different sentences for the same level of injury – wounding/GBH: five years’ and life imprisonment respectively. These are maximum sentences and reflect the severity of injury and MR, or a combination of these two offences. The
differences in severity of injury and MR, or a combination of these two offences are not sufficiently differentiated.

There has been much suggestion for reform in this area over the years, most recently in the 2015 Law Commission report *Offences Against the Person*. This modified the previous recommendations already suggested by the Home Office’s Draft Bill in 1998 (based on previous Law Commission recommendations) to: give a more logical structure; provide greater clarity in the offences’ interpretations; and ensure cases are tried in the most appropriate level of court given the gravity and complexity of the circumstances.

The Law Commission recommended that the reform to assault and battery would provide two offences of physical assault and threatened assault.

The Law Commission referred to ss 18, 20 and 47 as ‘the injury offences’ and the draft Bill organises the three offences from most serious to least serious:

- Clause 1: intentionally causing serious injury; maximum sentence of life imprisonment (in effect replacing s 18).
- Clause 2: recklessly causing serious injury; maximum sentence of seven years’ imprisonment (in effect replacing s 20).
- Clause 3: intentionally or recklessly causing injury; maximum sentence of five years’ imprisonment (in effect replacing s 47).

This means wounding is specifically removed and categorised as either an injury or a serious injury; GBH is replaced by ‘serious injury’; and the replacement for s 47 does not need an assault or battery to occur – any means of causing an injury is acceptable.

So it is clear that the offences need reform, and indeed there have been many attempts to action this reform. However, the proposals remain as such and, given that they attract little political currency, they are likely to remain so in the current climate.

**Chapter 4 The law of tort**

1 Explain the way in which a breach of the duty of care is established in a negligence claim.  

Breach is defined in *Blyth v Birmingham Water Works* (1856) as doing something a reasonable person would not do, or not doing something a reasonable person would do. Therefore this is an objective test. In some circumstances an appropriate degree of knowledge may be added to the reasonable person, i.e. making them the reasonable engineer – *Bolam v*
Frien Hospital (1957), or the reasonable child – Mullin v Richards (1998) (ruler sword fight), however, account will not be taken of trainee status – Nettleship v Weston (1971) (a learner driver judged by the standard of a reasonable driver).

There are four further factors the court will consider when determining breach. These can raise or lower how the reasonable person would be expected to act. First is the degree of risk involved – Bolton v Stone (1951) (a cricket ball clearing a fence six times in 30 years). If the risk is high, more precautions should be taken.

Second is the cost of precautions – Latimer v AEC (1952) (wet floor in a factory). If the cost is relatively low, the court will expect the precautions to have been taken.

Third is the potential seriousness of injury – Paris v Stepney Borough Council (1951) (the claimant lost his only eye in an accident at work). The more serious the potential injury, the more care must be taken.

The final factor is whether the activity was socially important – Marshall v Osmond (1983) (a police officer caused an accident when stopping a car thief). If so, the breach may be excusable.

2 Penny has just parked her car at the side of the road. Without looking in her mirror, she opens the car door right into the path of Joe, a passing cyclist. Joe is knocked over and suffers a head injury but gets up and continues on his bike. He then falls unconscious and crashes into a wall.

Advise whether or not Penny owes Joe a duty of care and, if so, whether or not she has breached that duty of care. [10 marks]

The law relating to duty of care was first established in Donoghue v Stevenson (1932) in the neighbour principle.

This states that you must take reasonable care to avoid acts or omissions you can reasonably foresee will injure your neighbour, who is someone so closely and directly affected by your actions that you ought reasonably to have them in your contemplation.

This was updated in 1990 in Caparo v Dickman (a case relating to the misvaluation of shares). The test to determine whether a duty exists or not is now, first, is the loss reasonably foreseeable? This is an objective test. In Jolley v Sutton London Borough Council (2000) it was reasonably foreseeable that boys would play on and be injured by an abandoned boat. So in Penny’s case the question is, is it reasonably foreseeable that
opening a car door without looking may cause injury to someone? Clearly it is.

Secondly, is there a relationship of proximity between the parties? In Bourhill v Young (1943) there was no proximity between a motor cyclist and a nosy fish wife, but in McLoughlin v O’Brien (1983) there was between a motorist and the mother of those injured by his actions. Clearly there must be proximity between Penny and Joe as she hit him: they were close in space.

The final Caparo test is, is it fair, just and reasonable to impose a duty? This is a policy test and deals with areas such as judicial immunity and when to impose a duty on the police and rescue services – Hill v Chief Constable of West Yorkshire (1988). As Penny does not fall into any of these categories, it is fair, just and reasonable to impose a duty on her to take care of Joe.

However, in Robinson v Chief Constable of West Yorkshire (2018), the Supreme Court stated that ‘it is normally only in novel cases, where established principles do not provide an answer, that the courts need to exercise judgment that involves consideration of what is “fair, just and reasonable”.’ As road users have a well-established duty of care to each other, the reality is that a duty would not need to be tested between Penny and Joe.

Breach is defined in Blyth v Birmingham Water Works (1856) as doing something a reasonable person would not do, or not doing something a reasonable person would do. Therefore this is an objective test and Penny will be judged on the standard of a reasonable person. In some circumstances, an appropriate degree of knowledge may be added to the reasonable person, i.e. making them the reasonable engineer – Bolam v Frien Hospital (1957), or the reasonable child – Mullins v Richards (1998) (ruler sword fight), however account will not be taken of trainee status – Nettleship v Weston (1971) (a learner driver judged by the standard of a reasonable driver). Therefore Penny will be judged by the standards of a reasonable and competent driver – who would look before opening a door into the road.

There are four further factors the court will consider when determining whether Penny was in breach. They are, first, the degree of risk involved – Bolton v Stone (1951) (a cricket ball clearing a fence six times in 30 years). Clearly there is a relatively high degree of risk in opening a door into the road.

Second is the cost of precautions – Latimer v AEC (1952) (wet floor in a factory). The precautions Penny could have taken were simply to look and wait, which would have cost nothing.
Third is the potential seriousness of injury – *Paris v Stepney Borough Council* (1951) (the claimant lost his only eye in an accident at work). As Joe was quite seriously injured this point is satisfied.

The final factor is whether the activity was socially important – *Marshall v Osmond* (1983) (a police officer caused an accident when stopping a car thief). If so, the breach may be excusable. It clearly was not socially important to open the door into the road without looking. Therefore, it is clear that Penny has breached the duty she owes to Joe.

### 3 Discuss the extent to which the rules of remoteness of damage achieve justice for claimants. [10 marks]

In determining whether damage is too remote to be recovered, the court will consider whether the damage is a foreseeable consequence of the breach. The type of damage must be foreseeable as in *Hughes v Lord Advocate* (1962) where injury to the boy was a foreseeable consequence of leaving a manhole exposed. However, the precise chain of events need not be foreseeable – *The Wagon Mound No. 1* (1961) (damage to property was foreseeable despite a complex chain of events involving welding and floating refuse).

