it seems, goods stored on it will be recoverable. Where there is a continuing nuisance, a claim can be brought in respect of damage which originated prior to the claimant's acquisition of an interest in the property.[160]

1-42 **Enjoyment of property** The interest in enjoyment of land has long been protected by the tort of nuisance and by the closely related tort of *Rylands v Fletcher*.[161] The tort of nuisance is regarded as applying where the cause of the interference with the enjoyment of land is a continuing activity for which the defendant is responsible whereas the rule in *Rylands* applies where the interference has been caused by an isolated escape of something dangerous from the defendant's land. The tort of nuisance neatly illustrates the difficult process of balancing conflicting interests to ensure that the interest of one neighbour in the free and undisturbed enjoyment of his property does not violate the corresponding interest of adjoining neighbours.[162] Nuisance and *Rylands v Fletcher* derive "from a conception of mutual duties of adjoining or neighbouring landowners".[163] In *Cambridge Water Co v Eastern Counties Leather*[164] the House of Lords stressed the common elements of the two tort actions and in *Hunter v Canary Wharf*,[165] it stressed the proprietary nature of nuisance. Thus, an action in nuisance was only available to persons with an interest in the affected property and compensation for nuisance involving personal discomfort was to be measured by the resulting diminution of the value of the land and not by analogy with personal injury awards.

1-43 **Intangible property** Protection against physical damage to property, dispossession, and interference in the enjoyment of land sufficed for the forms of property interests common until the industrial and technological developments of the nineteenth and twentieth centuries. Intangible property such as trade reputation, copyright, patents and trade marks demands more subtle forms of protection. The law recognises and protects such property rights, but both their existence and vindication tend to depend on an amalgam of the principles of common law and equity, and increasingly on statute. To a large extent, statute now regulates the protection of patents, copyrights, registered trade marks and designs, albeit the remedies to redress an infringement of those rights have tortious aspects. These are reviewed in Ch.24. The tort of conversion extends by fiction to protect a limited category of intangibles such as negotiable instruments but, it seems, will not be

[160] *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55; [2002] A.C. 321. See para.19-25.

[161] The rights conferred by the law of nuisance arise by virtue of the general common law, and do not depend on the terms of any conveyance or transfer of the land: *Thornhill v Sita Metal Recycling Ltd* [2009] EWHC 2037 (QB); [2009] Env. L.R. 35 at [20], per HH Judge Seymour: "A nuisance is a wrong to the enjoyment, by a person in exclusive possession of the land affected, of that land. The right to complain of a nuisance is not a commodity to be bought or sold at whim. It is, in law, an incident of exclusive possession of land … ".

[162] This is sometimes referred to as the principle of "reasonable user", though this is not unproblematic (see *Coventry v Lawrence* [2014] UKSC 13; [2014] A.C. 822 at [179] per Lord Carnwath) and it only applies to intangible damage to the occupier's enjoyment of land. Where a nuisance causes physical damage there is no balancing exercise undertaken: *St Helens Smelting Co v Tipping* (1865) 11 H.L.C. 642; para.19-08.

[163] *Read v Lyons* [1947] A.C. 156 at 173, per Lord Macmillan.

[164] [1994] 2 A.C. 264.

[165] [1997] A.C. 655.

extended further.[166] The tort of passing-off has developed to extend the protection afforded to trade reputation. Trade secrets continue to be protected initially by breach of confidence. Passing off and breach of confidence are examined in detail in Chs 25 and 26.

(iii) Economic interests

1-44 **Pure economic loss** "Pure economic loss" is the term used to describe an economic loss to the claimant which does not result from any physical damage to or interference with his person or tangible property. As Hobhouse LJ has observed, "in a competitive economic society the conduct of one person is always liable to have economic consequences for another and, in principle, economic activity does not have to have regard to the interests of others and is justifiable by the actor having regard to his own interests alone".[167] Hence, economic interests received limited protection. Pure economic loss will normally take two forms: wasted expenditure or loss of a gain, profits or profitability. The tort of deceit and the expanded tort of passing-off protect economic interests of both kinds where loss results from deliberate or reckless statements or conduct designed to induce the claimant to act against his interests, or to damage those interests with third parties. *Hedley Byrne v Heller*[168] allowed recovery of economic loss in negligence within the boundaries of a special relationship of a kind rendering it appropriate to require the defendant to safeguard the economic interests of the claimant. The outer limits of such special relationships, which will generally relate to wasted expenditure, are now set largely by *Caparo Industries Plc v Dickman*.[169] Loss of a potential gain, will, unless a consequence of physical damage, normally fall outside the ambit of torts. However, in *White v Jones*[170] the House of Lords confirmed that exceptionally the relationship between claimant and defendant can be such that responsibility for protecting the claimant's expectations properly rests with the defendant. Furthermore, a claimant who has been misled by a defendant into entering a particular transaction, may claim for the profits which would have been made had it entered an alternative transaction.[171]

1-45 **Unfair competition** The majority judgment in *Allen v Flood*[172] rejected the contention that the claimants enjoyed a "a legal right … to pursue freely and without hindrance, interruption or molestation, the profession, trade or calling which he has adopted for his livelihood". They enjoyed at most a freedom to pursue their livelihood or business "conditioned by a precisely similar right in their fellow men". English law embraces the principle of free competition. Damage to business interests is actionable only if proved to be unlawful. Prior to *Allen v Flood* the

[166] In *OBG Ltd v Allan* [2005] EWCA Civ 106; [2005] Q.B. 762 at [56], Peter Gibson LJ, with the agreement of Mance and Carnwath LJJ, on this point, said that there could be no conversion of a chose in action or contractual right. Despite the attraction of such a step, it was not open to the court to invent such a tort. This view was upheld by a bare majority of the House of Lords: [2007] UKHL 21; [2008] 1 A.C. 1. See para.16-36.

[167] *Perrett v Collins* [1998] 2 Lloyd's Rep. 255; [1999] P.N.L.R. 77 at 84.

[168] [1964] A.C. 465.

[169] [1990] 2 A.C. 605.

[170] [1995] 2 A.C. 207.

[171] *East v Maurer* [1991] 1 W.L.R. 461, and see para.17-46.

[172] [1898] A.C. 1.

(a) claims relating to liability for disease, particularly industrial disease; and (b) claims where the scientific evidence suggests that the claimant's injury results from a combination of factors: "guilty" causes traceable to the defendants' fault, and, "innocent" causes unrelated to any wrongdoing on the part of the defendants. Often these types of claim will overlap. Cancers, deafness and other forms of disease and disability may well on occasion be thought to be caused by environmental factors, or poor employment practice, or medical negligence, but equally often have other unrelated causes. It may be argued that the condition has genetic origins, or results from environmental factors beyond the defendants' control, or is an inevitable result of the claimant's original disease. The quality of the expert scientific evidence is all important.[36] But even where the causal mechanism is reasonably well-understood in medical terms, so that it can be said of a *population* that, e.g. exposure to a particular toxin (such as tobacco smoke) will lead to an increase in the number of cases of a particular disease (such as lung cancer), it may be virtually impossible for an *individual* affected by exposure to the toxin to prove that his disease was caused by that exposure.[37]

(b) The uncertainty of hypothetical human conduct

(i) Claimant's hypothetical conduct

2-13 **Causation depends on claimant's conduct** The outcome of the "but for" test in *Barnett v Chelsea and Kensington Hospital Management Committee* depended upon expert evidence as to the consequences of arsenic poisoning and the effectiveness of an antidote. There are cases where the answer to the hypothetical question that the test poses ("what would have happened if there had not been a breach of duty by the defendant?") depends upon what a person would have done. In *McWilliams v Sir Williams Arrol & Co*,[38] a steel worker fell 70 feet to his death. The defendants were found to be in breach of statutory duty in failing to provide him with a safety harness, but the evidence established that the dead man had rarely if ever worn a safety harness even when one was provided. His widow's claim for breach of statutory duty failed. She could not show that "but for" the defendants' wrongdoing her husband's death would have been avoided, because the probability was that he would not have worn it.[39] On the other hand, in applying the "but for" test care must be taken to identify the precise scope of the duty imposed on the

[36] See, e.g. *Reay v British Nuclear Fuels Plc* [1994] 5 Med. L.R. 1; *Wilsher v Essex AHA* [1988] A.C. 1074 HL.

[37] "Observing that a small percentage of cases of cancer were probably caused by exposure to asbestos does not identify whether an individual is one of that group. And given the small size of the percentage, the observation does not, without more, support the drawing of an inference in a particular case": *Amaca Pty Ltd v Ellis* [2010] HCA 5; (2010) 263 A.L.R. 576 at [70] (where the issue was whether exposure to asbestos, as opposed to the deceased's smoking habit, caused his lung cancer). See further *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 W.L.R. 2036 at [8] and [9].

[38] [1962] 1 W.L.R. 295 HL; and see *Wigley v British Vinegars Ltd* [1964] A.C. 307 HL (occupier's liability).

[39] Lord Reid commented that it would not be right to draw such an inference too readily, because people do sometimes change their minds unexpectedly, but the evidence in this case was "overwhelming". In *Chief Constable of Hampshire v Taylor* [2013] EWCA Civ 496; [2013] I.C.R. 1150 at [19] Elias LJ (with whom Patten LJ agreed) suggested that where a defendant was found to have been in breach of the Personal Protective Equipment at Work Regulations 1992 the burden of proving that the claimant would not have used the protective equipment, if provided, lay with the defendant. His Lordship cited *McWilliams v Sir William Arrol* for this proposition (and the judgment of Longmore LJ in *Ali Ghaith v Indesit Company UK Ltd* [2012] EWCA Civ 642 at [23]). *Sed quaere*: the result in *McWilliams v Sir William Arrol* did not turn on the burden of proof, since there was overwhelming evidence that the deceased would probably not have used a safety belt, if supplied (see per Lord Devlin at 309). Viscount Kilmuir LC (with whom Lord Morris agreed) made it clear (at 299) that the burden of proving both breach of duty and causation lay with the claimant. Lord Reid considered (at 306) what amounts to proof *when there is no direct evidence* because the victim is deceased and so unable to give evidence. The starting point is to make certain assumptions: "If general practice or a regulation requires that some safety appliance shall be provided, one would assume that it is of some use, and that a reasonable man would use it. And one would assume that the injured man was a reasonable man. So the initial onus on the pursuer to connect the failure to provide the appliance with the accident would normally be discharged merely by proving the circumstances which led to the accident, and it is only where the evidence throws doubt on either of these assumptions that any difficulty would arise. Normally it would be left to the defender to adduce evidence, if he could, to displace these assumptions." Arguably in this situation, as with the principle of res ipsa loquitur (see para.7-207), there is an *evidential* burden on the defendant to adduce evidence which displaces the initial inference that the breach of duty caused or materially contributed to the injury. But if the defendant does that, and (as rarely occurs in practice) the probabilities are equal, the claim should fail on the basis that the claimant has not discharged the burden of proving causation.

defendant. It may be that the evidence does indeed show that the claimant would not, for example, have worn protective clothing or equipment even if it were provided. But if the defendant's duty is to take all reasonable care to enforce and/or supervise the use of protective equipment, the defendant will not avoid liability unless it can be shown that even had all reasonable steps been employed to ensure the claimant used the protective equipment, he would still have refused to do so or evaded those precautions.[40]

2-14 **Negligent advice** This type of causation question arises whenever the claimant's loss depends upon what the claimant would have done, hypothetically, if there had been no breach of duty by the defendant. Typically, this will occur in "advice" cases, where it is alleged that had the defendant not been negligent in the advice or information given (or not given) the claimant would have done something different, thereby avoiding the loss that has materialised. Thus, where an accountant supplies negligently audited accounts in reliance upon which the claimant purchases a company which proves to be worth less than anticipated, then even if the claimant is able to establish that the accountants owed him a duty of care, he must also prove that had the accounts been accurate he would not have proceeded with the purchase.[41] In claims against solicitors there will be a reasonably strong (though rebuttable) presumption that a client would have acted on the solicitors' advice.[42]

[40] *Nolan v Dental Manufacturing Co Ltd* [1958] 1 W.L.R. 936 CA; *Pape v Cumbria CC* [1992] 3 All E.R. 211 CA; *Bux v Slough Metals Ltd* [1973] 1 W.L.R. 1358 (employers liable for failing to instruct and supervise the claimant in the use of safety equipment).

[41] See *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All E.R. 583.

[42] See *Levicom International Holdings BV v Linklaters* [2010] EWCA Civ 494; [2010] P.N.L.R. 29, a case concerning negligent advice by a solicitor to a client about commencing proceedings where, at [284], Jacob LJ commented: "When a solicitor gives advice that his client has a strong case to start litigation rather than settle and the client then does just that, the normal inference is that the advice is causative. Of course the inference is rebuttable—it may be possible to show that the client would have gone ahead willy-nilly. But that was certainly not shown on the evidence here. The judge should have approached the case on the basis that the evidential burden had shifted to [the defendant] to prove that its advice was not causative." Stanley Burnton LJ observed, at [261], that: "one has to ask why a commercial company should seek expensive City solicitors' advice (and do so repeatedly) if they were not to act on it."

2-22 **Claimant's disbelief in truth of misrepresentation** If a claimant to whom a misrepresentation has been made does not believe the defendant's statement then it might be thought problematic for the claimant to allege that the misrepresentation was relied upon and that therefore this caused the loss by inducing the claimant to do or refrain from doing something. However, the argument that the claimants had not believed the defendant's fraudulent statements and therefore the misrepresentations had not caused loss was rejected by the Supreme Court in *Hayward v Zurich Insurance Co Plc*.[67] The defendant had brought a claim for personal injuries in which he had fraudulently exaggerated the effects of his injuries. The claimants were the insurers who settled the claim despite having strong suspicions that the injuries were exaggerated. Some time after the settlement the insurers were provided with evidence demonstrating that the defendant's claim was grossly exaggerated and they sought damages for deceit. The defendant argued that the insurers could not claim to have been induced to enter into the settlement by the misrepresentation if they had not believed it. The Supreme Court held that it was "not necessary, as a matter of law, to prove that the representee believed that the representation was true." Although the representee's state of mind could be relevant to the issue of inducement, in that there could be difficulty in establishing that he was induced to enter into the contract and that he has thereby suffered loss as a result, this is a question of fact. Belief is not an independent requirement. In order to establish the causal link it was only necessary for the claimant to "have been influenced by the misrepresentation". Nor was it necessary for the misrepresentation to have been the sole cause. On the facts of *Hayward* the crucial issue in entering into the settlement was not whether the insurers believed the defendant's misrepresentations but their assessment of the risk that the court might believe the defendant at a trial.[68] That was sufficient for the misrepresentation to have influenced their decision settle the case.

2-23 **Causation and the detection of fraud** The rule that the "but for" test does not apply in actions for deceit is based on the paradigm fact-situation where A makes a fraudulent statement to B, who believes the statement, even though he should not have done so if he had made proper enquiry. B was negligent, but A cannot say "you should not have believed me", nor can A's employer say "you should not have believed him". Where, however, a firm of auditors is engaged by a company to undertake an audit of the accounts, and an employee of the company makes a fraudulent statement which is believed by the auditors, the position is different. In this situation the auditors, B, were under a duty to A's employer to test the truthfulness of A's statements. Had B performed that duty with reasonable care, he would have realised the statements were false. B's loss (as a result of A's fraud) is his liability to A's employer for failure to perform that duty. B cannot then argue that the cause of that loss was A's fraud, for which the employer was vicariously liable.[69] Although a third party who was misled by A's false statements into entering into a

[67] [2016] UKSC 48; [2017] A.C. 142.

[68] [2016] UKSC 48; [2017] A.C. 142 at [19], [32] per Lord Clarke. Lord Toulson made the same point at [71]: "Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it."