Furthermore, in *Smith v Leech Brain* (1962) (a dormant cancer caused the death after a burn at work) it was held that the extent of the damage need not be foreseeable as long as the type is.

Whether or not these legal rules achieve justice is a subjective concept, with one party believing that justice has been done and the other wholeheartedly disagreeing.

In civil law, concepts such as the standard of care owed by a professional above that of an ordinary person and the reasonable person foreseeability test help to achieve justice by attempting to examine the facts with a degree of objectivity. However, *The Wagon Mound Nos 1 and 2* illustrate that that objectivity is only as good as the judges making the decision – these two cases, based on the same events, yielded different outcomes. And the difference of opinion between Lord Denning and Sir Robert Megarry VC serves only to illustrate how judges, even very senior ones, see their roles differently in the application of the law in order to achieve justice.

### 4 Previously a quiet lake overlooked by a few cottages, Linacre Lake has recently been developed by its new owner, Wetlife Developments, to provide extensive leisure facilities, including
swimming and powerboating. In consequence, a cottage owner, Ingrid, has experienced a large increase in noise, especially at weekends and during frequent competition weeks. Additionally, damage to a diesel oil storage tank owned by Wetlife Developments resulted in a leak which caused extensive contamination of Ingrid’s vegetable garden.

Advise whether Ingrid will be successful in claims of both private nuisance and Rylands v Fletcher against Wetlife Developments. [25 marks]

In relation to the noise, Ingrid may have a claim in private nuisance. Nuisance is defined by Winfield as ‘unreasonable interference with a person’s use/enjoyment of his land’ and as such deals with the courts balancing the conflicting interests between neighbours.

The claimant must have ‘proprietary interest’ in the property, i.e. own or lease it. In Malone v Laskey (1907) the wife of the licensee did not have a proprietary interest. Here we know Ingrid owns her cottage, so this element is satisfied.

Interference can amount to encroachment, damage or an assault on the senses and has typically taken the form of noises and smells. In Kennaway v Thompson (1981) noisy motorboat racing amounted to a nuisance, as in this case.

Next the interference must be ‘unreasonable’ to give rise to a claim, i.e. an objective test. Issues that make an interference unreasonable include locality – Sturges v Bridgman (1879), where the judge said, ‘what would be a nuisance in Belgrave Square would not necessarily be so in Berdmonsey’. In this case we are told the area was ‘quiet’ so this increase in noise may be unreasonable – however, planning permission which changes the nature of the area may negate this. The duration and frequency may make the noise unreasonable, as in the Kimbolton case (Crown River Cruises Ltd v Kimbolton Fireworks (1996)). In the present case we are told the competitions are ‘frequent’. If the claimant is unusually sensitive, this doesn’t make the interference unreasonable unless the activity would amount to a nuisance to others – Robinson v Kilvert (1889). Finally, if the defendant acts with malice in the generation of the nuisance, this will also make it unreasonable – Hollywood Silver Fox Farm v Emmett (1936).

Therefore, the noise in this case is likely to amount to an unreasonable interference with Ingrid’s use of her land.

The defences to nuisance include prescription, which requires the nuisance to have gone unchallenged for 20 years, so clearly not relevant.
here as we are told the developments are recent; and planning permission. The latter has developed to become a defence from an original position that stated the planning authority could not authorise nuisance when taking into account the new purpose for which the land is used. Assuming Wetlife have obtained the relevant permission, this could operate as a defence. The fact that the lake is being used for sports suggests it might be of benefit to the community. However, this is no defence, but might mean an award of damages may be preferred to an injunction to stop, as in Miller v Jackson (1977), relating to a cricket club.

Clearly, as above, the activities at Linacre will interfere with Ingrid’s enjoyment of her land and so the remedy she will claim will be an injunction. This is a court order requiring the defendant to stop their nuisance behaviour. It is possible in this case, which is very similar to the facts of Kennaway v Thompson, that a partial injunction may be granted, i.e. not forbidding all activity on the lake, but limiting the occurrence of competitions, etc. that cause most of the nuisance.

5 Some swimmers were in the habit of swimming beneath the surface in an area of Linacre Lake clearly marked out for powerboating only. While doing so, Jon surfaced into the path of a powerboat being driven by Kylie. In the resulting collision, Jon suffered severe facial injuries while Kylie was knocked out of the boat and had her arm severed by the propeller.

Advise whether Jon and Kylie will be successful in claims of occupiers’ liability against Wetlife Developments. [25 marks]

Kylie’s rights against Wetlife will be under occupiers’ liability. As a powerboat user on a lake marked out for powerboating, we can assume that Kylie is a visitor rather than a trespasser and so it is the Occupiers’ Liability Act 1957 that would apply here.

An occupier for the purposes of both Occupiers’ Liability Acts is a person with ‘control’ of the premises. In Wheat v Lacon (1966), involving a guest at a B&B falling downstairs because of the lack of light bulb, both the brewery that owned the building and the licensee were ‘occupiers’. As we are told that Wetlife own Blackwater Lake, they are clearly in control of it and, therefore, are occupiers.

Section 2(2) of the 1957 Act states that occupiers owe a duty to visitors to ensure the visitors will be reasonably safe in using the premises for the purposes for which they are invited or permitted by the occupier to be there. In The Calgarth (1927) it was stated that ‘when you invite a person in to use the stairs, you do not expect him to slide down the bannister’.

© Hodder & Stoughton Ltd 2018
As Kylie is using the lake for the purpose for which it is intended, she is clearly owed this duty by Wetlife.

To determine whether Wetlife breached this duty, we would need to know whether they had done all that was reasonable in the circumstances to keep Kylie safe. We are told there were signs marking the area out for powerboaters, but not whether anything further had been done to ensure powerboaters were kept reasonably safe. The normal rules of breach of duty apply, so the courts will consider the objective test of *Blyth v Birmingham Water Works* (1856) and whether Wetlife had acted as a reasonable provider of such a facility would act. In addition, the court would consider the risk factors, for example the likelihood and degree of harm, the vulnerability of the victim and whether the risk held any social importance.

Furthermore, Kylie would need to establish that the breach, if there was one, caused her injuries. Clearly this rests entirely on establishing whether Wetlife are held to have breached their duty of care to Kylie.

Jon’s rights against Wetlife may be found under the Occupiers’ Liability Act 1984. As a swimmer on a lake marked out for powerboating, we can assume that Jon is a non-visitor, i.e. a trespasser, rather than a visitor and so it is the 1984 Act that would apply here.

The duty, contained in s 1(4), is ‘to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned’.

There are control measures on this though. Section 1(3) states that:

(a) the defendant must be aware of the danger
(b) the defendant must know that the other is in the vicinity of the danger
(c) the risk is one against which the defendant may reasonably be expected to offer the other some protection.