[69] *Barings Plc (In liquidation) v Coopers & Lybrand (A Firm)* [2003] EWHC 1319 (Ch); [2003] P.N.L.R. 34 at [732] and [733], per Evans-Lombe J.

transaction would be able to recover all losses flowing from that transaction, the auditors were not a "third party". They were in breach of a pre-existing duty, owed to A's employers, to guard against being misled by just such false statements, and it would make a nonsense of the auditors' duty to the company if the very act which ought reasonably to have been prevented gave rise to an equal and opposite counterclaim and so negatived the causal connection between the auditors' breach of duty and the client's loss.[70]

(iv) Defendant's hypothetical conduct

2-24 The causation problem is not limited to circumstances where the question is what the *claimant* would have done, in hypothetical circumstances, but also arises where there is a question as to what, hypothetically, the *defendant* would have done had she not been negligent. This is illustrated by *Bolitho v City and Hackney HA*,[71] in which the claimant, who was in hospital, suffered brain damage as a result of cardiac arrest caused by an obstruction of the bronchial air passages. The defendants admitted negligence because a doctor had not attended to the claimant in response to calls for assistance. The damage could have been avoided if the claimant had been seen by a doctor and "intubated", clearing the obstruction. The doctor who failed to respond said that had she attended she would not have intubated, and therefore the cardiac arrest and subsequent brain damage would have occurred in any event. There was evidence that a responsible body of professional opinion would have supported a decision not to intubate, although five medical experts for the claimant said that he should have been intubated, and it was agreed that this was the only course of action that would have prevented the damage. Lord Browne-Wilkinson said that in all cases the primary question is one of fact: did the wrongful act cause the injury? In cases where the breach of duty consists of an omission to do an act which ought to have been done (such as the failure of a doctor to attend the patient) the factual enquiry is necessarily hypothetical. The question is what would have happened if an event, which by definition did not occur, had occurred? The first question is: what would have happened—either the doctor would have intubated, had she attended, or she would not. The *Bolam* test,[72] by which standards of professional negligence are measured by reference to a responsible body of professional opinion, was not, and could not, be relevant to that question. The defendant doctor said that she would not have intubated, and therefore the claimant would in any event have sustained the brain damage. But she could not escape liability by proving that she would have failed to act as any reasonably competent doctor would have acted in the circumstances: "A defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter."[73] Applying *Joyce v Wandsworth HA*,[74] Lord Browne-Wilkinson, concluded that there were two questions for the judge to decide on causation: (1) what would the doctor have

[70] [2003] EWHC 1319 (Ch); [2003] P.N.L.R. 34 at [743]; applying *Reeves v Commissioner of Police for the Metropolis* [2000] 1 A.C. 360; see para.2-141.

[71] [1998] A.C. 232 HL.

[72] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; see para.9-76.

[73] per Lord Browne-Wilkinson at [1998] A.C. 232 at 240. See *Wright (A Child) v Cambridge Medical Group* [2011] EWCA Civ 669; [2013] Q.B. 312 at [56]–[61] per Lord Neuberger MR for discussion of the underlying rationale for this proposition. See para.2-127.

[74] [1996] P.I.Q.R. P121.

claimant's explanation of the cause should be accepted. Thus, the judge was correct to consider evidence other than the medical evidence and was entitled to conclude that the claimant had not satisfied the burden of proof.

2-28 These types of causation problem also tend to arise in medical negligence actions. In *Kay's Tutor v Ayrshire and Arran Health Board*,[87] the infant claimant contracted meningitis. In hospital he was given a massive overdose of penicillin which nearly killed him, but he recovered both from the toxic effects of the overdose and from meningitis. On recovery he was found to be profoundly deaf. Deafness is a recognised complication of meningitis. The hospital admitted negligence but denied liability for the deafness. No expert evidence linked overdoses of penicillin to such damage, but overdoses of such magnitude are almost unknown and previous recipients had died. The judge found for the claimant on causation on the basis that the effect of the overdose so weakened the claimant's system that he was much more likely to succumb to the complications of meningitis. Thus the defendants' negligence materially contributed to the claimant's injury. The House of Lords quashed his judgment for lack of any medical evidence that an overdose of penicillin increased the risk that meningitis would cause deafness: "… the paucity of such cases, none of which supports the suggested causal link, cannot of itself make good the lack of appropriate evidence."[88]

2-29 Thus, there are two stages to the process of establishing causation in cases of disease or adverse reactions to chemical agents, such as drugs. It must first be demonstrated, on the balance of probabilities, that the event which allegedly gave rise to the claimant's damage can ever cause that type of harm. It was on this basis that the claim in *Kay's Tutor v Ayrshire and Arran Health Board* failed, because there was no evidence that an overdose of penicillin can cause deafness.[89] Once it has been established that such an event can cause damage of that nature, the claimant must then prove that his particular damage was caused in this way. It is the second stage of the process that can present the greatest hurdle to claimants. In some cases, all the claimant will be able to point to is the statistical link between particular events or circumstances and the damage to individuals exposed to those events.

(i) Statistics and causation

2-30 Care has to be exercised when relying on statistics as a means of establishing causation. The court must look at the claimant's individual circumstances rather

[87] [1987] 2 All E.R. 417 HL. See also *Reay v British Nuclear Fuels Plc* [1994] 5 Med. L.R. 1 where the claimants were unable to prove that paternal pre-conception irradiation (radiation injury to the gonads resulting in mutation of spermatagonia) had caused the claimants' cancer.

[88] [1987] 2 All E.R. 417 HL at 421, per Lord Keith. See also *Dingley v Chief Constable of Strathclyde Police*, 2000 S.C. (HL) 77; (2000) 55 B.M.L.R. 1 HL—if there is insufficient evidence to establish whether as a general proposition multiple sclerosis can ever be triggered by trauma, the claimant will be unable to establish the specific issue that there was a connection between his injury in an accident and the subsequent onset of multiple sclerosis.

[89] See also *Loveday v Renton* [1990] 1 Med. L.R. 117 where the claimant failed to show, on a balance of probabilities, that pertussis vaccine could cause brain damage in young children, although it was "possible" that it did because the contrary could not be proved either. See also *Rothwell v Raes* (1990) 76 D.L.R. (4th) 280 where the Ontario Court of Appeal came to the same conclusion on pertussis vaccine. cf. *Best v Wellcome Foundation Ltd* [1993] 3 I.R. 421; [1994] 5 Med. L.R. 81 where the Supreme Court of Ireland held the defendants to have been negligent in distributing a *faulty* batch of pertussis vaccine, and an inference of causation was drawn from the temporal connection between the administration of the vaccine and the claimant's brain damage.

than at the general statistics. For example, in *Wardlaw v Farrar*[90] it was alleged that a general practitioner had been negligent in failing to diagnose a patient's pulmonary embolus and it was argued that the patient's chances of survival had been reduced by the delay in referring the patient to hospital for treatment. The evidence indicated that 85 per cent of patients diagnosed with a pulmonary embolus survive, but the patient did not respond to the usual beneficial effects of anti-coagulation therapy when she eventually received treatment in hospital, and subsequently died. Counsel argued that this fact should be ignored, since the issue had to be determined at the time of the negligent misdiagnosis. The Court of Appeal rejected the argument. In considering whether, on the balance of probabilities, the general practitioner's negligence had caused the death the court must take into account all relevant evidence, and the failure of anti-coagulant therapy to prevent the formation of a massive pulmonary embolism was a material piece of evidence. This pointed to the probability that the patient fell into the category of 15 per cent of patients who do not survive, despite treatment, for reasons that are not well-understood by medical science. Brooke LJ commented that:

> "While judges are of course entitled to place such weight on statistical evidence as is appropriate, they must not blind themselves to the effect of other evidence which might put a particular patient in a particular category, regardless of the general probabilities."[91]

On the other hand, care should be taken not to take the logic of this reasoning too far in the opposite direction. If the evidence is that, say, 80 per cent of patients survive with prompt treatment, but 20 per cent die even with prompt treatment, the fact that the patient died following delayed treatment does not establish that he probably fell into the 20 per cent category at the outset and therefore the delay did not contribute to the death. The assessment of causation would turn upon the detailed medical evidence, both as to the overall statistical chances of survival and the particular condition and circumstances of the patient.[92] To be a figure in a statistic does not, in itself, prove causation.[93] The difficulty of using statistics, which derive from trends in general populations, to prove what "probably" happened in a particular case is well recognised.[94] Moreover, analysis of the factual basis for draw-

[90] [2003] EWCA Civ 1719; [2004] Lloyd's Rep. Med. 98; [2004] P.I.Q.R. P19.

[91] [2003] EWCA Civ 1719; [2004] Lloyd's Rep. Med. 98; [2004] P.I.Q.R. P19 at [35].

[92] This passage was cited with apparent approval in *Schembri v Marshall* [2020] EWCA Civ 358 at [44]. per McCombe LJ; see also at [46].

[93] See the comments of Croom-Johnson LJ in *Hotson v East Berkshire AHA* [1987] A.C. 750 at 769: "If it is proved statistically that 25 per cent. of the population have a chance of recovery from a certain injury and 75 per cent. do not, it does not mean that someone who suffers that injury and who does not recover from it has lost a 25 per cent. chance. He may have lost nothing at all. What he has to do is prove that he was one of the 25 per cent. And that his loss was caused by the defendant's negligence. To be a figure in a statistic does not by itself give him a cause of action. If the plaintiff succeeds in proving that he was one of the 25 per cent. and that the defendants took away that chance, the logical result would be to award him 100 per cent. of his damages and not only a quarter …". See also the example of the two cab companies given by Lord Mackay in the House of Lords in *Hotson* [1987] A.C. 750 at 789.

[94] See, e.g. *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176 at [26]–[29], per Lord Nicholls. In *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 the Supreme Court was extremely cautious about the circumstances in which the use of epidemiological data to establish causation would be appropriate. Although epidemiological data may form an important element in the proof of causation, it had to be recognised that it deals with populations rather than individuals, and it would be inappropriate to reason from statistical data about causal effects within a population to a

it was proper to find him responsible for the injury to his colleague? Clearly in answering that second question an element of policy enters the equation. That element of policy may on occasion be expressed much more overtly. In *Rouse v Squires*,[361] it was held that the prior negligence of a lorry driver who skidded and obstructed the motorway continued to be an operative cause, and contributed to a subsequent accident when another driver failed to see the obstruction in dark, frosty conditions, and skidded, killing the claimant. Cairns LJ[362] suggested that:

> "If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, but not those who deliberately or recklessly drive into the obstruction, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person."

In *Wright v Lodge*,[363] the Court of Appeal relied on that dictum to exculpate the claimant from responsibility for her own carelessness in not pushing her car off the nearside of a dual carriageway after a breakdown. The defendant's subsequent reckless driving was found to be the substantive cause of the ensuing collision. As a matter of policy, it seems, deliberate or reckless conduct may eclipse an act of prior negligence, albeit "but for" that prior negligence the relevant damage would not have occurred.[364]

(a) Successive sufficient causes

2-103 Where there are two simultaneous, independent events, each of which would have been sufficient to cause the damage, the "but for" test produces the patently absurd conclusion that neither was a cause.[365] The only sensible solution here is to say that both caused the damage.[366] Where the two events are separated in time, the simple answer is that the first event should be treated as the cause. This is normally the case where both events are tortious, but where one of the events is not a tort a different rule applies.

[361] [1973] 1 Q.B. 889; cf. *Knightley v Johns* [1982] 1 W.L.R. 349, where a subsequent act of negligence by a police officer was held to break the causal link between the claimant's damage and the initial negligence of a motorist.

[362] [1973] 1 Q.B. 889 at 898.

[363] [1993] 4 All E.R. 299.

[364] Complex situations can arise where vehicles or vessels are involved in successive collisions. Each case is largely particular to its own facts but see generally *Fitzgerald v Lane* [1987] Q.B. 781 CA; [1989] A.C. 328 HL; *Miraflores (Owners) v George Livanos (Owners)* [1967] 1 A.C. 826; *The Calliope* [1970] P. 172; *The San Onofre* [1922] P. 243; *SS Singleton Abbey v SS Paludina* [1927] A.C. 16.

[365] The classic illustration is that of two fires started simultaneously by A and B, each of which spreads to C's house. But for A's act, would the house have been destroyed? Yes, because B's fire would have destroyed it. Therefore A's fire is not a "but for" cause. But the same reasoning applies to B's fire, and therefore one can show that B's fire was not a "but for" cause.

[366] See *Kuwait Airways Corp v Iraq Airways Co* [2002] UKHL 19; [2002] 2 A.C. 883 at [74], per Lord Nicholls: "In this type of case, involving multiple wrongdoers, the court may treat wrongful conduct as having sufficient causal connection with the loss for the purpose of attracting responsibility even though the simple 'but for' test is not satisfied. In so deciding the court is primarily making a value judgment on responsibility."

(i) Successive torts

2-104 In *Performance Cars Ltd v Abraham*,[367] D1 collided with the claimants' car causing damage which required that the whole of the lower part of the bodywork be resprayed. Before this could be done D2 collided with the car in such a way that, had there been no earlier collision, the whole of the lower part of the bodywork would have to be resprayed. Judgment against D1 remained unsatisfied so the claimants sought to recover the whole cost of the respray from D2. It was held this was not recoverable. D2 was only responsible for the additional damage inflicted on an already damaged vehicle. The need for a total respray arose not from the act of D2, but from the antecedent and independent act of D1. This conclusion reflects a wider principle that, normally, a defendant "must take his victim as he finds him". The principle may work to the claimant's advantage in some cases,[368] but it can also work to a defendant's advantage, so that where a tortfeasor damages an already damaged item of property or injures a claimant who is already disabled, he is only liable for the *additional damage* that he has caused.

2-105 In *Baker v Willoughby*,[369] the defendant negligently damaged the claimant's leg in a road traffic accident, significantly affecting his mobility. Before the case came to court the claimant was shot in the same leg in a robbery and the leg had to be amputated. The defendant argued that his responsibility was limited to the loss caused by the original injury up to the date of the robbery—the amputation submerged or obliterated the original injury. The loss occasioned thereafter derived from the loss of the leg altogether and that was the responsibility of the robbers. The House of Lords held that the defendant was liable for all the consequences of the original injury, as if the second incident had never occurred. To find otherwise would be an injustice to the claimant for (even if the robbers could be sued) they would be held liable only for the additional damage inflicted on an already damaged leg (applying *Performance Cars Ltd v Abraham*). After the shooting the claimant would have gone uncompensated for the difference between a "sound" and a "damaged" leg,[370] i.e. that part of his disability caused by the initial accident. The House of Lords considered that he should not be allowed to fall between two tortfeasors. In this type of situation the "but for" test does not assist because it demonstrates that from the date of the shooting neither tortfeasor caused the loss. But for the negligence of the motorist would Mr Baker have sustained a loss due to a damaged leg after the shooting? The answer is yes, because the leg would have been damaged by the shooting, and therefore the initial negligence is not a "but for" cause after the shooting. Similarly, but for the shooting would Mr Baker have continued to have a damaged leg? The answer is also yes, because absent the robbery the leg would still have been damaged as a result of the accident, and therefore the shooting is also not a "but for" cause of the disability which already existed when he was shot (though clearly it did cause the additional damage). A test which produces the conclusion that neither tortfeasor caused the harm cannot be of any assistance in a situation where simple common sense indicates that one or both of them should be responsible.[371] Applying a causation test to two consecutive torts, the initial tortfeasor continues to be responsible for any ongoing damage or dis-

[367] [1962] 1 Q.B. 33.

[368] See para.2-170.

[369] [1970] A.C. 467; see McGregor (1970) 22 M.L.R. 378; Strachan (1970) 33 M.L.R. 386.

[370] [1970] A.C. 467 at 492–495.

[371] An alternative solution to this problem is that adopted by the Court of Appeal in *Baker v Wil-*

a mess.[23] There have been various theories as to when the defence should apply: (i) when it is impossible for the court to determine the standard of care; (ii) when awarding damages to the claimant would be an affront to the public conscience; (iii) where the claimant has to rely on his own illegality in order to assert his claim; and (iv) when awarding damages to the claimant would undermine the integrity of the legal system. There is also potential for some overlap with other conceptual tools used by the courts, such as the duty of care in the tort of negligence, where the claimant's illegal conduct may lead the court to conclude that the defendant did not owe a duty of care to the claimant in the circumstances.

3-06 One of the difficulties in developing a coherent approach to the defence of illegality has been its potential to provide a defence to various causes of action, involving claims in contract, property, tort or unjust enrichment, and in a wide variety of circumstances. A test that works in one context may be unsuited to being applied in another. For example, the issues at stake in a contract action relating to real property may be completely different from the issues in a tort action in respect of personal injuries. Another problem has been judicial disagreement at the highest level as to whether the illegality defence should rest on a tight, rule-based approach or whether a wide range of factors should be taken into account by the court.[24] This has made it extremely difficult to identify a single test for applying the defence; indeed it may be that following the decision of the Supreme Court in *Patel v Mirza*[25] there is no "test" as such, but rather a broad approach which takes into account the different circumstances of each case.

(i) "Impossible" to set a standard of care

3-07 On one view, the defence applied in circumstances where it was "impossible" for the court to determine an appropriate standard of care, in which case the conclusion would be that no duty of care was owed by the defendant to the claimant.[26] Although this approach had support at the highest level in Australia,[27] it produced real difficulties in its application (when could it be said that it was "impossible" for the court to set a standard of care; how did the defence operate in the context of torts where there is no standard or duty of care as such, for example in trespass to the

[23] "The case law is notoriously untidy", per Lord Toulson in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430 at [57]; "a large body of inconsistent authority which rarely rises to the level of general principle", per Lord Sumption, [2014] UKSC 55; [2015] A.C. 430 at [14]; "a perplexing mass of inconsistent case-law", per Lord Sumption in *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; [2016] A.C. 1 at [62]; "a generalised statement of the conceptual basis for the doctrine ... has always proved elusive", per Lord Hughes in *Hounga v Allen* [2014] UKSC 47; [2014] 1 W.L.R. 2889 at [54]; "The application of the defence of illegality to claims in tort is highly problematic", per Lord Wilson in [2014] UKSC 47; [2014] 1 W.L.R. 2889 at [25]; the law on the topic is "in some disarray", per Lord Neuberger in *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467 at [164]; "the law of illegality has been a mess", per Lord Sumption [2016] UKSC 42; [2017] A.C. 467 at [265].