In *Swain v Natui Ram Puri* (1996), involving a child falling from a factory roof, the defendant had no idea that children were habitually trespassing and there was no evidence that should have informed him that that was the case, therefore as (a) and (b) are subjective tests, the defendant was not liable.

In this case we are told that swimmers habitually use the area marked out for powerboating, so it is highly likely that Wetlife knew of the danger and knew swimmers were to come into the vicinity of it.
Breach of the duty is to do with the ‘state of the premises’ and the dangers it poses. In Keown v Coventry Healthcare NHS Trust (2006) a fire escape being played on by children was a legal requirement and therefore was not in breach of the duty owed. Furthermore, under s 1(5) the defendant can fulfil their duty by warning the claimant of the danger. This is a lower standard than is required by the 1957 Act. So, by clearly marking an area for powerboating only, it is possible that Wetlife have done everything a reasonable occupier would need to do in respect of trespassers – although as we are told the swimmers are often under the surface, there is a possibility the signs may not be in appropriate places.

The Occupiers’ Liability Act 1984 only imposes a duty for death or personal injury, so should there be a breach of the duty here, Jon’s facial injury is sufficient.

6 Discuss the extent to which the Occupiers’ Liability Act 1984 is fair on occupiers.

This Act imposes liability on occupiers with regard to persons other than ‘visitors’. This includes trespassers (and burglars) and those who exceed their permission – see Revill v Newbery (1996).

It was introduced to provide a limited duty of care mainly towards trespassers. This was because previously in common law an occupier owed such entrants no duty at all. The common law can be particularly harsh on application to child trespassers – Addie v Dumbreck (1929), where children frequently played on colliery premises and near to dangerous machinery. When one was injured, there was no liability since he was a trespasser. Due to the increasing growth of more dangerous premises and taking into account the difficulties of making children appreciate the dangers, the law was changed. In British Railways Board v Herrington (1972) a six-year-old child was badly burned when straying onto an electrified railway line through vandalised fencing. The House of Lords, using Practice Statement 1966, established the ‘common duty of humanity’, a limited duty owed when the occupier is aware of the dangers, and of the likelihood of the trespass. The impracticalities of the rule meant that the 1984 Act was passed.

The 1984 Act provides compensation for injuries only. This means that damage to property is not covered, trying to create a balance between protecting trespassers and also recognising that they are deserving of less protection than are lawful visitors. Under s 1(3) an occupier will only owe a duty if:
‘(a) he is aware of the danger or has reasonable grounds to believe it exists;
(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and
(c) the risk is one against which, in all the circumstances of the case, he may be expected to offer the other some protection.’

The court must take into account all of the circumstances when the injury occurred – Donoghue v Folkestone Properties (2003), where the claimant was injured when he was trespassing on a slipway in a harbour and dived into the sea. The injury happened late at night in the middle of winter. The court held that the occupier did not owe a duty of care. A reasonable occupier would not expect such behaviour.

An occupier is also not liable if they had no reason to suspect that there is the presence of a trespasser. In Higgs v Foster (2004) a police officer investigating a crime entered the occupier’s premises for surveillance and fell into an uncovered inspection pit behind some coaches, suffering severe injuries and causing him to retire from the police force. The police officer was a trespasser and the occupier could not have anticipated his presence, so there was no liability.

An occupier is not liable for unknown dangers. In Rhind v Astbury Water Park (2004) the claimant ignored a notice stating ‘Private Property. Strictly no Swimming Allowed’ and jumped into a lake. He was injured by objects below the surface of the water. The occupier had no reason to know of the dangerous objects, so there was no liability.

Under s 1(4) the duty owed is to ‘take such care as is reasonable in all the circumstances’ to prevent injury to the non-visitor. A standard of care in this context is an objective negligence standard. The greater the degree of risk, the more precautions the occupier will have to take – Tomlinson v Congleton Borough Council (2003), where the local authority owned a park including a lake. Warning signs were posted prohibiting swimming and diving because the water was dangerous, but the council knew that these were ignored. The council decided to make the lake inaccessible to the public but delayed start on this work because of a lack of funds. The claimant, aged 18, dived into the lake, struck his head and suffered paralysis as a result of a severe spinal injury. The House of Lords held that the danger was not due to the state of the premises, but to the claimant’s behaviour and that was not the sort of risk that a defendant should have to guard against but one that the trespasser chose to run.
The same conclusion was reached in *Keown v Coventry Healthcare NHS Trust* (2006), where a child fell from a fire escape he was playing on. The court held that it was not the state of the premises but what the child was doing on them that was the cause of the harm, so there was no liability.

It is also clear that if the occupier has taken precautions or fenced the premises, this is not proof that the occupier knew or ought to have known of the existence of danger. In *White v St Albans City and District Council* (1990) the claimant had taken an unauthorised shortcut over the council’s land. He fell from a narrow bridge that had been fenced. The court did not feel that this was sufficient to make the council liable.

Further, it is possible for the occupier to avoid liability by taking ‘such steps as are reasonable in all the circumstances’ (s 1(5)).

This can be achieved by use of effective warnings. However, it is unlikely that warnings will be effective in the case of children, particularly young children – *Westwood v The Post Office* (1973), where a notice that ‘only the authorised attendant is permitted to enter’ placed on the door of a motor room was held a sufficient warning for an intelligent adult.

Section 1(6) also preserves the defence of *volenti* (consent); the claimant must appreciate the nature and degree of the risk, not merely be aware of its existence. In *Ratliff v McConnell* (1999) a warning notice at the shallow end of a swimming pool read, ‘Shallow end’. The pool was always kept locked after hours, and the claimant knew that entry was prohibited then. He was a trespasser and when he was injured diving into the shallow end his claim failed. The court held that he was aware of the risk and had accepted it.

Thus the law attempts to strike a balance between imposing onerous duties on occupiers and protecting potentially vulnerable trespassers such as children.

**Chapter 5 The nature of law**

1 Explain the relationship between legal rules and moral principles. Discuss the extent to which law should be based on moral principles. [25 marks]

Laws are rules and regulations that are objective and not necessarily fault-based, for example speeding. Morals are subjective personal codes of values or beliefs that are based on levels of fault and determine what is right or wrong, for example lying. In some situations it is possible for there to be an overlap of the two, such as murder, which is both against the law and morally wrong. Devlin developed four key principles that were

© Hodder & Stoughton Ltd 2018
addressed to Parliament, to be borne in mind when deciding which moral ‘offences’ should be prohibited by law and which should not.

The first principle is the individual freedom that is allowed should be consistent with the integrity of society. The second is that the limits of such tolerance are not static, but law makers should be slow to change laws which protect morality. The third principle is that privacy must be respected as far as possible and the fourth principle is that the law is concerned with minimum rather than maximum standards of behaviour. This means that society’s standards should be higher than the standards set down by law.

Laws and morals have many differences between them. Laws are made by formal institutions such as Parliament and the courts, whereas society itself creates morals over time, meaning there is no formal creation. This means, when it comes to changing laws and morals, the difference is that laws can be instantly made or revoked, whereas morals will always take time to modify as they change with society’s attitudes.