[24] See *Hounga v Allen* [2014] UKSC 47; [2014] 1 W.L.R. 2889; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430; *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; [2016] A.C. 1; and *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.

[25] [2016] UKSC 42; [2017] A.C. 467; see paras 3-25 to 3-27.

[26] See *Pitts v Hunt* [1991] 1 Q.B. 24.

[27] *Jackson v Harrison* (1978) 19 A.L.R. 129; *Gala v Preston* (1991) 100 A.L.R. 29.

person?). This prompted the High Court of Australia to reverse its approach,[28] and the test has never received widespread support in the English courts.[29]

(ii) Affront to the public conscience

Another approach was that the defence should apply in circumstances where it would be an "affront to the public conscience" to grant the relief which the claimant sought because the courts would thereby appear to assist or encourage the claimant in illegal conduct or to encourage others in similar acts.[30] Compensating criminals for damage sustained in the course of committing a crime would tend to bring the law into disrepute. However, in *Tinsley v Milligan*[31] the House of Lords criticised the affront to the public conscience test on the basis that it left too much discretion in the hands of the judges to determine the appropriate degree of moral turpitude in the claimant's conduct before deciding whether the defence applies. Lord Browne-Wilkinson said that the consequences of being a party to an illegal transaction could not depend on "such an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by illegal transactions".[32] **3-08**

(iii) Claimant's reliance on his own illegality

In *Tinsley v Milligan*[33] the defendant claimed an equitable interest in property purchased with funds from both claimant and defendant, though the property had been vested in the sole name of the claimant with the object of defrauding the Department of Social Security. The House of Lords held that the defendant was entitled to recover her equitable interest in the property provided that she was not forced to plead or rely on the illegality, even if it emerged that the title on which she relied was acquired in the course of carrying through an illegal transaction. Lord Goff was particularly critical of the "so-called public conscience test" on the ground that it was little different from saying that the court has a broad discretion whether to grant or refuse relief. The objection was that in cases of this nature (where the issue was whether equitable property rights could be acquired as a result of an il- **3-09**

[28] *Miller v Miller* [2011] HCA 9; (2011) 275 A.L.R. 611 at [54]: "Setting a norm of behaviour as between criminals may be difficult, but it is not impossible." The issue was whether the court *should* set a standard of care in the particular case, and this was a question of policy.

[29] The most prominent authority being *Pitts v Hunt* [1991] 1 Q.B. 24. An alternative view was that the claimant's criminal conduct was such that in the circumstances no duty of care was owed, irrespective of how "difficult" it might be to set a *standard* of care: see *Vellino v Chief Constable of the Greater Manchester Police* [2001] EWCA Civ 1249; [2002] 1 W.L.R. 218 at para.3-29; *Ashton v Turner* [1981] Q.B. 137.

[30] See *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1 at 35; *Thackwell v Barclays Bank Plc* [1986] 1 All E.R. 676; *Saunders v Edwards* [1987] 1 W.L.R. 1116; *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 Q.B. 283 at 291; *Howard v Shirlstar Container Transport Ltd* [1990] 1 W.L.R. 1292. It followed that where there was no affront to the public conscience ex turpi causa did not apply: *Reeves v Commissioner of Police of the Metropolis* [1999] Q.B. 169 (suicide of deceased, who was a known suicide risk, in police custody where police owed a duty of care to prevent suicide; Buxton LJ commented, at 185, that if "it shocks the conscience of the ordinary citizen" that a suicide should recover damages, why were the defendants under a duty of care to take steps to prevent the suicide?)

[31] [1994] 1 A.C. 340.

[32] [1994] 1 A.C. 340 at 369.

[33] [1994] 1 A.C. 340.

of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts",[148] which on one view suggests some comparison between the *extent* of the claimant's loss and the seriousness of the offence (given that in sentencing offenders the criminal law seeks to balance punishment with the seriousness of the offence). This could produce the odd result that where a claimant has suffered serious injury the outcome might be different from that where he had sustained minor injury. But none of the cases pre-dating *Patel* have taken this view. The issue of proportionality has been seen as linked to the seriousness of the claimant's criminal conduct rather than the seriousness of the damage sustained (and so the value of any damages that would be lost if ex turpi causa is applied). Thus, ex turpi causa may apply more extensive "punishment" (by refusing an award of damages) than would be considered appropriate in the context of a criminal offence.

(iv) Relevance of the claimant's mental state

3-46 In *Clunis v Camden & Islington HA*,[149] counsel for the claimant had argued that the correct approach was the "affront to the public conscience" test and that the defence should not apply where the claimant's degree of responsibility was diminished by virtue of mental disorder. This argument is consistent with the line taken by the Court of Appeal in *Kirkham v Chief Constable of Greater Manchester Police*[150] where it was held that awarding damages following a suicide would not affront the public conscience, where there was medical evidence that the suicide was "not in full possession of his mind".[151] It was held in *Clunis* that because the claimant had been convicted of a serious criminal offence, public policy would preclude the court from entertaining his claim "unless it could be said that he did not know the nature and quality of his act or that what he was doing was wrong".[152] His responsibility for the killing was reduced by his mental disorder, but his mental state did not justify a verdict of not guilty by reason of insanity. Diminished

380; [2015] P.I.Q.R. P19—joint criminal enterprise to ride a trail bike dangerously sufficiently serious to engage the ex turpi defence, given that the offence was punishable on conviction on indictment by up to two years' imprisonment: "On no view is it a trivial offence" (per Richards LJ [43]). Clarke LJ commented, at [86]: "It may be that the dividing line should be between those offences which are, and those which are not, punishable by imprisonment. Or it may be that the criterion is simply whether the public interest requires the doctrine to apply to a crime of the category in question."

148 [2016] UKSC 42; [2017] A.C. 467 at [101] and [120]. See also *Gujra v Roath* [2018] EWHC 854 (QB); [2018] 1 W.L.R. 3208 at [30] where Martin Spencer J considered that the loss of damages claimed in an action for malicious prosecution (in respect of being remanded in custody for a few weeks and then being electronically tagged for a few months) was not "in any way disproportionate to the unlawfulness of the claimant's conduct in associating himself with a serious attempted fraud upon an insurance company". See further *Stoffel & Co v Grondona* [2018] EWCA Civ 2031; [2018] P.N.L.R. 36 at [39] where Gloster LJ set out a list of factors taken into account in concluding that, on the facts of that case, it would be "entirely disproportionate" to deny a claim against negligent solicitors for failing to register the claimant's title to property where the claimant had participated in a mortgage fraud. There was no risk that enforcement of the claim would undermine the integrity of the justice system.

149 [1998] Q.B. 978.

150 [1990] 2 Q.B. 283.

151 [1990] 2 Q.B. 283 at 291, per Lloyd LJ. Farquharson LJ said, at 296, that an action could hardly be said to be grounded in immorality where "grave mental instability" on the part of the victim has been proved, although "the position may well be different where the victim is wholly sane".

152 [1998] Q.B. 978 at 989.

responsibility did not remove liability for his criminal act, and therefore he had to be taken to have known what he was doing and that it was wrong. Public policy must not allow the law of tort to be an "instrument to enforce obligations alleged to arise out of the claimant's own criminal act". This makes a great deal hang on the distinction between the criminal law defence of diminished responsibility and the defence of insanity, with an apparent presumption that mentally disordered offenders who have some awareness of their condition and some "responsibility" for their conduct, however impaired their reasoning might be, will be caught by the public policy defence of ex turpi causa non oritur actio.[153] In *Reeves v Commissioner of Police of the Metropolis*, however, the Court of Appeal held that the ex turpi causa defence should not apply to a suicide *whether or not the claimant was of sound mind*.[154] There was no distinction in this respect between persons suffering from a mental illness and persons who were not, since the claimant recovers damages, not because of his mental state, but because he is a suicide risk and has not received the care that he should have. To this extent, *Reeves* was a conscious departure from *Kirkham*, though it does seem to be at odds with *Clunis* on the question of the claimant's mental state.[155] Possibly, suicide and self-harm by the claimant is a special case, where the claimant's mental state is irrelevant, but in cases where the claimant is seeking compensation for the legal consequences of the harm that he has inflicted on others, it must be demonstrated that he was simply not responsible for his actions, even though those actions have had legal repercussions such as his detention under the Mental Health Act 1983).

3-47 In *Gray v Thames Trains Ltd*[156] Lord Hoffmann, having set out the narrow and the wide forms of ex turpi causa, dealt with the causation issue of the wide form of the rule as it applied to the facts in *Gray*,[157] but did not address the question of whether it was "offensive to public notions of the fair distribution of resources that a claimant should be compensated … for the consequences of his own criminal conduct" or what factors would be taken into account in applying this. Perhaps his Lordship considered that manslaughter on the grounds of diminished responsibility so obviously fell within this formulation that it did not require elaboration. Certainly, he considered that the sentence imposed by a criminal court must be assumed to be what the criminal court regarded as appropriate to reflect the personal responsibility for the crime he has committed.[158] Lord Phillips was less dogmatic on this issue. There could be extreme circumstances, said his Lordship, (though *Gray* was not such a case) where a claimant has been ordered to be detained under s.37 of the Mental Health Act 1983 where the offending behaviour has played no part in the decision to impose the hospital order, and in this situation it was strongly

153 The difference between *Kirkham* and *Clunis* is striking. Applying *Kirkham* the illegality defence only applies where it can be said that the claimant was "wholly sane", whereas according to *Clunis* the defence applies unless the claimant is wholly insane, provided, of course, the claim is essentially based on his illegal act.

154 [1999] Q.B. 169 at 185 per Buxton LJ: "If it shocks the conscience of the ordinary citizen that a suicide could recover, why is it the duty of the police, not merely as public officers but in the private law of negligence, to take reasonable steps to prevent suicide? … Here, the alleged turpitudinous act is the very thing that the defendant had a duty to try to prevent, imposed by a law of negligence which itself appeals to public conscience or at least to public notions of reasonableness."

155 Judgment in *Reeves* was handed down on 10 November 1997 and in *Clunis* on 5 December 1997. Neither judgment refers to the other.

156 [2009] UKHL 33; [2009] 1 A.C. 1339.

157 See para.3-18.

158 [2009] UKHL 33; [2009] 1 A.C. 1339 at [41].

tory provisions by too readily making findings of contributory negligence.[287] The claimant's conduct must be judged in the context of the circumstances of his work and in the light of the defendant's statutory responsibility for his welfare. In some circumstances the risk may be so great that the employer has a duty to issue an absolute prohibition against using a dangerous method of working.[288] A difference may also exist in nuisance.[289] These instances lend support to the statement that "the reasonable defendant is not allowed to have lapses, but the reasonable [claimant] is".[290] This means that claimants are sometimes judged by less exacting standards than defendants, which in turn suggests that apportionment of responsibility will vary according to the nature of the claimant's wrongdoing. In *Quintas v National Smelting Co Ltd*,[291] the trial court held the defendants liable for breach of statutory duty, but not for common law negligence, and held that the claimant was 75 per cent responsible. The Court of Appeal held them liable for common law negligence, but not for breach of statutory duty and considered that, on this basis, the claimant was only 50 per cent responsible. Sellers LJ said:

> "The nature and extent of the defendants' duty is, in my view, highly important in assessing the effect of the breach or failure of duty on the happening of the accident giving rise to the [claimant's] claim and on the conduct of the [claimant]. There is an interaction of factors, acts and omissions to be considered."[292]

3-81 **Anticipating danger** A reasonable claimant must not expect that others will always observe due care in their conduct. "A prudent man will guard against the possible negligence of others, when experience shows such negligence to be

W.L.R. 871; *Ryan v Manbre Sugars* (1970) 114 S.J. 454. For the type of accident against which is necessary to protect a workman who is concentrating on his task, see *McArdle v Andmac Roofing Co* [1967] 1 W.L.R. 356. Failure by an employee to keep a look out will not amount to contributory negligence if he is entitled to assume that his fellow-workmen will not move the machinery which caused the accident: *Wright v R Thomas and Baldwins* (1966) 1 K.I.R. 327; *Kansara v Osram (GEC) Ltd* [1967] 3 All E.R. 230. Contributory negligence is not a defence where, even if the employee had taken the precautions suggested by the defendant employer, the defendant would still have been in breach of statutory duty: *Toole v Bolton MBC* [2002] EWCA Civ 588—employee failed to wear gloves provided by the employer, but the gloves would probably not have prevented the injury even if used.

287 "Where there has been such a breach of statutory duty by the employer … it is important to ensure that the statutory requirement placed on the employer is not emasculated by too great a willingness on the part of the courts to find that the employee has been guilty of contributory negligence. It is very easy for a judge with the advantage of hindsight to identify some act on the part of the employee which would have avoided the accident occurring. That in itself does not demonstrate negligence on the part of the employee … . To impose too strict a standard of care on the workman would defeat the object of the statutory requirement": per Keene LJ in *Cooper v Carillion Plc* [2003] EWCA Civ 1811 at [13]; *Mullard v Ben Line Steamers Ltd* [1970] 1 W.L.R. 1414; cf. *Jayes v IMI (Kynoch) Ltd* [1985] I.C.R. 155, where the Court of Appeal made a finding of 100 per cent contributory negligence in a case of breach of statutory duty, even though the intention of the statute was to protect a workman from his own folly. See, however, the discussion of *Jayes v IMI (Kynoch) Ltd* at para.3-58 fn.199.

288 *King v Smith* [1995] I.C.R. 339 (window cleaner standing on the exterior sill of a second floor window, with no means of attaching a safety harness; window cleaner 30 per cent responsible, employer 70 per cent on the basis of a failure to provide an adequate warning).

289 *Trevett v Lee* [1955] 1 W.L.R. 113 at 122, per Lord Evershed MR, sed quaere.

290 Williams, *Joint Torts and Contributory Negligence* (1951), p.353; but see also p.358.

291 [1961] 1 W.L.R. 401. See also *Mullard v Ben Line Steamers Ltd* [1970] 1 W.L.R. 1414; *Bux v Slough Metals Ltd* [1973] 1 W.L.R. 1358.

292 [1961] 1 W.L.R. 401 at 408.

common."[293] Normally, a claimant should, for his own protection, keep his eyes open and take proper precautions to guard against the occurrence of an accident. However, where he has been thrown off his guard by the conduct of the defendant, and reasonably induced to believe that he may proceed with safety, a lesser degree of care and circumspection may be required of him.[294] This simply reflects the requirement to exercise reasonable care *in all the circumstances*.

3-82 **Contributory negligence of children** Conduct on the part of a child which contributes to an accident will not necessarily be judged in the same light as similar conduct by an adult. What is negligence in an adult is not necessarily negligence in a child. The exercise of "ordinary care must mean that degree of care which may reasonably be expected of a person in the [claimant's] situation",[295] which in the case of a very young child could be nil.[296] So in *Gardner v Grace*,[297] where a child, aged three-and-a-half years, ran out into a road and was knocked over by the defendant's cart, it was held that the defence of contributory negligence did not apply. In *Yachuk v Oliver Blais Co Ltd*,[298] a boy of nine went with his brother, aged seven, to a petrol station and obtained petrol by falsely representing that it was wanted for his mother's car which was "stuck down the street". He then made a torch with it to use in a game and, on lighting the torch, the petrol caught fire and the boy was burned. The Privy Council held that there was no contributory negligence on the ground that the boy did not know that petrol was likely to burst into flame if heat were brought near it.

3-83 In considering whether a child has taken reasonable care for his own safety regard must be had to the age of the child, the circumstances of the case and the knowledge by the particular child of the dangers to which the defendant's negligence has exposed him. In *Gough v Thorne*,[299] Lord Denning MR said that a very young child cannot be guilty of contributory negligence; an older child may be, but it depends

293 per Lord Du Parcq in *Grant v Sun Shipping Co* [1948] A.C. 549 at 567.

294 *Pressley v Burnett*, 1914 S.C. 874; per Lord Cairns in *North Eastern Ry v Wanless* (1874) L.R. 7 H.L. 12 at 15; *Mercer v SE & C Railway's Managing Committee* [1922] 2 K.B. 549; per Lords Cairns and Selbourne in *Dublin, Wicklow and Wexford Ry v Slattery* (1878) 3 App. Cas. 1155 at 1165 and 1193; per Lord Esher in *Smith v South Eastern Ry* [1896] 1 Q.B. 178 at 183; *Bridges v North London Ry* (1873-74) L.R. 7 H.L. 213; *Praeger v Bristol and Exeter Ry* (1871) 24 L.T. 105; *Struthers v British Railways Board* (1969) 119 N.L.J. 249.

295 per Lord Denman in *Lynch v Nurdin* (1841) 1 Q.B. 29 at 113; *Pearson v Coleman Bros* [1948] 2 K.B. 359; *Gough v Thorne* [1966] 1 W.L.R. 1387; *French v Sunshine Holiday Camp (Hayling Island)* (1963) 107 S.J. 595; *Whitehouse v Fearnley* (1964) 47 D.L.R. (2d) 472; *Spiers v Gorman* [1966] N.Z.L.R. 897; *Jones v Lawrence* [1969] 3 All E.R. 267; *Minter v D & H Contractors (Cambridge)*, *The Times*, 30 June 1983; *Ducharme v Davies* [1984] 1 W.W.R. 699 (three-year-old infant not capable of negligence). In the pre-1945 cases judges may have denied contributory negligence in order to ensure the child received a remedy at all, whereas today in similar circumstances they may apportion responsibility.

296 The Occupiers' Liability Act 1957 s.2(3)(a), warns expressly that "an occupier must be prepared for children to be less careful than adults". The *Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd.7054 (1978), Vol. I, para.1077 recommended that where a child is under 12 contributory negligence should not be pleadable.

297 (1858) 1 F. & F. 359; *Lay v Midland Ry* (1874-75) 34 L.T. 30; and see *Lynch v Nurdin* (1841) 1 Q.B. 29 (child aged seven-and-a-half not contributorily negligent when he mischievously climbed on to the defendant's cart). *Lynch v Nurdin* "has been treated in subsequent cases as sound law", per A. L. Smith LJ in *Harrold v Watney* [1898] 2 Q.B. 320 at 322; and "remains an authority on the question of contributory negligence of children", per Slesser LJ in *Liddle v Yorkshire (North Riding) CC* [1934] 2 K.B. 101 at 129; *Creed v McGeoch Sons Ltd* [1955] 1 W.L.R. 1005.

298 [1949] A.C. 386.

299 [1966] 1 W.L.R. 1387; *Gardner v Grace* (1858) 1 F. & F. 359 (contributory negligence does not ap-

7. CHILDREN

5-52 **Age of majority** By the Family Law Reform Act 1969 a person attains full age on reaching the age of 18. And, by s.105 of the Children Act 1989, a person is to be regarded as a "child" until he or she attains that age.[165]

5-53 **Liability of children** There is no defence of minority as such known to the law of tort and, save that a child must have a litigation friend to conduct proceedings on his behalf,[166] a child may be sued in tort as if he were of full age.[167] However, by analogy with the cases concerning contributory negligence of young children[168] the age of a child defendant is relevant in torts involving negligence, intention or malice. In *Mullin v Richards*,[169] the Court of Appeal held that the test for negligence was not whether the actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised they created a risk of injury, but whether an ordinarily prudent and reasonable child of the defendant's age, in the defendant's situation, would have appreciated the risk. Accordingly a 15-year-old schoolgirl was not liable when, playing at fencing with plastic rulers with a classmate, one of the rulers broke and a piece of plastic entered the claimant's eye.

5-54 **Liability of child where tort connected with contract** A child cannot be sued in tort if the tort action is in effect a means of enforcing a contract that does not bind him. Thus in *R Leslie Ltd v Sheill*,[170] the defendant, a child, had fraudulently acquired a loan from the claimant by representing that he was of full age and thus in possession of the relevant contractual capacity to enter into such an agreement. In an action framed in the tort of deceit, the court held him not liable: to have found otherwise would have been merely a roundabout way of giving effect to the contractual loan. An interesting but, as yet, unanswered question is whether there may be any liability in negligence on the part of a child where the law would recognise concurrent contractual and tortious duties. Certainly, a child can be held liable in tort where, although arising out of a contract in the sense that but for the contract there would have been no opportunity for the tort, it is in fact independent of the contract. Thus, where a minor (lacking contractual capacity) hired a horse and loaned it to a friend who jumped it contrary to a contractual stipulation that the horse should not be jumped, the minor was held liable for trespass.[171] The question whether in such cases the wrongful act is in mere excess of, or entirely outside, the contract is one of degree.[172]

5-55 **Child bailee**[173] A bailment is usually accompanied by a contract, either express or implied by law, to restore the goods upon the determination of the bailment. This is not, however, essential. There may be a complete bailment without a contract.

165 The term "child" is also adopted throughout the Civil Procedure Rules: see CPR rr.2.3 and 21.1(2).
166 CPR r.21.2.
167 See, e.g. *Gorely v Codd* [1967] 1 W.L.R. 19. With regard to trespass, however, see now *Wilson v Pringle* [1987] Q.B. 237.
168 Generally, see para.3-82. See *McHale v Watson* (1966) 115 C.L.R. 199 H. Ct of Aus.
169 [1998] 1 W.L.R. 1304. See further para.7-170.
170 [1914] 3 K.B. 607.
171 *Burnard v Haggis* (1863) 14 C.B. (N.S.) 45 at 53.
172 cf. *Walley v Holt* (1876) 35 L.T. 631; *Fawcett v Smethurst* (1914) 84 L.J.K.B. 473.
173 See also Ch.16 (interference with goods).

Goods may be delivered on a condition or trust not amounting to a contract, so as to create a special property in the bailee, while leaving the general property in the bailor.[174] The minority of such a bailee would not affect his rights and liabilities in tort. He could bring an action, whilst his special property lasted, against any person who deprived him of the goods.[175] On the determination of the bailment by efflux of time, or by some act on his part so inconsistent with the condition of the bailment as to entitle the bailor to treat it as determined,[176] the whole property in the goods would revert to the bailor, who could sue him for conversion if the goods were not restored.[177]

5-56 **Contract procured by fraud of child** Where goods are delivered to a child in pursuance of a contract of sale, the position is different. The property in the goods may pass to him even though the contract was obtained by his fraud, and the seller has then no remedy by way of an action for conversion or deceit, for that would be in substance a means of enforcing the contract to pay the price.[178] A child who procures a contract by a fraudulent representation that he is of age is not liable either on the contract or for the tort of deceit.[179] He is, however, subject to an equitable obligation to restore any property which can be traced to his possession if obtained by such a fraud. He will be compelled to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud. But this obligation is very limited. If there is no possibility of restoring the very thing obtained by the fraud there is no remedy. For any remedy would amount to the enforcement of a void contract.[180] Restitution stops where repayment begins.[181] In addition, by s.3 of the Minors' Contracts Act 1987, if a contract is unenforceable against the defendant because he was a child at the time the contract was made the court may require the defendant "if it is just and equitable to do so" to transfer to the claimant any property acquired by the defendant under the contract or any property representing it. Though the equitable relief, just discussed, is preserved, statutory relief is more general and not limited to cases where the child is guilty of fraud.

5-57 **Liability of parent** A parent is not, as such, liable for the torts of his child.[182] If, however, the circumstances are such as to bring into existence the relationship of employer and employee between parent and child, and a tort is committed by the child in the course of his employment, or if the parent has himself been guilty of negligence, then he will be liable.[183]

174 See *R. v McDonald* (1885) 15 Q.B.D. 323 (child hirer of furniture, no valid contract of hire, but if child sells the furniture, he is guilty of larceny).
175 (1885) 15 Q.B.D. 323 at 325.
176 e.g. a pledging of the goods by the child.
177 *Mills v Graham* (1804) B. & P. 1 N.R. 140.
178 *Leslie v Sheill* [1914] 3 K.B. 607.
179 *Leslie v Sheill* [1914] 3 K.B. 607.
180 *Leslie v Sheill* [1914] 3 K.B. 607 (limiting *Stocks v Wilson* [1913] 2 K.B. 235).
181 *Leslie v Sheill* [1914] 3 K.B. 607 at 618, per Lord Sumner.
182 *North v Wood* [1914] 1 K.B. 629; *Gorely v Codd* [1967] 1 W.L.R. 19.
183 *Bebee v Sales* (1916) 32 T.L.R. 413; *Carmarthenshire County Council v Lewis* [1955] A.C. 549. See also para.7-235.

health professionals dealing with vulnerable patients, be they in prison hospitals, mental hospitals or possibly even in the hands of ordinary doctors or other professionals,[567] will owe this limited duty to prevent actual or attempted suicide. There is nevertheless a crumb of comfort for them here. In a suitable case where the patient retains a degree of autonomy, a deduction for contributory negligence will be appropriate,[568] as it is elsewhere where suicide is made the subject of a wrongful death claim.[569]

(ii) Antenatal injuries

9-91 **Antenatal injuries** For a long time it was unclear whether a child could sue at common law for injuries inflicted *in utero*; it was, however, finally established in 1992 that it could.[570] But the point is now moot. Today the matter is governed by the Congenital Disabilities (Civil Liability) Act 1976,[571] which replaces any liability at common law,[572] and imposes liability for antenatal injuries, but only in carefully defined circumstances.

9-92 **The Congenital Disabilities (Civil Liability) Act 1976**[573] Under the 1976 Act, a child born alive[574] and suffering from injuries as a result of an occurrence which affected (1) either parent in his or her ability to have healthy children; or (2) the mother in the course of her pregnancy; or (3) either mother or child in the course of labour, has an action against any person responsible for that occurrence, provided that that person would have been liable in tort[575] to the affected parent had the latter been injured. Thus a doctor who negligently prescribed a drug causing deformities in a foetus would be liable to the child if and when born. Section 1A of the Act[576] extends its effects to IVF babies, and in addition creates a statutory liability to the child in respect of negligence in the care or treatment of embryos or gametes outside the body which lead to its being born disabled.[577] Section 1(5) of the 1976 Act expressly enacts the *Bolam* test in the context of actions for antenatal injury:

"The defendant is not answerable to the child, for anything he did or omitted to do when

[566] cf. *Nyang v G4S Care & Justice Services Ltd* [2013] EWHC 3946 (QB) (person detained pending deportation: accepted, duty to prevent self-harm).

[567] See *PPX v Aulakh* [2019] EWHC 717 (QB), where a GP in charge of a troubled patient was regarded as being under a duty to refer him to a crisis mental health team if he had given indications of a present suicidal intention (which on the facts he had not).

[568] In *PPX v Aulakh* [2019] EWHC 717 (QB), above, it was held that if liability had been established a 25 per cent reduction would have been appropriate.

[569] See generally *Corr v IBC Vehicles Ltd* [2008] UKHL 13; [2008] 1 A.C. 884; see para.3-70.

[570] *Burton v Islington HA* [1993] Q.B. 204. See too *X & Y v Pal* (1991) 23 N.S.W.L.R. 26, where it was said that a common law duty was owed to children conceived after negligent failure to diagnose a condition in the mother that could harm them, such as congenital syphilis.

[571] See too para.5-58.

[572] Section 4(5).

[573] See M. Brazier and E. Cave, *Medicine, Patients and the Law*, 6th edn (2016), paras.11.13 onwards.

[574] The mother will have an action herself if the child is stillborn or she miscarries as a result of medical negligence, and she suffers injury as a result.

[575] Including strict product liability under Consumer Protection Act 1987: see s.6(3) of that Act. But the Act does not apply, apparently, in contract, e.g. if the only claim lies under ss.9–10 of the Consumer Rights Act 2015.

[576] Inserted by the Human Fertilisation and Embryology Act 1990.

[577] Hence creating something similar to an action for "wrongful life", denied elsewhere: for mention of the anomaly, see R. Scott, "Reconsidering 'wrongful life' in England after thirty years: legislative mistakes and unjustifiable anomalies" [2013] C.L.J. 115.

responsible in a professional capacity for treating and advising the parent, if he took reasonable care having due regard to the then received professional opinion applicable to the particular class of case; but this does not mean that he is so liable only because he departed from received opinion."[578]

For the purposes of contributory negligence, the unborn child is identified with the affected parent; so damages payable to it may be reduced where that parent shares responsibility for its being born disabled.[579]

9-93 Evidence establishing negligence in the treatment of the affected parent will normally be sufficient to meet the pre-condition of liability in tort to that parent, but two sets of circumstances pose difficulties. First, the requirement that the defendant be liable in tort to the parent can cause problems. Suppose that an obstetrician knows that a baby is in distress and likely to be damaged if he fails to intervene by forceps or Caesarean section. He will be negligent if he fails to advise the mother of what is needed. But if despite his efforts the mother refuses consent to intervention and the child is born damaged, the child has no action against the obstetrician or his mother. The mother is immune from suit under the Act[580]; and the obstetrician has committed no tort against her.[581] Secondly, no liability arises out of events taking place before conception where either parent was aware of the risk of a baby being born defective as a result. So where a doctor prescribes a drug to a woman with a warning that it may be teratogenic, he will not be liable if she subsequently conceives a child which is indeed born deformed.[582]

9-94 **Antenatal injury and "wrongful life"**[583] A medical practitioner is liable to a child when his negligence causes the child to be born disabled: for instance, where he botches a difficult birth. But he is not liable to the child where as a result of negligence he fails to detect disabilities which, if known to the mother, would have caused her to terminate her pregnancy. In *McKay v Essex Area Health Authority*[584] the claimant child was severely damaged by rubella contracted by her mother in the early months of pregnancy. It was alleged that the defendants' negligence was responsible for the mother being told, wrongly, that tests for the disease were negative. Had she known that she had rubella she would have had an abortion. The Court of Appeal held that neither at common law[585] nor under the 1976 Act[586] could

[578] Quaere whether this section, which specifically refers to "advice", precludes the application to cases of antenatal injury in England and Wales of the principle in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430, where the issue was precisely one of negligent advice to the pregnant mother before the birth. The issue did not arise in *Montgomery*, an appeal from Scotland where the 1976 Act does not apply.

[579] Section 1(7). Refusing to terminate the pregnancy by agreeing to an abortion is not, however, sharing responsibility for the child being born disabled: *Emeh v Kensington and Chelsea and Westminster AHA* [1985] Q.B. 1012.

[580] See s.1; except where her negligent driving of a vehicle causes injury to the unborn child: s.2.

[581] He cannot compel the mother to submit to intervention: see *Re F (In Utero)* [1988] Fam. 122.

[582] Section 1(4). The position is probably the same at common law in any case: *Paxton v Ramji* (2008) 299 D.L.R. (4th) 614; *Bovingdon v Hergott* (2008) 290 D.L.R. (4th) 126.

[583] M.A. Jones, *Medical Negligence*, 5th edn (2018), para.2–140 onwards; A. Morris & S. Saintier, "To be or not to be? Wrongful Life and Misconceptions" (2003) 11 Med. L. Rev. 167; R. Scott, "Reconsidering "wrongful life" in England after thirty years: legislative mistakes and unjustifiable anomalies" [2013] C.L.J. 115.

[584] [1982] Q.B. 1166.

[585] [1982] Q.B. 1166 at 1176 and 1182. A Canadian court has reached the same conclusion (*Lacroix (Guardian) v Dominique* (2001) 202 D.L.R. (4th) 121), as has the High Court of Australia, by a

reasonable precautions to check the authenticity of those instructions[798]; and a solicitor giving a formal reference on his client's trustworthiness to the other side in, say, a conveyancing transaction remains under a duty to take care in what he says.[799] Yet another example is *Al-Kandari v JR Brown & Co*.[800] The defendants, who acted for the husband in contested custody proceedings, gave an undertaking to the court to retain their client's passport and not to release it to him without the court's consent. They broke the undertaking; the husband, armed with the passport, kidnapped the claimant wife and their children, and removed the latter to Kuwait. The defendants were held to owe a duty to the claimant which they breached by not warning her of the risk that arose once the passport was no longer in their hands.

(iii) Duties as trustee or under the law of trusts

9-129 **Liability under the law of trusts** In addition to any duties in contract or tort, a lawyer may owe a duty to a client as trustee of the latter's funds. This arises particularly[801] where the solicitor for a purchaser or mortgage lender is entrusted with the price or mortgage monies for transmission to the vendor.[802] In such a case the solicitor's duty is to disburse the monies according to his instructions or account for them to the client: if he fails to do this, he is presumptively liable for breach of trust,[803] whether he disburses the funds at the wrong time,[804] omits to ap-

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Property (Miscellaneous Provisions) Act 1989 s.2).

798 *Al-Sabah v Ali* [1999] E.G.C.S. 11 (impostor forged claimant's signature and instructed solicitors to dispose of her property: solicitors liable to claimant for expenses of re-establishing title). See too *Penn v Bristol & West Building Society* [1997] 1 W.L.R. 1356 (similar); *Johnson v Bingley Dyson & Finney* [1997] P.N.L.R. 392 (duty of solicitor to verify authenticity of enduring power of attorney under which instructions given); *Esser v Brown* (2003) 223 D.L.R. (4th) 560 (notary instructed to sell property by one co-owner acting in fraud of the other: held to owe duty to latter).

799 cf. *Edwards v Lee, The Times*, 5 November 1991 (solicitor gave clean reference on client he knew to have 13 fraud charges outstanding; no defence that this was information received in confidence from the client). *Aliter* with a less formal enquiry, which would perhaps not give rise to a "special relationship" at all: cf. *Ouwens v Ace Builders P/L* (1989) 59 S.A.S.R. 54 (no liability in solicitors answering unconnected claimant's "arm's length" questions about client's inheritance).