There are also differences in the physicality of laws and morals. The existence of laws can be shown, whereas some morals are very vague in definition as everyone in society has their own individual ideas. This, therefore, results in a lack of general agreement on certain issues, such as abortion. The enforcement of laws and morals is again very different, with laws having the more serious outcome. If laws are broken, the state will impose a restriction, punishment or treatment on the person and they will go through a formal process to achieve justice for the injured party. Breaching moral standards, however, simply results in social disapproval.

As society has no involvement in creating and changing laws, their attitude to laws is irrelevant. However morals are important to society as they reflect the values and beliefs of many people.

It has been argued by many as to whether laws and morals should coincide with each other, when they are completely different.

Natural law theory maintains that the law should be used to enforce moral values and St Thomas Aquinas stated that this is a ‘dictate of right reason’.

Positivists, however, maintain that laws and morals should be kept separate and Jeremy Bentham called the natural law theory ‘nonsense upon stilts’.

Professor H.L.A. Hart argued that ‘Laws should only intervene where immorality causes harm to the society or harm to the individual concerned’. He believed that law and private morality should have a clear separation as law should be based on logic and not morals. He also

© Hodder & Stoughton Ltd 2018
believed that, if morals became laws, it would take away an individual’s right to freedom.

However, in the case of Shaw v DPP (1961), the judge in the House of Lords said, ‘Criminal Law should cover immoral behaviour even if it does not harm other people’ and ‘there is such an offence as conspiracy to corrupt public morals’. This is, therefore, an opposing opinion to Professor Hart.

Lord Devlin’s view on the topic was that laws can be used to preserve morality because it is so important to communities and therefore enforcing morals through law will prevent disintegration.

Having a theoretical perspective is one thing, however the practical application of the law is quite another. There are many cases where the decision has been based on law and many where it has been based on morals, and striving for consistency would be at the cost of justice in many cases. An example of a case where the decision was based on law is R v Wilson (1996). In this case a man used a hot knife to tattoo his wife, resulting in burns. However, he was found not guilty of GBH as she consented to it. This can be contrasted with R v Brown (1993) where, as part of a sadomasochistic orgy, the defendants inflicted consensual pain upon each other. Lord Templeman said, ‘pleasure derived from the infliction of pain is an evil thing’. Another case based on morals is Knuller v DPP (1972), where the defendant was found guilty of publishing homosexual prostitution adverts. And yet, in R v Human Fertilisation and Embryology Authority, ex parte Blood (1997), the claimant was denied access to her dead husband’s sperm as he had died before being able to give his consent – something it was argued she had a moral right to if not a legal one. Similarly in Evans v UK (2007), foetuses had to be destroyed as the father would not consent to them being used by their mother.

However, as with any issue, everyone will have an individual opinion on whether it is right to base a case decision on moral beliefs or the strict application of the law. Whether law and morals should be kept separate or whether law should be based on moral principles is highly emotive in practice.

2 Discuss the importance of fault-based liability in English law. [25 marks]

Fault can be defined as culpability, blameworthiness or responsibility for one’s actions.
In criminal law, the golden thread of *actus non facit reum, nisi mens sit rea* requires an act to be accompanied by a guilty mind in order to be criminal. Thus in criminal law, fault is synonymous with ‘guilt’.

Elements of fault can be found in both the AR and the MR.

The first requirement of an AR is that it must be voluntary, thus there is no fault in a crime caused as a consequence of a fit or reflex – *Hill v Baxter* (1958).

As a general rule, the criminal law does not attach fault to a failure to act or an omission. However, there are a number of circumstances where the law regards a failure to act as so blameworthy that a degree of fault is attached to it, for instance the moral obligation to take care of a child – *R v Instan* (1893), *R v Lowe* (1973).

Furthermore, fault can be attached for unforeseen and unintended consequences of an act using the rules of causation, for example using the thin skull test, a defendant can be guilty of causing a death that was actually caused by an underlying and unknown condition of the victim. Furthermore, using the principle of NAI, a defendant can be guilty of causing injuries that were in reality caused by the victim himself – *R v Roberts* (1971).

However, fault is even more obviously found in the MR of a criminal offence.

There are degrees of MR and these reflect the level of fault displayed by the defendant in the commission of the AR.

The highest level of fault can be found in direct intent; this is where the AR was the defendant’s aim or purpose, i.e. a deliberate act – *R v Mohan* (1976).

Still a type of intention but requiring slightly less fault is oblique intent; this is where the defendant could foresee the AR was a virtual certainty but went ahead anyway – *R v Woollin* (1998) – thus denying the defendant who didn’t ‘want’ a virtually certain outcome the opportunity to claim ‘it wasn’t my fault’.

Subjective recklessness is where the defendant appreciated a risk of the AR but went ahead anyway – *R v Cunningham* (1957) – and provides sufficient basis of fault of basic intent crimes.

Finally there is an objective MR, where fault can be attached to a defendant for failing to take what would be regarded by the reasonable man as adequate care. This is quite rare in criminal law, as objective tests for fault are synonymous with civil law, but is a sufficient degree of fault.
for a small number of offences, including some serious ones such as gross negligence manslaughter – *R v Adomako* (1994).

Fault is important as it allows the courts to differentiate in sentencing. There are a number of offences with similar ARs but very different levels of fault, which are then reflected in the sentencing. For example, GBH requires a victim to suffer very serious harm, but could have a maximum sentence of life imprisonment or a maximum of five years’ imprisonment, dependent on the levels of fault displayed by the defendant, not on the levels of injury suffered by the victim.

These levels of fault tend to show how seriously the crime is viewed, as opposed to the outcome. It is sociologically important to be able to attach labels to criminals that reflect their levels of fault, for example in the cases *R v Hart* (2000) (the Selby train crash) and *R v Huntley* (2004) (the Soham murders). Even though his actions killed 13 people, because he was only reckless or negligent, there was a degree of public sympathy for Gary Hart. Ian Huntley, however, who intended to kill Holly Wells and Jessica Chapman, was met with public revulsion.

It is also important to be able to reduce or remove fault with the application of partial or complete defences where the defendant’s fault is mitigated by the justification of his actions. For example, a defendant who killed the abuser of his child, or who was suffering from an abnormality of mental functioning, will be convicted not of murder, but of manslaughter, and thus may not necessarily face a life sentence. Equally a defendant who kills in self-defence will be acquitted completely.

There are, of course, two types of offence that do not require fault: strict and absolute liability offences. In these cases, the defendant needs only to commit the AR as there is no MR. These offences are there to regulate society and protect the vulnerable, for example parking offences or sexual intercourse with a child under the age of 13. The laws governing these offences are strictly monitored to ensure that people are not unjustly found guilty of an offence over which they had no control. For example, in *Sweet v Parsley* (1969) a landlady was charged with growing cannabis on her property, when it had actually been grown by one of her student tenants.