800 [1988] Q.B. 665; cf. *Klingspon v Ramsey* [1985] 5 W.W.R. 411 and the Singapore decision in *Anwar v Ng Chong* [2014] SGCA 34; [2014] 3 S.L.R. 761 (solicitors instructed to draft loan without client's son's guarantee disobeyed instruction: liable to son) (criticised, A. Kuan et al, "The conceptual basis of the solicitor's liability to a third party" (2016) 32 P.N. 32).

801 But not exclusively. The same position can equally arise with a straightforward express trust (as in *Daniel v Tee* [2016] EWHC 1538 (Ch); [2016] 4 W.L.R. 115; and *Levack v Philip Ross & Co (a firm)* [2019] EWHC 762 (Comm); [2019] P.N.L.R. 20), or with monies held pending a loan to any other borrower against security over its assets. See, e.g. *Gabriel v Little* [2013] EWCA Civ 1513; (2013) 16 I.T.E.L.R. 567 (though no such trust was found on the facts) (the point did not feature on appeal in *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599).

802 This is not the only case. The same position can equally arise with, for instance, monies held for loan to a company against security over the company's assets (e.g. *Bellis v Challinor* [2015] EWCA Civ 59; [2016] W.T.L.R. 43; or held against payment for services (*Chang v Mishcon de Reya* [2015] EWHC 164 (Ch)) (though in neither case was a trust found to exist on the facts).

803 See para.9-21; *Target Holdings Ltd v Redferns* [1996] A.C. 421; *Lloyds TSB Bank Plc v Markandan & Uddin* [2012] EWCA Civ 65; [2012] 2 All E.R. 884); *Nationwide Building Society v Davisons Solicitors* [2012] EWCA Civ 1626; [2013] P.N.L.R. 12). It should be noted, however, that mere negligence in protecting the client's interest, for instance by failing to notice matters that might raise suspicions and warn the client of them, is not covered: here liability is simply for negligence. See *Bristol & West Building Society v Mothew* [1998] Ch. 1; and *Birmingham Midshires Building Society v Infields* (1999) 66 Con. L.R. 20.

804 *Target Holdings Ltd v Redferns* [1996] A.C. 421.

ply them to pay off prior charges,[805] transfers them to impostors not entitled to receive them,[806] or pays them over against a forged transfer.[807] Where such a breach is committed his duty is not strictly to compensate the beneficiary for his net loss, as in tort,[808] as to restore the trust monies so as to put the trust fund in the position it would have occupied had the terms of the trust been observed.[809] However, in practice the measure of compensation is in most cases much the same,[810] and indeed the House of Lords and the Supreme Court have both criticised the idea that a technical change in the cause of action should make a large difference in the measure of recovery.[811]

9-130 Liability for breach of trust is not dependent on fault. However, it may be possible for the solicitor to invoke s.61 of the Trustee Act 1925, which gives the court a discretion to exonerate a trustee from liability if he proves that he has acted honestly and reasonably, and ought fairly to be excused for his breach of trust.[812] But the standard under s.61 is an exacting one, and in practice it can be difficult for a solicitor to invoke it in order to extricate himself from liability.[813] It should also be noted that where funds are held on trust, the duties arising under the trust are

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805 *AIB Group (UK) Plc v Mark Redler & Co* [2014] UKSC 58; [2015] A.C. 1503.

806 *Money Express Ltd v Iqbal Hafeez Solicitors* [2011] EWHC 3037 (Ch); *Lloyds TSB Bank Plc v Markandan & Uddin* [2012] EWCA Civ 65; [2012] 2 All E.R. 884; *Purrunsing v A'Court & Co* [2016] EWHC 789 (Ch); [2016] 4 W.L.R. 81.

807 *Nationwide Building Society v Davisons Solicitors* [2012] EWCA Civ 1626; [2013] P.N.L.R. 12.

808 "[T]he common law rules of remoteness of damage and causation do not apply" (Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1996] A.C. 421, 434); *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] A.C. 1503 at [98] (Lord Reed). Equally there is no scope for reduction of any award for contributory negligence, whether under the Law Reform (Contributory Negligence) Act 1945 or otherwise: *Lloyds TSB Bank Plc v Markandan & Uddin* [2012] EWCA Civ 65; [2012] 2 All E.R. 884.

809 See, e.g. *Target Holdings Ltd v Redferns* [1996] A.C. 421, 434–435 (Lord Browne-Wilkinson); *AIB Group (UK) Plc v Mark Redler & Co* [2014] UKSC 58; [2015] A.C. 1503 at [92]–[93] (Lord Reed).

810 But not in all. One case where this made a difference was *Various Claimants v Giambrone & Law (A Firm)* [2017] EWCA Civ 1193; [2018] P.N.L.R. 2 (lawyers liable for releasing buyers' deposits on Calabrian real estate without obtaining stipulated guarantees, without reference to whether guarantees would have been worth anything). For a critical comment see P. Davies, "Equitable compensation and the SAAMCO principle" (2018) 134 L.Q.R. 165.

811 See Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1996] A.C. 421, 436–439; *AIB Group (UK) Plc v Mark Redler & Co* [2014] UKSC 58; [2015] A.C. 1503 at [64]–[66] (Lord Toulson). On this see A. Shaw-Mellors, "Equitable compensation for breach of trust: still missing the target?" [2015] J.B.L. 165.

812 See Rimer LJ in *Lloyds TSB Bank Plc v Markandan & Uddin (A Firm)* [2012] EWCA Civ 65; [2012] 2 All E.R. 884 at [61]. For cases where solicitors in breach of trust benefited from the section, see *Nationwide Building Society v Davisons Solicitors* [2012] EWCA Civ 1626; [2013] P.N.L.R. 12 (solicitors entirely innocently duped into releasing loan monies to bogus solicitors in league with fraudsters); *Ikbal v Sterling Law* [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9 (release against forged transfer). The cases are discussed in J. Lowry & R. Edmunds, "Relieving the trustee-solicitor: a modern perspective on section 61 of the Trustee Act 1925?" (2017) 133 L.Q.R. 223.

813 See e.g. *Purrunsing v A'Court & Co* [2016] EWHC 789 (Ch); [2016] 4 W.L.R. 81 at [38]; also *P&P Property Ltd v Owen White & Catlin LLP* [2018] EWCA Civ 1082; [2019] Ch. 273, especially at [111]. Note that if the solicitor cannot disprove negligence of a kind related to the loss suffered, the jurisdiction to relieve falls away, even if the fault was in fact non-causative: *Santander UK v RA Legal Solicitors* [2014] EWCA Civ 183; [2014] P.N.L.R. 20. Furthermore, s.61 cannot be invoked so as to reduce any award on account of contributory negligence: *Lloyds TSB Bank Plc v Markandan & Uddin (A Firm)* [2012] EWCA Civ 65; [2012] 2 All E.R. 884. See generally, on the application of s.61 to solicitors, M. Haley, "Section 61 of the Trustee Act 1925: a judicious breach of trust?" [2017] C.L.J. 537, 557 onwards.

for any consequences of his advice being wrong.[1079] There is no doubt that this principle applies equally to lawyers.[1080] Hence where, through a solicitor's negligent advice, the claimant purchases a property he would not otherwise have bought, his damages will not normally include any sum in respect of either a subsequent decline in property values generally, or any other unconnected factor depreciating the particular property.[1081] Again, a lender misadvised as to the legal enforceability of a loan agreement cannot recover where the loan is lost through the borrower's inability to repay it[1082]; and a lender misled as to the purpose of a loan cannot recover in so far as he would still have lost his money even if he had known the facts.[1083] Yet again, solicitors who negligently fail to warn lenders that the necessary security is not in place before releasing loan monies,[1084] or that there are suspicious features indicating a possible overvaluation which suggest that any lender should steer clear,[1085] are liable only for the loss flowing from the deficiency in the security.

9-166 Although the *SAAMCO* limitation began as a limitation of liability for negligent advice, it reflects a more general rule: namely, that a wrongdoer is not liable except for the kind of loss which the duty breached was designed to prevent.[1086] So failing to warn a joint tenant that a devise of his share is ineffective in the absence of prior severance engenders liability to the disappointed beneficiary but not to the estate thus diminished[1087]; and it has been held that if a solicitor fails to prosecute

[1079] *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 241 (Lord Hoffmann); *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599 at [25]–[45] (Lord Sumption). See also J. Thomson, "SAAMCO revisited" [2017] C.L.J. 476; H. Evans, "Solicitors and the scope of duty in the Supreme Court" (2017) 33 P.N. 193.

[1080] See, e.g. *Lloyds Bank Plc v Crosse & Crosse* [2001] EWCA Civ 366; [2001] P.N.L.R. 34; and *Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599.

[1081] e.g. *Lloyds Bank Plc v Crosse & Crosse* [2001] EWCA Civ 366; [2001] P.N.L.R. 34 (failure to spot troublesome restrictive covenant: solicitors liable only for depreciation due to the covenant, not whole loss); *Cottingham v Attey Bower* [2000] P.N.L.R. 557 (failure to advise that extension illegally built: damages limited to the loss due specifically to lack of planning consent); *Credit & Mercantile Plc v Nabarro* [2014] EWHC 2819 (Ch); [2015] P.N.L.R. 14 (undevelopable land). See too *Trust Co of Australia v Perpetual Trustee Co* (1997) 42 N.S.W.L.R. 237; and the Irish decision in *Rosbeg Partners v L.K. Shields (A Firm)* [2018] IESC 23; [2018] P.N.L.R. 26 (solicitors who negligently failed to register title, thus rendering land unsaleable, liable only for costs of doing so, plus any diminution in value before matter could be put right).

[1082] *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33; [2011] 3 All E.R. 655. cf. *Broker House Insurance Services Ltd v OJS Law* [2010] EWHC 3816 (Ch); [2011] P.N.L.R. 23. Compare *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599 (failure to advise of possible misuse of loan funds: no liability where non-repayment due simply to uncreditworthiness of borrower).

[1083] *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599.

[1084] *AIB Group (UK) Plc v Mark Redler & Co* [2013] EWCA Civ 45; [2013] P.N.L.R. 19 at [10] (Patten LJ); also the Irish decision in *KBC Bank Ireland Plc v BCM Hanby Wallace (A Firm)* [2012] IEHC 120; [2013] P.N.L.R. 7 (reversed on other grounds, [2013] IESC 32; [2013] P.N.L.R. 33).

[1085] As in *Portman Building Society v Bevan Ashford* [2000] P.N.L.R. 344. In that case there was held to be full liability, but this result was stated to be wrong by Lord Sumption in *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599 at [52]. The same, it is suggested, goes for a series of other cases on similar facts, such as of *Leeds & Holbeck Building Society v Alex Morison & Co*, 2001 S.C.L.R. 41; [2001] P.N.L.R. 346; *Newcastle Building Society v Paterson Robertson & Graham*, 2001 S.C. 734; [2001] P.N.L.R. 870; and *Michael Gerson Investments Ltd v Haines Watts* [2002] P.N.L.R. 34.

[1086] *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 210 (Lord Hoffmann).

[1087] *Carr-Glyn v Frearsons* [1999] Ch. 326, 337 (Chadwick LJ).

proceedings with due expedition, he may be liable if the action is struck out for delay, but not generally if the defendant becomes bankrupt in the meantime.[1088]

Qualification to the "SAAMCO limitation" However, the *SAAMCO* principle **9-167** is subject to an important limit. Where a lawyer gives advice generally on the advisability of a transaction, rather than on some limited aspect of it, so that he can be regarded as "guiding the whole of the decision-making process",[1089] he is normally regarded as accepting liability for any foreseeable loss suffered.[1090] An example might be where a non-commercial client seeking to invest a legacy in property development asked a solicitor in general terms to choose between a number of schemes on offer and the solicitor advised one of them having failed to notice signs that the property was subject to inappropriate planning restrictions: in such a case, it is suggested that he would be potentially liable for the investor's whole loss, even if partly resulting from a downturn in the market.

Loss of a chance[1091] Prima facie the burden is on the claimant to prove, on a bal- **9-168** ance of probabilities, that the defendant lawyer's negligence was a cause of his loss: if he can do so, he recovers in full, while otherwise he receives nothing.[1092] In certain cases, however, the claimant, whether he sues in contract or tort,[1093] may recover damages based on the loss of the chance of making a gain or avoiding a loss. One such instance concerns bungled litigation, referred to below.[1094] But in *Allied Maples Ltd v Simmons & Simmons*[1095] the Court of Appeal made it clear that the principle is wider than this, and that wherever the chance of making a gain or avoiding a loss depended substantially on the hypothetical actions of a third party, *prima facie* a "loss of chance" award was appropriate. Solicitors advising the purchasers of a company negligently failed to warn them that the sellers' warranties against contingent liabilities were inadequate. Although the purchasers could not prove on a balance of probabilities that the sellers would have agreed to an extended warranty if asked, it was held that they were entitled to an award based on the chance

[1088] *Pearson v Sanders Witherspoon* [2000] P.N.L.R. 110.

[1089] The phrase is Lord Sumption's: *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599 at [40]. In such a case he regarded it as "pragmatic justice" that the solicitor should be liable for the whole loss.

[1090] See *South Australia Asset Management Corporation v York Montague Ltd* [1997] 1 A.C. 191, 214 (Lord Hoffmann).

[1091] N. Jansen, "The Idea of a Lost Chance" (1999) 19 O.J.L.S. 271. For extensive discussion of the rules relating to loss of a chance, including how multiple contingencies are to be treated, see *Assetco Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm); [2019] Bus. L.R. 2291 at [428]–[455].

[1092] e.g. *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 Q.B. 113.

[1093] Most cases allowing such recovery have been in contract, but not all: for a case where it was accepted that the same rule applied in tort, see *Khan v R.M. Falvey* [2002] EWCA Civ 400; [2002] P.N.L.R. 28.

[1094] See para.9-170.

[1095] [1995] 1 W.L.R. 1602; see too *Lord Briggs in Perry v Raleys Solicitors* [2019] UKSC 5; [2019] 2 W.L.R. 636 at [17]–[22]. For a virtual carbon copy of *Allied Maples*, see the later *Perkin v Lupton Fawcett* [2008] EWCA Civ 418; [2008] P.N.L.R. 30. See too *McGregor v Michael Taylor & Co* [2002] 2 Lloyd's Rep. 468 (solicitors at fault in failing to advise wife of possibility of setting aside charge over her share of shared home: 75 per cent loss of chance award); *Magical Marking Ltd v Ware & Kay LLP* [2013] EWHC 59 (Ch) (misadvice to company about right to remove director: loss of chance of amicable arrangement for departure); *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146; [2016] Ch. 529 (loss of chance of opening profitable business in New York); *Moda International Brands Ltd v Gateley LLP* [2019] EWHC 1326 (QB); [2019] P.N.L.R. 27 (loss of chance to stipulate for profit share due to drafting error). cf. the earlier cases of *Hall v Meyrick* [1957] 2 Q.B. 455; and *Dunbar v A & B Painters Ltd* [1986] 2 Lloyd's Rep. 38.

disclaimer of third party liabilities,[1401] though such disclaimers are subject, in the same way as all disclaimers, to control under the general law relating to exception clauses.[1402]

9-226 Nevertheless, the above rule is only presumptive, and there are a number of situations where a duty to third parties, particularly those closely connected to the client, may be owed. Thus there may well be a duty where a firm of auditors' corporate client is a member of a group of companies effectively run as one.[1403] Again, accountants who negligently advised a company that a proposed arrangement between it and its directors was lawful were held liable to the directors when it was not and they were disqualified as a result[1404]; and similarly, it is suggested that where accountants are instructed by a husband to arrange a tax-saving scheme for himself, his wife and children, they will on principle be liable to the latter if they botch it.[1405] Moreover, it has also been held that where shares in a closely-held company fall to be sold at a price to be fixed by valuation, the accountants performing the valuation may owe duties to either party.[1406]

9-227 Furthermore, there may also be liability where accountants' advice is clearly meant to protect the interests of a third party and it is possible to infer some kind of acceptance of responsibility for it by the accountant. Thus, while auditors generally do not owe duties to persons buying into a company or business,[1407] it may be different with accounts prepared specifically for a named would-be buyer.[1408] Similarly, accountants or auditors may be liable to third parties on some basis other

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engaged by company owe no duty to shareholders); *Devine v McAteer* [2014] NICA 50 (tax advice to husband cannot be relied on by wife). And see the actuary case of *Precis (521) Ltd v William H Mercer Ltd* [2005] EWCA Civ 114; [2005] P.N.L.R. 28. The question of the liability of company accountants or auditors to investors and buyers is dealt with in the following paragraphs.

1401 *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm); [2015] 1 C.L.C. 180. Accepted in *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm); [2015] 1 C.L.C. 180; where it was also accepted that the reasoning in *Harris v Wyre Forest DC* [1990] 1 A.C. 831 applied to such clauses, so as to subject them to control even though expressed as devices to prevent any duty arising in the first place. In the event that the claimant is a consumer, the relevant legislation is s.62 of the Consumer Rights Act 2015, subjecting such clauses to a test of whether, in breach of a duty of good faith, they unduly imbalance the relation between accountant and claimant.