Although these types of offences appear to contradict the golden thread of criminal law, there is an increasing number of them. The justification for these offences is that they encourage the raising of standards, for example in relation to food hygiene – *Callow v Tillstone* (1900). Furthermore, they encourage a guilty plea in offences where it would be incredibly difficult to prove fault – ‘I didn’t mean it’ defence, thus saving the courts a huge amount of time and money by issuing fixed penalties.
However, there is a school of thought that believes this type of offence contradicts the fundamental principles of Art 6 of the Human Rights Act 1998, the right to a fair trial.

Therefore, fault-based liability is the cornerstone of English criminal law. However, no fault liability has its place and the criminal justice system would quickly grind to a halt without its existence.

A similar theory occurs in civil law. One of the largest areas of civil law, negligence, relies on the defendant breaching a duty of care that they owe to the victim (as in Donoghue v Stevenson (1916)). This breach is where the fault lies. To be found to have breached the duty of care, the defendant must be seen to have fallen below the standards of the reasonable person, making this a kind of objective fault. The level of fault that a defendant has can vary, depending on a multitude of factors. For example, the level of fault can change according to the potential injury arising from the act, as in Paris v Stepney Borough Council (1951). The level of fault can also decrease if the activity has a social benefit, such as in Bolton v Stone (1951), the cricket ground case. A final example is that the level of fault arises if the defendant voluntarily took on a duty of care.

Fault may also be transferred from one person to another. This is known as vicarious liability; one example of this is when a company is part of a civil action and the fault of an employee is transferred to their employer. Under the Consumer Protection Act 1987 fault can also be created in order to start a civil action. As long as it can be proved that there was a defect with a product, the company can be asked for damages, regardless of whose fault it was. It is important to realise that whatever fault there is in a case, it can be shared between the two parties. This is known as contributory negligence and was shown in the case of Froom v Butcher (1976). For example, if someone is injured in a car accident, but they were not wearing their seat belt, they can be judged to have had half the fault for the outcome and they will only receive half the damages that they could have received.

Fault was first introduced into negligence law in Cambridge Water v Eastern Counties Leather (1994). Before that, fault was not always necessary for damages to be paid. However, fault has always been a part of criminal law and it is necessary to justify sentencing as it would be unjust to penalise someone for an act when the outcome was not their fault. It simply would not be possible to have a criminal legal system without fault.

However, some civil legal systems do operate a non-fault-based system. For instance, in New Zealand, all taxpayers pay into a fund that pays the victims of accidents and other incidents resulting in injuries to the victim.
A limited version of this is applied in this country, where victims of road traffic accidents are still compensated if the car that caused the accident cannot be found. However, to apply an entirely no-fault system would require higher taxes for everyone. A no-fault system is more just to the victim as some victims do not receive compensation for various reasons. However, it would mean that people would pay for incidents with which they are in no way connected, in essence being penalised for no reason, although most countries that apply the system consider it to be compulsory insurance against having a civil action brought against them.

3 Discuss the meaning of ‘justice’ and the extent to which English law succeeds in achieving justice. [25 marks]

A somewhat metaphysical concept, justice in its broadest sense could be regarded as the idea that the law seeks to punish wrongs and protect rights.

This in itself throws up many questions, such as what are ‘rights’ and how are ‘wrongs’ so determined?

In A Theory of Justice (1971), John Rawls described justice as a ‘social contract’, meaning the principles of justice are to be viewed as the result of a binding contract among members of society, the breach of which attracts some form of sanction.

Philosophers from as early as Aristotle’s time have attempted to pin down the meaning with some similarity between them.

Aristotle felt justice was about distribution and proportionality. This is quite close to current ideas about social justice and can been seen in many human rights issues. In Lindsay v Commissioners of Customs and Excise (2002) the practice of Customs officials to confiscate cars as well as the goods being smuggled in them was held to be disproportionate.

Jeremy Bentham coined the idea of utilitarianism, a concept later developed by John Stuart Mill. This basically works on the principle that the purpose of law is to achieve the greatest happiness for the greatest number of people. This clearly indicates that the law’s purpose is to create a balance, but that the individual’s good may be sacrificed in favour of the good of the whole. Examples of this are clear in policy decisions, such as R v Brown (1993), where the good of society (i.e. not to be corrupted) outweighed the concerns of the individuals involved (i.e. to consent to whatever activity they chose to).
Marx, however, argued that in a capitalist society all laws are unjust and that justice can only be achieved by redistribution of wealth, perhaps leading to Rawls’s simple idea of a social contract.

From a narrower perspective, judges also vary in their perceptions of justice. Lord Denning felt it was his role to avoid or change laws that he felt impaired justice, whereas Megarry VC in Tito v Waddell (No. 2) (1977) felt he could not ignore the law even if he felt it delivered a ‘raw deal’ in a particular instance.

So it can be seen that whether the legal rules achieve justice or not is rather subjective. In any particular legal dispute, one party will usually see that justice has been done, while the opposition may wholeheartedly disagree.

Nevertheless, there are some legal rules that even the most partisan observer could not deny strive to achieve justice at least for the majority, if not the whole.

First, procedural law puts systems in place in an attempt to ensure justice. Examples of these include everyone being entitled to put their case in court and the existence of financial assistance for this, which is evidence that the law should be open to all, not just those that can afford it. The rules of evidence ensure the material presented in court is reliable, for example confession evidence of a defendant intimidated by police will not be admissible – R v Miller (1992). The right to trial by jury can ensure ‘justice’ being done in an individual case rather than a policy or ‘floodgates’ type of verdict – R v Ponting (1985).

Furthermore, there is substantive justice, i.e. that done by the application of legal rules themselves, for example in criminal law the defences to justify the actions of the defendant, and the partial defences to murder ensuring the defendant still shoulders some responsibility, but not complete.

Similarly, in civil law concepts such as ‘promissory estoppel’ and the standard of care owed by a professional rather than an ordinary person are all examples of substantive law striving to achieve justice.

Thus, we are given a framework in which all should be equal before the law. Within this framework we resolve our disputes by applying substantive laws developed over time, designed to produce the most ‘just’ results.

There are, however, significant numbers of ‘miscarriages of justice’ where these systems and safeguards have failed in their aims and lives have been destroyed in the process.

© Hodder & Stoughton Ltd 2018
Issues include the mandatory life term for murders, which allows no judicial flexibility to recognise different levels of seriousness of offence – in *R v Canning* (2002) the trial judge described his sentence as ‘a classic example of injustice’. Other examples of defendants wrongly convicted and executed (Timothy Evans) or imprisoned for extensive periods are never far from the headlines (the Birmingham Six, the Guildford Four).

That said, it is perhaps that these are so tragic that they stick in our memory. They are, after all, a very tiny minority of the cases that pass through our criminal and civil justice systems and so perhaps it is fair to conclude that most of the system is just and achieves just results most of the time – a state of affairs that will satisfy most utilitarians.

4 Explain what is meant by ‘balancing conflicting interests’. Discuss whether the law is successful in balancing conflicting interests. [25 marks]

The purpose of the law is to create a balance between the conflicting interests or rights of individuals and the state.

Rudolf von Jhering wrote *The Struggle for Law* (1872) in which he argued that law is a science to be utilized for the further advancement of the moral and social interests of mankind. He saw law as a means of ordering a society in which there are many competing interests. The law is the end result of a struggle between individuals and groups each pursuing their own interests. It causes healthy legal change, however it seems the law often reflects the interests of the dominant group.

Roscoe Pound is associated with social engineering. He emphasised the importance of social relationships in the development of law, stating that a lawmaker acts as a social engineer by attempting to solve problems in society using law as a tool, thus creating a balance between the competing interests. Social interests include health and safety and public order, while individual interests include privacy and domestic relations. Pound believed that, where possible, the law should create a level playing field of these interests, meaning social interests should be weighed against other social interests and individual interests against other individual interests as a failure to do this will result in a bias in favour of social interest.

Conflict between individuals’ interests are generally dealt with by substantive laws, such as theft and the civil laws of tort, contract and family, among many others.

Conflict between an individual’s interests and the state’s interests are generally dealt with by procedural laws, such as the rule in the Terrorism Act 2006 that allows the police to hold a suspected terrorist for up to 14
days without charge. Bail seeks to protect the right to liberty of suspects, but balances this against the need to ensure that victims are not intimidated and that the criminal process is determined without inference.

Sentencing creates a balancing act between the needs of the defendant wanting mitigating factors to be considered and the needs of the victim who wants justice by looking at aggravating factors. When the courts fail to achieve a balance, both the defendant and the prosecution may want to lodge an appeal.

Eliza Manningham Buller, the former director of MI5 delivered a Reith Lecture on the challenges faced by and the importance of the security services investigating and preventing terrorist attacks while adhering to the rule of law and the rights of the individual.

Generally, the law follows Jeremy Bentham’s principle of utilitarianism, the doctrine that a law is right in so far as it promotes happiness, and that the greatest happiness of the greatest number should be the guiding principle of conduct. However, there are times when the law upholds the right of the individual against the majority and this is also vital to protect our key values, such as freedom of religious belief and freedom of speech.

5 ‘Cyber-crime and data protection are the greatest technological challenges facing the law.’ Discuss the extent to which you agree with this statement. [25 marks]

Cyber-crime is crime carried out remotely using technology and the internet. This is often used to perpetrate property offences, such as accessing bank accounts, setting up fake investment opportunities or using viruses designed to halt or slow the operation of a computer or computer network system, for financial gain or simply to destroy information, or compromising physical security so other crimes can be carried out. Hacking is where information is held electronically and accessed illegally for criminal purposes. Identity theft and identity fraud are popular and devastating crimes where a person’s details are used to access confidential information or commit crimes.

However, there are also much more sinister and dangerous offences that make increasing use of technology and these include online bullying and abuse.

There are many individual pieces of legislation aimed at combating these offences, including the Computer Misuse Act 1990, which has been criticised as being poorly drafted, hastily enacted and, like any criminal law, doing little to prevent cybercrime.
The reality is that, no matter how good our laws or our IT forensic experts are, they can only ever be reactive to the crime that is being committed. It is impossible for them to be proactive in prevention as the resources and expertise that can be ploughed into criminal activity can never be matched by the state. It is up to all of us as individuals to be proactive in protecting ourselves and to be vigilant for this ever more sophisticated type of criminal activity.

Data protection is linked to cyber-crime, as accessing people’s data can create potential for criminal activity. As a consequence, we have two new pieces of legislation that attempt to protect our data. The EU GDPR Regulation 2016 and the domestic Data Protection Act 2018 place obligations on agencies/businesses that collect and share our data. This activity must now have a lawful basis and penalties are imposed when those businesses use or lose our data. Obligations are placed upon them to ensure data is secure from both loss and criminal activity – businesses must have policies in place to take reasonable measures to ensure data is safe and is only retained for as long as is necessary to reduce the possibility of it being unlawfully accessed.

A data subject has the right to request the data that is being held about them and the Freedom of Information Act 2000 allows access to information not regarding data subjects.

Article 8 of the European Convention on Human Rights guarantees the right to respect for family and private life. This Article is not an absolute right and can be restricted in accordance with law or where necessary in a democratic society. This means it is subject to the data protection laws above and the right of state agencies to collect and retain data regarding vulnerable people.

Closed circuit television (CCTV) appears to make society safer, however it could be argued that the ability to continuously track people without permission is of major concern.

Automatic number plate recognition (ANPR) is the filming of car registration plates to check for uninsured cars or wanted drivers, even though the majority of car users are insured and haven’t committed crimes.

Biometrics is the application of statistical information to biological data, which attempts to predict how a person will act and behave without actually testing or even meeting the individual. It is used in job recruitment.

Radio frequency identification uses small location emitting devices attached to products so that manufacturers can track their movements.
and location after production. It is used on hire cars or ID cards in workplaces, tracking the number of times a person uses the toilet, etc.

Location data in smart-phone technology tracks the location and movement of people so companies can track where people have been and are likely to go.

The Investigatory Powers Act 2016 provides a framework for the security services or other relevant bodies to intercept communications and store information. While providing safeguards, the powers are widespread and the ability to store and record any communication is possible.

So while there are a great many technological advances that present challenges, their use sometimes benefits us and keeps us safe, as well as giving us the feeling that ‘Big Brother is watching’.

Chapter 6 Human rights law

1 Yulia, who is from Russia, was arrested on suspicion of shoplifting and had her rights read to her by the arresting officer. However, Yulia does not speak a lot of English and did not understand what was happening. Yulia was put on remand and her trial date was set for six months’ time. She was refused access to a solicitor for the first two weeks. When the date arrived for her trial, the judge was ill, so the trial date was postponed for another six months. At Yulia’s trial, she was sent to prison for two years.

Advise Yulia on whether her rights or liberties were breached on her arrest, while on remand or during the trial. [25 marks]

Yulia is advised that she may have a claim under Arts 5 and 6 of the European Convention on Human Rights, which was incorporated into English Law by the Human Rights Act 1998.

Article 5(1) states:

‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law’

Article 5(1) deals with the justified deprivation of liberty and states that liberty may be restricted in the following circumstances: lawful arrest or detention; after conviction in a competent court; after non-compliance with a court order (such as bail); and when a suspect is committing or about to commit a crime.

© Hodder & Stoughton Ltd 2018
If the officer had reasonable grounds for believing Yulia had committed an offence, and correct procedure was followed in order to make the arrest, then the arrest is lawful. However, the detention can only be lawful if the rights of the detainee are adhered to. These include access to legal advice and we are told Yulia was refused such access for two weeks – so her detention on these terms would have been unlawful under the Police and Criminal Evidence Act 1984, Code C.