1403 *BCCI SA v Price Waterhouse* [1998] P.N.L.R. 564 (failure to spot irregularity in BCCI group: auditors arguably liable to all members of group, even though employed by only one): see too *Riyad Bank v Ahli United Bank Plc* [2006] EWCA Civ 780; [2006] 2 Lloyd's Rep. 292 (advisers to bank setting up Shari'a investment arm owe direct tortious duty to the latter). But the purpose for which the claimant relied on the advice may be all-important: cf. *Barings Plc (In Liquidation) v Coopers & Lybrand* [2002] P.N.L.R. 16, where a "group claim" of this kind failed on that basis.

1404 *Coulthard v Neville Russell* [1998] P.N.L.R. 276. Compare *Christensen v Scott* [1996] 1 N.Z.L.R. 273 (accountants advising family company owe duty of care to family members in capacity of guarantors of liabilities). However, in a case of this sort the claimant may find difficulty in claiming any loss that simply reflects the diminution in the value of his shareholding due to a wrong done to the company: see *Johnson v Gore Wood* [2002] 2 A.C. 1.

1405 Solicitors have been held so liable: *Matthew v Maughold Life Assurance Co Ltd* [1955–95] P.N.L.R. 309. In *Richards v Hughes* [2004] EWCA Civ 266; [2004] P.N.L.R. 35 the Court of Appeal doubted, *obiter*, whether accountants who bungled a tax-saving school fees scheme were liable to the children whose own trust monies had to be spent as a result. Sed quaere.

1406 *Killick v PriceWaterhouseCoopers* [2001] P.N.L.R. 1; see too the similar *Pearce v European Reinsurance Consultants Run-off Ltd* [2005] EWHC 1493 (Ch); [2006] P.N.L.R. 8.

1407 *Caparo Plc v Dickman* [1990] 2 A.C. 605; below, para.9-228.

1408 *JEB Fasteners Ltd v Marks Bloom & Co* [1981] 3 All E.R. 289; affirmed on causation, [1983] 1 All E.R. 583 (though the circumstances may indicate otherwise: *Peach Publishing Ltd v Slater & Co* [1998] P.N.L.R. 364). See too *Royal Bank of Scotland plc v Bannerman Johnstone Maclay* [2005] CSIH 39; 2005 S.C. 437; [2005] P.N.L.R. 43 (accountants knew bank support of company conditional on view of accounts: Scots court holds duty owed to bank); *Trustees Executors & Agency*

than reliance. So in *Law Society v KPMG Peat Marwick*,[1409] where auditors to a firm of solicitors failed to spot signs of ongoing fraud, they were held liable to the Law Society, which had to compensate the victims of the fraud.

9-228 The problem of third-party liability has arisen in particular in connection with company accounts and auditors' reports that have been relied on by third parties in buying shares or lending to the company, or by predators in taking over the company concerned. In *JEB Fasteners Ltd v Marks, Bloom*[1410] Woolf J held that accountants who prepared annual accounts for a company in the knowledge that they were intended for the benefit of the claimants, who were at the time negotiating to take it over, owed the claimants a duty of care. A number of Commonwealth authorities reached the same result.[1411] However, the decision of the House of Lords in *Caparo Industries Plc v Dickman*[1412] shows that this is a very limited liability indeed. The claimants bought some shares in F Ltd with a view to a possible takeover. Later, having received copies of the accounts, audited and approved by the defendants, they launched a bid that was ultimately successful. When they discovered alleged inaccuracies in the accounts concealing large unexpected losses in F Ltd, they sued, *inter alios*, the auditors. The latter took the preliminary point that they owed no duty of care. The House of Lords[1413] held they were right: the duty of care in respect of negligent misstatement was, they said, limited to statements made with a view to reliance by the claimant for a particular purpose. It did not apply where a statement was put into more or less general circulation[1414] (as in the case of standard company accounts), however foreseeably claimants might rely on them.[1415] Although *JEB Fasteners Ltd v Marks, Bloom*[1416] was cited without disapproval by Lord Bridge in *Caparo*, it now seems clear that it can be justified, if at all, only on the basis that the accounts there were prepared in some sense for the

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Co of NZ v Price Waterhouse [2000] P.N.L.R. 673 (auditors' liability to bondholders for failing to note matters giving rise to right to accelerate liability).

1409 [2000] 1 W.L.R. 1921; [2000] 4 All E.R. 540 CA. In New Zealand auditors in a similar position were held directly liable to the fraud victims themselves (*Price Waterhouse v Kwan* [2000] 3 N.Z.L.R. 39): sed quaere. See too *Andrew v Kounnis Freeman* [1999] 2 B.C.L.C. 641 (accountants arguably liable to CAA for negligently certifying bankrupt tour operator solvent, with result that CAA put to expense repatriating passengers when operator failed).

1410 [1981] 3 All E.R. 289. The claim failed on causation (upheld on appeal, where the duty of care was not in issue: [1983] 1 All E.R. 583). cf. Denning LJ's dissenting judgment in *Candler v Crane Christmas* [1951] 2 Q.B. 164, later vindicated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, and also the Scots decision in *Twomax Ltd v Dickson M'Farlane & Robinson*, 1982 S.C. 113.

1411 e.g. *Haig v Bamford* (1975) 53 D.L.R. (3d) 81; *Scott Group Ltd v McFarlane* [1978] 1 N.Z.L.R. 553. But see *Caparo v Dickman*, below.

1412 [1990] 2 A.C. 605. See J. Weir, "Statutory auditor not liable to purchaser of shares" [1990] C.L.J. 212; J. Fleming, "The Negligent Auditor and Stakeholders" (1990) 106 L.Q.R. 349. The Canadian courts have since followed it (*Hercules Management v Ernst & Young* [1997] 2 S.C.R. 115), as have the Australian (*Lowe v A.G.C.* [1992] 2 V.R. 671; *Esanda Ltd v Peat Marwick* (1997) 15 A.C.L.C. 483).

1413 Reversing the Court of Appeal, which had held ([1989] Q.B. 653) that Caparo were owed a duty qua existing shareholders, though not otherwise. This distinction was rejected by the House of Lords as anomalous and unreasonable.

1414 See [1990] 2 A.C. 605, 621 (Lord Bridge).

1415 This is understandable: liability to any foreseeable relier would seriously raise the spectre of liability "in an indeterminate amount of an indeterminate time to an indeterminate class" decried by Cardozo J in the New York decision of *Ultramares Corp v Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 450 (1931).

1416 [1981] 3 All E.R. 289.

the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud.[77] And the same goes for projections as to the future: if a defendant says he expects an event to take place when he does not, he makes an untrue statement of fact.[78] The only obstacle in the way of maintaining an action for a false representation on this basis lies in the difficulty of proving what the defendant's real opinion was,[79] and in the difficulty of distinguishing a representation of the existence of an opinion from the representation of the existence of a fact on which that opinion is based.

17-14 Furthermore, at least where the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best will often carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it.[80] If he does not actually believe in such facts, it follows that he will be liable in deceit.[81] In such a case, the test as to whether a statement of opinion involves such a further implied representation will involve a consideration of the meaning which is reasonably conveyed to the representee. The material facts of the transaction, the knowledge of the respective parties, their relative positions, the words of the representation and the actual condition of the subject-matter are all relevant to this issue.[82]

17-15 **Misrepresentation: statements of law** Throughout the nineteenth and twentieth centuries, propositions of law tended to be regarded as inherently non-factual.[83] Hence statements of law were treated as statements of opinion at most, demonstrable as false only by proof that the representor did not in fact entertain that view of

[77] See, e.g. *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 C.L.R. 337 (opinion conveyed by bank as to client's financial standing not honestly held); also *Anderson v Pacific Insurance Co* (1872) L.R. 7 C. & P. 65, 69 (Willes J); also *Khambay v Nijhar (t/a Gravitas Consulting)* [2015] EWHC 190 (QB) at [76]; and *Vald. Nielsen Holding A/S, Newwatch Ltd v Baldorino* [2019] EWHC 1926 (Comm) at [133] (both approving the statement of the law in this paragraph). Hence characterising a statement as a mere assertion of belief will still not protect the maker if he does not in fact believe it to be true.

[78] See *Karberg's Case* [1892] 3 Ch. 1, 11.

[79] See, e.g. *Peek v Gurney* (1873) L.R. 6 H.L. 377, 404.

[80] *Barings Plc (In Liquidation) v Coopers & Lybrand (A Firm)* [2002] EWHC 461 (Ch); [2002] P.N.L.R. 39 at [48]–[52]; *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC); [2010] B.L.R. 267; 129 Con. L.R. 147 (statement by contractor that it was capable of handling project when it knew it had no reasonable grounds for making it). See too the contract cases of *Smith v Land & House Property Corp* (1885) 28 Ch. D. 7, 15 (Bowen LJ); and *Brown v Raphael* [1958] Ch. 1636 (both concerned with the right to rescind, where the same requirement applies of a representation of fact, though not of a guilty state of mind). This paragraph was cited with approval in *Vald. Nielsen Holding A/S, Newwatch Ltd v Baldorino* [2019] EWHC 1926 (Comm) at [134].

[81] *Barings Plc (In Liquidation) v Coopers & Lybrand (A Firm)* [2002] EWHC 461 (Ch); [2002] P.N.L.R. 39 at [48]–[52]. In fact the representor there, a banking executive who signed a representation to accountants that there was nothing untoward, had the necessary bona fide belief and therefore there was no liability.

[82] *Bisset v Wilkinson* [1927] A.C. 183; *Smith v Chadwick* (1884) 9 App. Cas. 187; *Brown v Raphael* [1958] Ch. 1636; *Jaffray v Society of Lloyds* [2002] EWCA Civ 1101 at [58].

[83] Thus a contract could not be rescinded on the basis of a misrepresentation or mistake of law (*Eaglesfield v Londonderry (Marquis)* (1876-77) 4 Ch. D. 693) (though there were suggestions that fraudulent statements of law might be on a different footing (*West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360, 362–363)); nor was money thought to be recoverable if paid by mistake of law rather than fact (e.g. *Bilbie v Lumley* (1802) 2 East 469).

the law which he expressed.[84] However, the distinction between factual and legal statements was difficult to draw at the best of times,[85] and has now been discredited elsewhere in the law.[86] It is therefore submitted that in the law of deceit misstatements of law now fall to be treated on a similar footing to misstatements of fact,[87] though given the uncertainty inherent in case law development and statutory interpretation, proof that a defendant knowingly misrepresented the law is likely in practice to be hard to come by.

17-16 **Mere puffs** There is no misrepresentation in the case of mere exaggerated praise by a vendor of his wares; he is entitled to assume that his statement will be construed as mere puffing. But though a vendor may entertain "sanguine expectations" of the advantages to be derived from his goods, and may employ "high colouring and even exaggeration" in his description of them, he must make no misstatement of any material facts or circumstances.[88]

17-17 **Misrepresentation: dangerous and defective chattels** There is no doubt that a seller[89] of goods who states that they are sound when he knows they are not is liable to the buyer or anyone else who relies on his statement and suffers loss. So in the old case of *Langridge v Levy*[90] the seller of a shotgun who told the buyer that it was safe when he knew it was not was held liable in deceit to the buyer's son who relied on the assertion and was injured when the firearm exploded. In *Langridge's* case, however, there was it seems a positive representation by the defendant.[91] What is the position where there is no such representation, but merely a sale or circulation of a chattel known to be defective? It has been suggested that anyone who sells

[84] See *Beattie v Ebury (Lord)* (1872) L.R. 7 Ch. 777 at 802, per Mellish LJ.

[85] See the convoluted, and hardly informative, example given by Jessel MR in *Eaglesfield v Londonderry (Marquis)* (1876-77) 4 Ch. D. 693 at 702-703 (statement that a woman is married may be factual or legal according to the circumstances). Statements as to the legal effect of a document could be remarkably awkward in this connection. Compare *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360 (whether Act of Parliament gave power to directors to sign for company matter of fact) with *Eaglesfield v Londonderry (Marquis)* (1876-77) 4 Ch. D. 693 (ranking of share issues inter se matter of law).

[86] The leading case, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, reversed previous authorities and decided that money paid by mistake of law could be recovered on the same basis as if the mistake had been factual. *Pankhania v Hackney LBC* [2002] EWHC 2441 (Ch); [2002] N.P.C. 123 then decided that statements of law were misrepresentations under the Misrepresentation Act 1967. See too *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] Q.B. 303 (legal mistakes as capable of impugning a contract as factual ones).

[87] Even, it would seem, where the law is unexpectedly changed with retrospective effect by legal decision, as happened in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 34, above. But proof of a guilty state of mind in such a case. so as to establish liability in deceit, would be well-nigh impossible.

[88] See Lord Chelmsford in *Central Ry Co of Venezuela v Kisch* (1857) L.R. 2 H.L. 99 at 113. It is suggested that the "mere puffs" principle is largely an outgrowth of the rule that statements of opinion are not as such statements of fact.

[89] Doubtless the same principle applies to a lender or a person letting out goods on hire or otherwise making them available.

[90] (1837) 2 M. & W. 519. cf. *Dobell v Stevens* (1825) 3 B. & C. 623; and the American *Patterson v Landsberg* (1905) 7 F. 675.

[91] See (1837) 2 M. & W. 519 at 530, per Parke B. Admittedly, on the facts the evidence seems scanty: see the comments of Lord Atkin on *Langridge's* case in *Donoghue v Stevenson* [1932] A.C. 562 at 587–588.

such registration by virtue of a fraudulent application, or an application based on an innocent but erroneous claim about having satisfied the adverse possession requirements, then the register can be restored to its former state, once again recording the original proprietor's title.[75]

18-16 **Possession of minerals** Possession of the surface of land prima facie includes possession of the subjacent minerals also,[76] even though they be unopened, for possession of the surface prima facie operates to exclude others from access to the minerals. But that presumption is always liable to be rebutted by showing that the possession of the minerals is in fact in somebody else, for the minerals may be worked from the adjoining land, and apparently even a wrongdoer may, in the absence of fraud,[77] by driving levels through a whole seam of coal, acquire possession of the unworked coal within the limits to which the levels extend.[78] But the mere wrongful getting of neighbouring coal by a mine owner is not such a possession of the seam as to confer a title under the Statute of Limitations.[79]

18-17 **De facto possession** A person claiming as against the true owner cannot be said to have possession unless the true owner has been dispossessed.[80] In order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done on it and the intention of the squatter all fall to be considered.[81] Moreover, to found a claim in trespass, possession must be exclusive.[82] Accordingly, pasturing cattle on strips of grass at the side of a private road does not give the owner of the cattle possession of the strips, because the right of passage exercised by other persons prevents his possession from being exclusive.[83] In *Fowley Marine (Emsworth) Ltd v Gafford*,[84] the Court of Appeal held that the claimants had exclusive possession in a tidal creek and that the unpermitted acts of boat owners in mooring their craft in the creek did not amount to acts of concurrent possession, since those acts were not shown to be

(QB); [2013] 1 W.L.R. 1253 at [15], per Eady J.

75 *Baxter v Manion* [2011] EWCA Civ 120; [2011] 1 W.L.R. 1594. As to the power more broadly to rectify errors on the register, see Land Registration Act 2002 Sch.4.

76 *Smith v Lloyd* (1854) 9 Exch. 562 at 574, per Parke B. See *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35; [2011] 1 A.C. 380. Common law reserves to the Crown all gold and silver in mines: *The Case of Mines* (1567) 1 Plowd. 310.

77 *Bulli Coal Mining Co v Osborne* [1899] A.C. 351; *Oelkers v Ellis* [1914] 2 K.B. 139.

78 See *Ashton v Stock* (1877) 6 Ch. D. 719 at 726, per Hall VC.

79 *Ashton v Stock* (1877) 6 Ch. D. 719; *Thompson v Hickman* [1907] 1 Ch. 550.

80 See para.18-80.

81 *Buckinghamshire CC v Moran* [1990] Ch. 623. Slade LJ stressed that although the intention of the squatter is material to the question of dispossession, the intention of the owner as to future possible use is generally not material except to the extent that the squatter's knowledge of the owner's intention may bear on his *animus possidendi*: *Buckinghamshire CC v Moran* [1990] Ch. 623 at 639–640.

82 In *Marsden v Miller* (1992) 64 P.C.R. 239, the mere erection of a fence round an area of disputed land had failed to exclude all others from the land and was held not to give rise to such possession as was necessary to support an action for trespass.

83 *Coverdale v Charlton* (1878) 4 Q.B.D. 104. The same principle applies where the land in question is subject to a public right of way. The ongoing existence of this right of way will defeat any claim that the possession gained was exclusive: *R. (on the application of Smith) v Land Registry* [2010] EWCA Civ 200; [2011] Q.B. 413.