However, under Art 5(2) a person must be informed as soon as possible that they are being or have been arrested, the reason for the arrest and all in a language they understand. As we are told Yulia did not understand, it may be that the police failed to provide her with an interpreter and therefore were in breach of this particular provision.

Article 6(3) states:

‘Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [This may have been breached if Yulia did not understand.]

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; [This may have been breached by the lack of access to a solicitor.]

...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. [This may have been breached in the same way as Art 6(3)(a) above.]’

Furthermore, under Art 5(3) an arrested person must be brought to trial, bailed (with or without conditions) to appear at a trial, or released within a reasonable period of time. It seems unreasonable to remand into custody someone suspected of shoplifting, but it is possible there are other reasons for doing so: perhaps Yulia is a danger. The Bail Act provides an assumption of bail so to refuse it there must be adequate grounds – we would need further information to assess this point.

Under Art 5(4), an arrested person is entitled to a swift trial to decide their innocence or guilt. This includes any appeals against conviction and/or sentence. The delay of six months for a trial that is more than likely to be held in the Magistrates’ Court is unreasonable and therefore a
breach of this subsection. Furthermore, the extended delay for 12 months makes it highly unreasonable.

In addition, Art 6(1) states:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

The sentence of two years may also be excessive, but without further information regarding aggravating and mitigating factors it is difficult to tell. However, the time served on remand should be deducted from the term handed down by the court.

Article 5(5) provides that if any of the rights under Art 5 are infringed, the arrested person is entitled to compensation, usually in the form of a financial reward. It is clear that Yulia will be entitled to compensation as there are a number of issues with the procedure she faced.

2 Melanie was the leader of an animal rights group that had decided to organise a march through the city centre. The police were concerned about the march, as the group has deliberately caused criminal damage on some, but not all, of their previous marches.

Anne was an undercover police officer who infiltrated the group. She read all of Melanie’s letters while staying at her house. One of the letters contained plans about entering a fast-food restaurant and a department store to throw paint during an upcoming march.

Anne took photos of the letters and gave them to the local newspaper, the Daily Blag. The newspaper contacted Melanie saying it was going to print a story which contained information about the plans.

Advise Melanie of her rights and remedies against the police and the Daily Blag arising from these incidents. [25 marks]

Under Art 11 citizens have the right to freedom of peaceful assembly and association. This Article allows citizens to come together for peaceful protest, while disallowing compulsory membership of an organisation, such as a trade union, or taking part in a protest against a person’s will. Melanie is therefore entitled to organise a lawful pressure group and able to protest peacefully for her cause.
Under Art 11(1), ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests’.

‘Assembly’ means that citizens can meet and gather with other citizens as a group for lawful purposes, such as Melanie’s pressure group’s march through the city centre.

‘Association’ means that citizens can form lawful groups, organisations or clubs for their own interests. This freedom includes the forming of trade unions to protect workers’ rights, their freedoms and their interests, such as Melanie’s pressure group for the rights of animals in employment.

The rights for Melanie can be restricted under Art 11(2). The right to freedom of peaceful assembly and to freedom of association states:

‘No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

Thus, the freedom of assembly and association can be restricted if there is a law, required in a democratic society and it:

(a) benefits national security or the public’s safety
(b) prevents disorder or crime
(c) protects health or morals of its citizens, or
(d) protects the rights and freedoms of others.

Therefore, as Sharon has information suggesting that there will be criminal damage caused during the march, a restriction can be placed on Melanie’s request for the march under Art 11(2) in order to keep the peace.

Therefore, it would be unlikely that any objection to the ban on the march Melanie might have would be upheld in court.

In the case of the correspondence under Art 8(1), every person has a right to respect of privacy, family life, home and correspondence.

‘Correspondence’ means respecting a person’s post, email, phone calls, texts, etc.
Article 8(1), the right to respect for family and private life is restricted under Art 8(2), which states:

‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Thus, the right to respect for family and private life can be restricted if there is a law, required in a democratic society and it:

(a) benefits national security, the public’s safety or the financial safety of the country
(b) prevents disorder or crime
(c) protects health or morals of its citizens, or
(d) protects the rights and freedoms of others.

While the use of an undercover agent, Anne, would appear lawful and the methodology acceptable in obtaining the information is legal under Art 8(2), giving them to the newspaper would certainly amount to a breach.

3 Discuss the impact of the Human Rights Act 1998 on the doctrine of parliamentary sovereignty.

A.V. Dicey said:

‘The principle of Parliamentary sovereignty means ... that Parliament ... has the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’

This means that Parliament cannot control the actions of its future self, and the courts have no power to question the legality of an Act of Parliament. In British Railways Board v Pickin (1974) Pickin argued that the Board had misled Parliament. The House of Lords held the validity of an Act could not be lawfully attacked by claiming that Parliament was misled (either by fraud or otherwise) during the course of the enacting of a piece of legislation. The courts should not interfere with or adjudicate how Parliament exercised its function when making its decision on a piece of legislation.

However, there are a number of current Acts that do give the courts power to declare new parliamentary laws incompatible with them, thus
contradicting the rule above. These include s 4 of the Human Rights Act 1998. This gives the courts the power to declare an Act incompatible with the European Convention on Human Rights. For example, *H v Mental Health Review Tribunal* (2001) declared that the Mental Health Act 1983 was incompatible.

However, because (as Dicey tells us) Parliament can do anything and cannot be controlled by previous parliaments, in theory there is no reason why Parliament cannot simply repeal the Human Rights Act, thus regaining its supremacy. Indeed, it appears that this will happen with the repeal of the European Communities Act 1972, restoring sovereignty previously delegated to the European Union.

**Chapter 7 The law of contract**

1 Adam is a student in the final year of studying A Levels. In his spare time, he designs and makes T-shirts. Adam can supply ready-made T-shirts from his catalogue and made-to-order T-shirts at the request of a buyer. Adam has just received an enquiry for 100 readymade T-shirts and 100 made-to-order T-shirts from his father, who runs a shop.

However, Adam has told his father that he is going to give up his studies in order to concentrate on his business. Alarmed at this, Adam’s father places the order for the T-shirts and says he will pay him £200 per month to finish his studies in sixth months’ time. Adam says that this is not enough and he would need at least £500. His father says he will only pay Adam £300 per month: ‘Take it or leave it’. Adam reluctantly agrees to continue with his studies and accepts his order for the T-shirts. Adam’s father pays on time for the order for the T-shirts, but after three months he stops paying £300 monthly and refuses to continue to do so. In fact, his father says that he only had enough money for three months and had no intention of paying Adam after that.

Advise Adam whether an enforceable contract has been entered into.  

[25 marks]

The enquiry from Adam’s father is unlikely to be an offer to order/buy as Adam’s father is simply making an enquiry and not a firm order. This is most likely to be seen as an invitation to treat – *Partridge v Crittenden* (1968).