84 [1968] 2 Q.B. 618.

done with the intention to take possession.[85] In terms of understanding what is required by way of the trespasser's intention, the law was clarified by the decision of the House of Lords in *JA Pye (Oxford) Ltd v Graham*.[86] In that case, Lord Browne-Wilkinson indicated that possession requires two elements: factual possession and the intention to possess. In relation to the former he was clear that "an appropriate degree of physical control" suffices,[87] while with respect to the intention to possess he expressly approved[88] the dictum of Slade J in *Powell v McFarlane*[89] that there must be "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow".

Defence of *jus tertii* A de facto possession gives a right to retain the possession and undisturbed enjoyment as against all wrongdoers. It is not, however, sufficient as against the lawful owner. And one who alleged that he had an oral tenancy had, by virtue of s.40 of the Law of Property Act 1925[90] (which prevented him from proving his oral tenancy),[91] to respect the title of the owner. He who has such a possession may, just as may the lawful owner, use a reasonable degree of force in its defence.[92] He may sue in trespass anyone who disturbs his possession, and in such an action it is no answer for the defendant to show that the title and right to possession is in another person. *Jus tertii* is no defence to the action unless the defendant can show that the act complained of was done by the authority of the true owner.[93] Nor does it matter how recently the possession was acquired.[94] Where a trespass action is brought by a bare possessor, *jus tertii* cannot be raised to mitigate the damages payable. This is because possession is, as against a wrongdoer, prima facie evidence of title, and it cannot be displaced merely by showing that the possession was of recent origin and was not derived from any person who had title.[95] **18-18**

Trespasser A trespasser who enters and expels the person in possession does not obtain possession so as to enable him to maintain trespass against the evicted person seeking repossession unless the person expelled has submitted to the expulsion by delaying to re-expel the intruder within a reasonable time. In the absence of submis- **18-19**

85 [1968] 2 Q.B. 618 at 638, per Willmer LJ.

86 [2002] UKHL 30; [2003] 1 A.C. 419.

87 [2002] UKHL 30; [2003] 1 A.C. 419 at [41]. For these purposes, there is no fixed notion of an appropriate degree of control. Each case needs to be adjudged "bearing in mind the nature of the land": *Greenmanor Ltd v Laurence Pilford* [2012] EWCA Civ 756 at [27], per Etherton LJ; cf. *Chambers v Havering LBC* [2011] EWCA Civ 1576; [2012] 1 P. & C.R. 17.

88 [2002] UKHL 30; [2003] 1 A.C. 419 at [42].

89 (1979) 38 P. & C.R. 452.

90 See now the Law of Property (Miscellaneous Provisions) Act 1989 s.2.

91 *Delaney v TP Smith Ltd* [1946] 1 K.B. 393.

92 *Green v Goddard* (1704) 2 Salk. 641; *Weaver v Bush* (1798) 8 T.R. 78.

93 *Graham v Peat* (1801) 1 East 244; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch. 84. In the case of Crown land *jus tertii* is available to intruders unless the claimant shows he is in occupation with the consent and privity of the Crown or that the title has passed to him by adverse possession: *Harper v Charlesworth* (1825) 4 B.C. 574 at 586–590.

94 *Catteris v Cowper* (1812) 4 Taunt. 547.

95 *Eastern Construction Co v National Trust Co* [1914] A.C. 197; *Glenwood Lumber Co v Phillips* [1904] A.C. 405. The possessor may have to account to the true owner for the damages recovered: *Eastern Construction Co v National Trust Co* [1914] A.C. 197 at 210.

period… [for it is enough] if the person claiming to be in possession for 12 years, without interruption, has had the requisite degree of control of the land throughout the relevant period of 12 years".

18-82 **Licence a matter of fact** The Law Reform Committee recommended that the finding of a licence should depend on findings of fact alone and the Limitation Act 1980 Sch.1 Pt I para.8(4) now provides that:

> "for the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land. This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case."

The giving of a licence is a matter of fact and does not depend on positive acceptance by the licensee. Thus, where an occupier in adverse possession received a letter of licence to continue her occupation, the Court of Appeal held that time stopped running in her favour because she had received it, notwithstanding that she made no response to it.[432] Her possession was not adverse because it was referable to a lawful title to possess conferred by the licence.[433] Similarly, in *Smith v Lawson*,[434] the Court of Appeal held that a representation that no further rent would be collected gave rise to a promissory estoppel which would have prevented the owner from claiming possession for non-payment of rent. It followed that the occupant was effectively a licensee and could not establish adverse possession. But in the absence of a licence stopping time running, a mere letter demanding possession does not stop it. Unless a squatter vacates or gives a written acknowledgment, the owner must issue his writ within the prescribed time.[435]

18-83 **Period of limitation** So far as an action for damages in trespass is concerned, the claimant must normally bring his case within six years from the accrual of the cause of action.[436] However, when recovering land from a squatter, two rather different limitation periods apply, depending on whether the land in question was unregistered or registered. For unregistered land, the Limitation Act 1980 stipulates that a claimant must bring an action within 12 years of the time at which the right to bring that action first accrued to him or to some person through whom he claims.[437] At the determination of this period, his right and title to the land is extinguished.[438] When the person bringing the action, or his predecessor in title, has been in possession but has been dispossessed or has discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance of

[432] *BP Properties Ltd v Buckler* (1987) 2 E.G. 168. In order to evict, the licensor must revoke the licence.
[433] cf. *Colchester BC v Smith* [1992] Ch. 421, in which an occupier who might otherwise have acquired land by adverse possession was prevented by estoppel from raising the question of title.
[434] (1998) 75 P. & C.R. 466.
[435] *Mount Carmel Investments Ltd v Thurlow (Ltd)* [1988] 1 W.L.R. 1078. It seems that the owner out of possession can stop time running by giving permission to stay (see *BP Properties v Buckler* (1987) 2 E.G. 168) and an entry may stop time running.
[436] Limitation Act 1980 s.2. The usual extension in cases of disabilities applies. See further para.31-21.
[437] Limitation Act s.15(1). There are modifications of this period in the case of the Crown: Sch.1 Pt II.
[438] Limitation Act s.17; *Nicholson v England* [1926] 2 K.B. 93.

possession.[439] In the case of registered land, the Land Registration Act 2002 provides that a claimant in adverse possession may apply to become the registered proprietor of the land after only 10 years' adverse possession.[440] Upon becoming the registered proprietor, the original proprietor's right to recover the land is extinguished. Although a squatter who enters a residential property commits a criminal offence under s.144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, this illegality does not prevent his conduct from qualifying as adverse possession under Sch.6 to the Land Registration Act 2002.[441] On the other hand, the fact that the squatter is committing such an offence will make it easier for the true owner to enlist the assistance of the police in removing him.

When right of action accrues The right of action to recover land does not accrue until there is adverse possession in some person in whose favour the period of limitation can run. Adverse possession depends essentially on the nature of the squatter's user and how far it is inconsistent with, or prejudicial to, the purposes of the persons entitled.[442] If there is no-one in adverse possession, the right of action does not accrue until adverse possession is taken.[443] An act which may be a trespass such as children playing on land next to their mother's bungalow,[445] do not count for this purpose. In each case the conduct (*corpus*) and the motive (*animus*)[446] of the trespasser are to be considered on the facts.[447] The intention, or *animus possidendi*, is simply intention to keep possession; it does not necessarily involve an intention to gain a title. The conduct or *corpus* is any act of possession. Thus in *Taylor v Nute*,[448] the Court of Appeal found that where defendants extended agricultural operations to an adjacent plot unused by the claimant, fenced it in, and finally began to build a bungalow, the initial acts of levelling the ground constituted adverse possession from which time began to run against the claimant. The fact that the owner makes no use of, and apparently has no use for, his land does not preclude adverse possession. Nor does the fact that he has no immediate use for the land yet has plans for its use at a later date.[449] **18-84**

Action under a will or intestacy or otherwise In actions to recover the land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, the right of action accrues **18-85**

[439] Limitation Act Sch.1 Pt I para.1. Dispossession is the squatter expelling the true owner; discontinuance, the departure of the true owner followed by entry of the squatter.
[440] Land Registration Act 2002 Sch. 6 para.1.
[441] *Best v Chief Land Registrar* [2015] EWCA Civ 17; [2016] Q.B. 23 at [71].
[442] *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex BP Ltd* [1975] Q.B. 94. In each case it is necessary to decide whether the squatter had held adverse possession. See para.18-17.
[443] Limitation Act 1980 Sch.1 Pt I para.8.
[444] *Williams Brothers Direct Supply Ltd v Raftery* [1958] 1 Q.B. 159. cf. *Buckinghamshire CC v Moran* [1990] Ch. 623.
[445] *Tecbild Ltd v Chamberlain* (1969) 20 P. & C.R. 633.
[446] Defined, *Powell v McFarlane* (1979) 38 P. & C.R. 452 at 471. See also *Buckinghamshire CC v Moran* [1990] Ch. 623 at 639-640; *Lambeth LBC v Blackburn* [2001] EWCA Civ 912; (2001) 33 H.L.R. 74 (making it clear that a squatter who changes the locks on the premises in which he is squatting may reasonably be taken to have formed the intention to exclude the world at large, including the true owner).
[447] *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 E.G.L.R. 85.
[448] [1976] 1 W.L.R. 1295; *Williams v Usherwood* (1983) 45 P. & C.R. 235.
[449] *Buckinghamshire CC v Moran* [1990] Ch. 623.

element of flexibility by restricting the rule to circumstances where the defendant had made "a non-natural use" of the land.[214] This is "strict liability", in the limited sense that it is unnecessary for a claimant to prove negligence in the defendant or his agents. Although it might once have developed as a separate branch of the law in its own right, the rule in *Rylands v Fletcher* is now perceived, as a result of three House of Lords decisions stretching across more than half a century,[215] to be simply a special sub-rule of the law of private nuisance dealing with damage caused by isolated escapes of dangerous substances from land.[216]

19-45 **Transco and Cambridge Water** This principle was taken up and applied by the later Victorian judges with a considerable degree of vigour, but increasingly in more recent times it has undergone dilution. The rule has attracted a large number of exceptions or defences to liability which have limited its general scope and force, and cases in which it has been applied have become infrequent. In *Transco v Stockport MBC*,[217] counsel for the defendant invited the House to hold that the rule was obsolete, and should be treated as having been absorbed by the tort of negligence. In rejecting this submission the House subjected the rule to a very wide-ranging examination, before concluding that the rule still has a part to play in English law. In so holding the House confirmed the approach which it had itself taken 10 years earlier in *Cambridge Water Co Ltd v Eastern Countries Leather Plc*,[218] another decision of major importance in this area. In that case the defendants were leather manufacturers who used a chemical solvent in their tanning process. Until 1971, when their manufacturing processes changed, small quantities of solvent spilled on to the concrete floor of their premises. From there it seeped through into the soil below and escaped into percolating channels of underground water which the claimant company used for the local public supply. The water was rendered unfit for human consumption as a result, but it was found as a fact that the seepage had been quite unforeseeable. The claimants attempted to hold the defendants liable under the rule in *Rylands v Fletcher*, but were unsuccessful. The actual claim in *Transco v Stockport MBC*, which arose out of the leakage of a large quantity of water from a pipe used to supply a block of flats, also failed on the facts.

19-46 **Restrictive approach** Although the House of Lords in the *Cambridge Water* case was opposed to undue narrowing of the scope of the rule by artificial invocation of the concept of natural user,[219] in other respects their Lordships adopted a restrictive approach to the doctrine. In so doing, they echoed the general approach of the House in its earlier examination of the scope of the rule, shortly after the end of the Second World War, in *Read v J Lyons & Co Ltd*.[220] The claimant had been employed in the defendants' munitions factory, and was injured there by the explosion of a shell. No allegation of negligence was made by her against the defendants. The

[214] (1866) L.R. 1 Ex. 265 at 338–340. *Porter (JP) Co Ltd v Bell* (1955) 1 D.L.R. 62 at 66, per Macdonald J.

[215] See *Transco v Stockport MBC* [2003] UKHL 61; [2004] 2 A.C. 1; *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 A.C. 264; *Read v J Lyons & Co Ltd* [1947] A.C. 156.

[216] Isolated escapes *not* involving dangerous substances are not actionable in the absence of negligence: see, e.g. *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] EWCA Civ 685; (2014) 154 Con. L.R. 26.

[217] [2003] UKHL 61; [2004] 2 A.C. 1.

[218] [1994] 2 A.C. 264.

[219] See para.19-54.

[220] [1947] A.C. 156.

basis of her claim was that the defendants carried on the manufacture of high-explosive shells knowing that they were dangerous things. The House of Lords held the defendants were not liable, on the ground that the rule in *Rylands v Fletcher* does not apply unless there has been an escape from the defendant's land, to a place outside his occupation or control, of something dangerous in the sense that, if it escapes, it will do damage.[221] That was the ratio of the decision, but the dicta accompanying the decision displayed a conservative or restrictive approach to the rule of strict liability. The speeches denied the existence of any general principle of strict liability for ultra-hazardous activities; in the absence of negligence, liability would only be found in certain defined situations.[222] In *Cambridge Water*, their Lordships took the view that in principle the rule should be seen as little more than "an extension of the law of nuisance to cases of isolated escapes",[223] and this view was subsequently endorsed by the House in *Transco v Stockport MBC*.[224]

19-47 **Rule rejected in Australia** Shortly after the House of Lords handed down its decision in *Cambridge Water*, the High Court of Australia, by a majority of five to two, held in *Burnie Port Authority v General Jones Pty Ltd*,[225] that the rule in *Rylands v Fletcher* no longer existed as an independent head of liability in that country but should instead be regarded "as absorbed by the principles of ordinary negligence".[226] In *Burnie*, the defendant building owners employed independent contractors to do certain reconstruction work which involved the use of highly flammable material. Owing to the gross negligence of the contractors a fire was started which spread to a part of the building occupied by the claimants under an agreement with the defendants. The claimants' property was destroyed and they sued the defendants. Although the action succeeded, and the defendants were held liable for the negligence of their contractors, this was not on the basis of the rule in *Rylands v Fletcher* but on the ground that "a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of these things" owes a "non-delegable" duty in the tort of negligence to those who suffer damage as a result. The majority regarded this approach as preferable "to the rule in *Rylands v Fletcher*, with all its difficulties, uncertainties, qualifications and exceptions".[227] The reasoning of the High Court of Australia in *Burnie's* case was analysed by Lord Walker of Gestingthorpe in his speech in *Transco v Stockport MBC*. He concluded that "the case for writing off *Rylands v Fletcher* as a dead letter" had not been made out,[228] but acknowledged the need for greater clarity in identifying the conditions for the application of the rule. He emphasised the disadvantages which abolition of the rule could have for claimants obliged to discharge the burden of proving negligence

[221] [1947] A.C. 156 at 176.

[222] There is no one common principle from which all cases of strict liability can be deduced: [1947] A.C. 156 at 167 and 181; *Rylands v Fletcher* does not lay down or reflect "an aspect of some wider principle applicable to dangerous businesses or dangerous things": per Lord Uthwatt at 186.

[223] [1994] 2 A.C. 264 at 306.

[224] [2003] UKHL 61; [2004] 2 A.C. 1. See, e.g. per Lord Bingham at [9] ("a sub-species of nuisance"); and per Lord Hobhouse at [52] ("an aspect of the law of private nuisance"); see also per Lord Hoffmann at [27].

[225] (1994) 120 A.L.R. 42. Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, Brennan and McHugh JJ dissenting.

[226] (1994) 120 A.L.R. 42 at 67.

[227] (1994) 120 A.L.R. 42 at 67–68.

[228] [2003] UKHL 61; [2004] 2 A.C. 1 at [99].

without any negligence on the part of the company, and damaged some electric cables.[647] Similarly, when a watercourse was constructed for the purpose of bringing water to a mill, and, owing to the shuttle which regulated the flow of water from the river into the watercourse getting out of repair, the watercourse overflowed and caused damage, the owner of the watercourse was held liable.[648] His liability was not affected by the fact that he had granted to the claimant a right to use the water for a mill belonging to the claimant.

19-131 **Construction work** Again, where a local authority constructed a road on the side of a hill so that it acted as a catch-water for rain from the upper slopes, and in a heavy rain the water flowed over the road into the valley beneath and damaged the claimant's mills, the local authority were held liable.[649] Where the occupier of land placed a quantity of earth against the wall of his building, so as to cause rain-water to percolate through the wall of his neighbour, he was held liable on the ground that, "if any one by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured".[650] Also, when water came down the defendant's pipes and collected in his cellar, whence it percolated into the claimant's cellar, the defendant was held liable on the principle of *Rylands v Fletcher*.[651] Again, where the occupier of the upper floor of a building was engaged in the operation of washing cinematograph films, using for that purpose large quantities of circulating water, a boiler, a sink, and several containers, and the water escaped to the floor below, it was held that the case was within *Rylands v Fletcher* and the occupier of the upper floor was liable.[652]

(ii) Statutory undertakers

19-132 **Negligence and strict liability** Those bodies now concerned with water resources[653] operate under statutory powers, and at common law they are exempt from liability except on proof of negligence, unless the statute preserves their liability.[654] A very large exception to this general rule is now contained in the Water Industry Act 1991 s.209, which provides that "where an escape of water, however caused, from a pipe vested in a water undertaker causes loss or damage", then the undertaker is strictly liable.[655] It is a defence that the escape was wholly due to the claimant's fault, or that of his servant, agent or contractor, but act of God or

[647] *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 K.B. 772.