The order from Adam’s father does amount to an offer to buy the T-shirts, which we assume is accepted by Adam. The consideration would be the
Ordinarily the offer to pay the £200 would constitute an offer, which if accepted by the offeree would form a contract. However, there are two potential complications here. The first is whether this would, in these circumstances, be seen as a social and domestic arrangement and therefore there is no intention to create legal relations and it is unenforceable. The second issue is that Adam rejects the offer of £200, insisting that this is not enough and wants £500. This would potentially amount to a counter offer – *Hyde v Wrench* (1840).

Nevertheless, the £500 is rejected by Adam’s father who again counter offers £300, which is ‘reluctantly’ agreed to by Adam. When Adam’s father stops paying, whether this is a breach of contract depends upon the intention between the parties – *Balfour v Balfour* (1919), *Merritt v Merritt* (1970), *Jones v Padavatton* (1969).

There may be an issue of undue influence or duress if Adam’s father had forced his son take the counter offer of £300.

Adam may be able to sue for unliquidated damages for the unpaid maintenance if there was not a formal business contract containing an amount for liquidated damages. In addition, he may be successful in an application for specific performance – *Dyster v Randall and Sons* (1926).

---

2 Harry owns Harry’s Autos. Sarah owns Sarah’s Taxis. One of her taxis needed its annual service, so she went to Harry’s Autos for it to be serviced.

As part of the service, the front brake pads were changed. Sarah collected the car but as she was driving it back to the office, she pressed the brake pedal, the brakes failed and the car was involved in an accident. Sarah suffered a broken collarbone, the front bumper of the taxi was damaged and an expensive, high quality webcam that she keeps in the taxi for her own security was damaged beyond repair.

Sarah telephoned Harry when she was discharged from hospital to tell him about the accident. She said the accident could only have been caused by the service he provided being defective. He replied that he did not accept liability and that she should look at the clauses on the receipt carefully.

**Advise Sarah on whether she can recover her losses from Harry.**

[25 marks]
Sarah is advised that the relevant issues are terms of the contract, in particular exclusion clauses as it appears Harry is not accepting liability on the basis of the existence of such clauses.

In negotiations to form a contract, both parties may discuss a variety of issues before committing to the agreement. In determining whether a term is included in a contract, the courts will consider whether the parties are aware of the term when making the contract.

Generally, if a party is unaware of a ‘term’ that is relied upon later by one of the parties who knew of the term, then the term is unlikely to be actionable. This depends on the term and the likely impact of its operation.

As Harry has told Sarah to look at the receipt, which is generally issued after payment, and which in turn is generally made once work is complete, it seems highly likely that at the time of making the contract Sarah did not know of the terms and, indeed, it does not form part of the contract.

If, however, it does, the impact must be examined. Exclusion or exemption clauses may be inserted into a contract in order to reduce or eliminate the liability of either party where certain events may occur. They can operate perfectly legitimately where both parties are of equal bargaining power.

The exclusion clause is generally included in the contract either by signature or if the other party had knowledge of the clause. It is possible that Sarah did not, so the clause may be without effect.

The general rules for knowledge of the exclusion clause to be enforced are:

- Did the party have knowledge of the clause? (Perhaps they had contracted before and were understood to have such knowledge.)
- Were reasonable steps taken to bring the exclusion clause to the attention of the party? Where the contract is not necessarily signed but the clause should have been brought to the other party’s notice (for example, by a sign or on a document given to a party), the exclusion clause will only be binding if the parties had express knowledge of it at the time of the contract – Olley v Marlborough Court Hotel (1949). A ticket with an exclusion clause on the reverse is generally insufficient – Chapelton v Barry UDC (1940). On this basis it is highly unlikely Harry will be able to rely on whatever is on the receipt.

However, should the court decide the term was adequately incorporated into the contract, the next step will be to see if it is valid.

© Hodder & Stoughton Ltd 2018
Their agreement is not a consumer contract as both parties are dealing as owners of their respective businesses and so the Consumer Rights Act 2015 does not apply.

However, the Unfair Contract Terms Act (UCTA) 1977 applies to clauses that seek to limit or exclude liability in business-to-business contracts. Section 3(2) of UCTA 1977 states that a party cannot rely on a contract term to exclude or limit liability for breach except in so far as the term satisfies the requirement of ‘reasonableness’. Under s 2(1) a party cannot rely on an exclusion clause that tries to exclude or restrict their liability for death or personal injury resulting from negligence. So, assuming the accident was caused as a consequence of a negligent service/repair of the brakes, Harry cannot restrict his liability for the personal injuries Sarah has suffered. Section 2(2) provides that in the case of other loss or damage, a person cannot exclude or restrict their liability for negligence except when the term or notice satisfies the requirement of reasonableness, so it is possible Harry will be able to exclude damage to the taxi and webcam, but highly unlikely. Given the nature of his business and the potential for danger in failing to adequately service taxis, which are used by the public, the court is unlikely to regard this exclusion as reasonable.

In terms of the damage, it is certainly foreseeable that the taxi will be damaged and that personal injury will result as a consequence of faulty brakes. The damage to the webcam may not be recoverable if it is not foreseeable – *The Wagon Mound* (1961). However, as many taxis are fitted with this type of equipment now, it may well be regarded as foreseeable.

3 Baroness Hale said in *Transfield Shipping Inc v Mercator Shipping Inc* (2008) ‘Loss of the type in question has to be “within the contemplation” of the parties at the time when the contract was made.’

**Discuss how the law of contract restricts the amount of damages payable in the event of a breach of contract.**

This case concerned the loss of profit from the late return of a ship that had been hired out. The House of Lords held that the loss of profits in the next charter was not within the scope of damages.

Generally, the purpose of an award of damages for breach of contract is to compensate the injured party. The general rule is that damages are meant to place the claimant in the same position as if the contract had
been performed. Damages are usually awarded for loss of a bargain and/or wasted expenditure.

The traditional test of remoteness is set out in Hadley v Baxendale (1854) and is a test of foreseeability. That means the loss will only be recoverable if it was in the contemplation of the parties. The loss must be foreseeable not merely as being possible, but as being not unlikely.

The knowledge that is taken into account when assessing what is in the contemplation of the parties comes under two limbs: first is the knowledge of what happens ‘in the ordinary course of things’; this is assumed, whether or not they knew it. Second is actual knowledge of special circumstances outside the ordinary course of things, but that was communicated to the defendant or is otherwise known by the parties.

Following the decision of the House of Lords in the Transfield case, it is clear that the remoteness test is about identifying the scope of the implied assumption of responsibility by the defendant and therefore requires an assessment of the common expectation of the defendant’s liability.

Losses may have been foreseeable at the time of the contract, but they will only be recoverable if they were caused by the breach of contract or duty. The claimant must prove on a balance of probabilities that the breach caused the loss.

The rule of mitigation requires a claimant to take steps to minimise its loss and to avoid taking unreasonable steps that increase its loss. A claimant cannot recover damages for any loss that could have been avoided by taking reasonable steps. The claimant is said to have a ‘duty to mitigate’.