[648] *RH Buckley & Sons Ltd v N Buckley & Sons* [1898] 2 Q.B. 608.

[649] *Baldwin's Ltd v Halifax Corp* (1916) 85 L.J.K.B. 1769. The same result would follow if an occupier of land dug a drain on his land and discharged the water, so collected, on to his neighbour's land in a concentrated flow.

[650] *Hurdman v North Eastern Ry* (1878) 3 C.P.D. 168. *Broder v Saillard* (1876) 2 Ch. D. 692 is a somewhat similar case. cf. *Lambert v Barratt Homes Ltd* [2010] EWCA Civ 681; [2010] B.L.R. 527. See also *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880 (overflow from blocked culvert held to be a nuisance). *Simpson v Att Gen* [1959] N.Z.L.R. 546.

[651] *Snow v Whitehead* (1884) 27 Ch. D. 588.

[652] *Western Engraving Co v Film Laboratories Ltd* [1936] 1 All E.R. 106.

[653] See the Water Industry Acts 1991 and 1999, and the Water Resources Act 1991.

[654] *Green v Chelsea Waterworks Co* (1894) 70 L.T. 547; *Dunn v Birmingham Canal Co* (1872) L.R. 8 Q.B. 42. The Reservoirs Act 1975 s.28 Sch.2, preserves strict liability for the construction of reservoirs.

[655] See also the related provision in s.82 of the New Roads and Street Works Act 1991 which similarly

independent act of a third party is no defence, and the statutory liability is therefore "far stricter than under the rule in *Rylands v Fletcher*".[656] The words "loss or damage" are, however, apparently confined to those heads of damage normally recoverable in negligence, so that the "purely non-physical is excluded from recovery",[657] and interruption with the domestic gas supply has been held to be outside the section.[658]

(iii) Sewers and drains

Rylands v Fletcher In *Jones v Llanrwst Urban DC*[659] Parker J said: **19-133**

"I think it clear that the principle of *Fletcher v Rylands* would apply to the owner of a sewer, whether he made his sewer or not. His duty at common law would be to see that the sewage in his sewer did not escape to the injury of others, and mere neglect of this duty would give any persons injured a good cause of action."

Accordingly, where the claimant and the defendant were the occupiers of adjoining houses, and a drain which commenced on the defendant's premises and, after collecting the sewage of several other houses, doubled back under the defendant's house, got out of repair so that the sewage escaped into the claimant's cellar, the defendant was held liable, although he did not know of the existence of the return drain.[660] Again, where the defendant maintained a drain on his land and the drain became choked, so that the adjoining land was flooded, he was held liable on the ground of nuisance.[661] When drains or sewers are constructed under statutory authority, there is no liability except on proof of negligence. The negligence may take place in the original construction of the works[662] or in their subsequent management.[663]

Statutory provisions When sewers are made or maintained under statutory provi- **19-134**
sions, an action will normally lie for damage caused by an overflow of the sewers,

imposes strict liability upon statutory undertakers in certain circumstances, but apparently does not preclude the imposition of negligence liability if the particular nature of the claimants' loss causes it to fall outside the strict liability scheme: see *Southern Gas Networks Plc v Thames Water Utilities Ltd* [2018] EWCA Civ 33; [2018] 1 W.L.R. 5977.

[656] per Lord Hoffmann in *Transco v Stockport MBC* [2003] UKHL 61; [2004] 2 A.C. 1 at [42]. The Contributory Negligence Act 1945, the Fatal Accidents Act 1976, and the Limitation Act 1980 apply to the liability under the section.

[657] per Stanley Burnton J *Anglian Water Services Ltd v Crawshaw Robins & Co Ltd* [2001] B.L.R. 173 at [149].

[658] See *Anglian Water Services Ltd v Crawshaw Robins & Co Ltd* [2001] B.L.R. 173

[659] [1911] 1 Ch. 393 at 405, cited with approval by Evershed MR in *Pride of Derby and Derbyshire Angling Association v British Celanese Ltd* [1953] Ch. 149. But though bulk sewage may attract strict liability it may well be doubted whether sewage in an ordinary domestic scale is within the rule of *Rylands v Fletcher*, on the analogy of domestic water supplies; para.19-135.

[660] *Humphries v Cousins* (1877) 2 C.P.D. 239. In *Ilford Urban DC v Beal* [1925] 1 K.B. 671, Branson J pointed out that the defendant must have known that there was a drain carrying away his own sewage, although he may have been ignorant of the return drain. If he neither knew nor ought to have known the existence of the drain, he would not have been liable.

[661] *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880; *Pemberton v Bright and the Devon CC* [1960] 1 W.L.R. 436 CA.

[662] *Collins v Middle Level Commrs* (1869) L.R. 4 C. & P. 279; *Harrison v GN Ry* (1864) 3 H. & C. 231.

[663] *Dixon v Metropolitan Board of Works* (1881) 7 Q.B.D. 418. (Flood caused by the opening of watergate at outfall of sewer. Defendants not liable because gate was constructed to let out water in case of heavy rain.)

21-12 Defamatory meaning On the question of whether the words complained of have a defamatory meaning, liability is based on an objective test.[55] A defendant may be liable for words innocent on the face of them which are in fact defamatory of another person by reason of facts unknown to the author or publisher but known to the person to whom they are published.[56] Similarly a defendant may be liable for a defamatory statement that can reasonably be taken as referring to the claimant by persons with special knowledge, even though the defendant neither had nor could have had any knowledge of the facts that caused those persons with special knowledge to connect the claimant with the statement.[57] This is commonly referred to as an "innuendo" meaning.

21-13 Reference to the claimant The claimant must prove that he is referred to, but he may have been referred to by initials[58] or by asterisks[59] or by a fictitious name[60] or the name of somebody else[61] or by reasonable inference from a statement concerning another person[62] or by a statement true of another person which might reasonably be understood as referring to him.[63] The fact that the claimant has a common name is not sufficient of itself to negate reference to him.[64] In the case of a corporate claimant it is not necessary to prove that a publisher of words complained of knew its formal legal name.[65] The question whether the defamatory words refer to the claimant is determined by an objective test, and liability arises if the words are in fact defamatory of the claimant whether or not there has been an intention to refer to him, or negligence in relation to reference to him.[66] Evidence is admissible to prove that persons with special knowledge understood the claimant to be referred to in any of the above situations.[67] There is no rule that for a statement to be defamatory of the claimant it must contain "some key or pointer"[68] indicating him or her. It is sufficient if a sensible person in the light of any special facts or knowledge proved, could reasonably have understood that the statement referred to the claimant.[69] The circumstances in which the statement was published will be relevant in ascertaining whether an inference that the claimant was referred to was reasonable. A person is not expected to read the daily newspaper with the same care as that of a businessman scrutinising a contract.[70] It is for the judge to decide whether the words complained of are capable of being taken as referring to the claimant, and a question of fact whether they were reasonably so understood.[71] Where the defamatory words do not clearly refer to the claimant (i.e. by name), the defendant is entitled to particulars of the material facts on which the claimant relies in support of his allegation that he has been referred to.[72] The general rule is that a person must be identified at the time of publication and not by reference to later material.[73] Whilst generally two or more publications by the same defendant cannot be aggregated to give rise to a cause of action in defamation, in certain limited circumstances, where there is a sufficient nexus between the earlier and later publications, this may be possible.[74]

Defamation of a class The question whether an individual can sue in respect of words which are directed against a group, or body, or class of persons generally, was considered by the House of Lords in *Knupffer v London Express Newspaper Ltd*,[75] and the law may be summarised as follows: **21-14**

(a) The crucial question remains whether or not the words are reasonably capable of referring to the claimant. What matters is whether the words were published "of the claimant" in the sense that he can be said to be personally pointed at[76] rather than the application of any arbitrary general rule subject to exceptions that liability cannot arise from words published of a

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55 See, e.g. *Fullam v Newcastle Chronicle* [1977] 1 W.L.R. 651 at 654 CA ("The essence of libel is the publication of written words to a person or persons by whom they would be reasonably understood to be defamatory of the plaintiff"); *Charleston v News Group Newspapers Ltd* [1995] 2 A.C. 65; *Rothschild v Associated Newspapers Ltd* [2012] EWHC 177 (QB) at [23] (upheld on appeal: [2013] EWCA Civ 197; [2013] E.M.L.R. 18). Tugendhat J said "the court is not concerned with what the writer or publisher intended, nor with what any actual reader may have understood, still less with what the claimant understood. The meaning (or each of the meanings where there are multiple allegations) must be a single meaning, that is a meaning which the court finds would be understood by the hypothetical reasonable reader".

56 *Cassidy v Daily Mirror* [1929] 2 K.B. 331; *Hough v London Express Newspaper Ltd* [1940] 2 K.B. 507.

57 *Morgan v Odhams Press* [1971] 1 W.L.R. 1239 HL. The Court of Appeal in *Baturina v Times Newspapers Ltd* [2011] EWCA Civ 308; [2011] 1 W.L.R. 1526 confirmed that the rule is compliant with art.10.

58 *Roach v Garvan* (1742) 2 Atk. 469; *O'Brien v Clement* (1846) 16 M. & W. 159.

59 *Bourke v Warren* (1826) 2 C. & P. 307.

60 *R. v Clerk* (1728) 1 Barn. 304; *Youssoupoff v MGM Pictures Ltd* (1934) 50 T.L.R. 581.

61 *Levi v Milne* (1827) 4 Bing. 195.

62 *Cassidy v Daily Mirror* [1929] 2 K.B. 331 at 338; *Morgan v Odhams Press Ltd* [1971] 1 W.L.R. 1239 HL.

63 *Newstead v London Express Newspaper Ltd* [1940] 1 K.B. 377.

64 See *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] Q.B. 946.

65 *Euromoney Institutional Investor Plc v Aviation News Ltd* [2013] EWHC 1505 (QB) at [61]–[62] where Tugendhat J approved the test set out in *Duncan & Neill on Defamation* (3rd edn) at para.10.02.

66 See *Morgan v Odhams Press Ltd* [1971] 1 W.L.R. 1239; and see *Hyams v Peterson* [1991] 1 N.Z.L.R. 711.

67 *Bottomley v Bolton* (1970) 115 S.J. 61 CA.

68 See *Morgan v Odhams Press Ltd* [1970] 1 W.L.R. 820 CA at 828. See also *Hyams v Peterson* [1991] 1 N.Z.L.R. 711.

69 *Morgan v Odhams Press Ltd* [1971] 1 W.L.R. 1239; distinguishing *Astaire v Campling* [1966] 1 W.L.R. 34; *Hayward v Thompson* [1982] Q.B. 47 CA; and see *Hyams v Peterson* [1991] 1 N.Z.L.R. 711.

70 *Morgan v Odhams Press Ltd* [1971] 1 W.L.R. 1239, per Lord Reid at 1245.

71 The jury's decision will not be overturned lightly: *Hayward v Thompson* [1982] Q.B. 47. Now that the jury has ceased to be the presumptive tribunal of fact in defamation cases (Defamation Act 2013 s.11), the issue of capability is likely to fall away and a judge will be able to determine reference and meaning at an early stage.

72 *Bruce v Odhams Press Ltd* [1936] 1 K.B. 697; cf. *Greenslade v Swaffer* [1955] 1 W.L.R. 1109; *Morgan v Odhams Press Ltd* [1971] 1 W.L.R. 1239.

73 *Grapelli v Derek Block (Holdings)* [1981] 1 W.L.R. 822 CA; but see *Hayward v Thompson* [1982] 1 Q.B. 47; and *Chase v News Group Newspapers Ltd* [2002] EWHC 2209 (QB) where Eady J declined to strike out a claim where the claimant sought to establish identification from subsequent publications indicating there is no bright line as to the circumstances when the general rule would not apply.

74 *Simon v Lyder* [2019] UKPC 38; [2019] 3 W.L.R. 537; referring to *Grapelli v Derek Block (Holdings)* [1981] 1 W.L.R. 822 CA; and *Hayward v Thompson* [1982] 1 Q.B. 47.

75 [1944] A.C. 116. Applied in *Schloimovitz v Clarendon Press, The Times,* 6 July 1973 (definition of "Jew"). See *Church of Scientology of Toronto v International News Distributing Co* (1974) 48 D.L.R. (3d) 176; *Booth v BCTV Broadcasting System* (1983) 139 D.L.R. (3d) 88; *Farrington v Leigh, The Times,* 10 December 1987 CA.

76 cf. *Braddock v Bevins* [1948] 1 K.B. 580 at 588–589.

sociated Newspapers Ltd[122] Nicklin J noted that significant complication and cost would have been avoided had the court been asked to determine meaning (and the issue of fact/opinion) before a defence was filed. However, ruling on meaning as a preliminary issue will not always be appropriate if doing so would not be likely to save time and cost, and if meaning is not easily separable from other issues.[123] Once the court has determined the actual meaning of the words, it is not open to the defendant to seek to defend as true some other meaning.[124] Judicial determination of meaning as a preliminary issue does not necessarily establish the intensity of the sting, which may be a matter for trial. In some cases, the meaning of the words complained of and their defamatory sting will go together, but not always.[125] In *Sakho v WADA*[126] Steyn J also determined the meaning of republications which the claimant did not rely upon as separate causes of action, but instead sought damages in relation to the repetition via the republications as well as the original publications, and which were relied upon in relation to serious harm.

21-25 Whilst in the libel context there can be only one meaning that the court may find the words bear, it is worthy of note that in malicious falsehood[127] the single meaning rule does not apply, which could lead to a claimant failing in libel but succeeding in malicious falsehood. The Court of Appeal has considered such a potential outcome "bizarre".[128]

21-26 **Context** The context in which words are published is very important. In construing the meaning of an alleged libel, the whole publication is to be taken into account, provided that it all relates to the same defamatory allegation. This includes all of the text, even where spread across different pages, headlines, photographs and any text/insert boxes.[129] The claimant is not permitted to pick out this or that sentence which he may consider defamatory, for there may be other passages which will take away their sting. Bane and antidote may be found together. In the case of the internet, words may take on a different interpretation because of the way people treat and react to bulletin boards and blogs. It has been said that words published on bulletin boards and blogs may be more akin to slanders than libels.[130] Language which is not defamatory on its face may become so when the circumstances are taken into account. In *Lord McAlpine of West Green v Bercow*[131] an apparently innocuous question posted on Twitter was found to be defamatory to certain readers

[122] [2018] EWHC 3960 (QB).

[123] *Reay v Beaumont* [2018] EWHC 2172 (QB); *Dahlan v Middle East Eye Ltd* [2019] EWHC 2261 (QB).

[124] *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032 (QB); [2019] Q.B. 861.

[125] *Simpson v MGN Ltd* [2016] EWCA Civ 772; [2016] E.M.L.R. 26.

[126] [2020] EWHC 251 (QB); [2020] E.M.L.R. 14.

[127] See Ch.22.

[128] *Cruddas v Calvert* [2015] EWCA Civ 171; [2015] E.M.L.R. 16.

[129] *Charleston v News Group Newspapers Ltd* [1995] 2 A.C. 65 HL. In *Dee v Telegraph Media Group Ltd* [2010] EWHC 924 (QB); [2010] E.M.L.R. 20 Sharp J ruled that in relation to newspaper articles on the same subject spread over a number of pages, the ordinary reasonable reader was to be taken to have turned over the pages and read what he was directed to on the continuation pages. In *Horan v Express Newspapers* [2015] EWHC 3550 (QB) the court considered the full context of the article complained of, including the text on both pages 1 and 5 of the newspaper, the photograph used, the headlines and insert box. But in *Telnikoff v Matusevitch* [1992] A.C. 343 the House of Lords decided that a letter, written by the defendant, had to be looked at on its own since the claimant's article, to which it was a response, would not necessarily have been read by those who read the letter.

[130] *Smith v ADVFN Plc* [2008] EWHC 1797 (QB).

[131] [2013] EWHC 1342 (QB).

who would have been aware of specific facts. The tweet was: "Why is Lord McAlpine trending? *innocent face*". The judge observed that the tweet was not a publication to the world at large, such as a daily newspaper or broadcast. It was a publication on Twitter and the hypothetical reader must be taken to be a reasonable representative of users of Twitter who followed the defendant. The circumstances which would be known to such readers were that there was extensive speculation regarding the identity of an unnamed "senior Tory politician" who was said to be guilty of child abuse. The claimant would have been known to have been a senior conservative politician. The court concluded that the words "innocent face" would be regarded as insincere and ironical, giving rise to the defamatory imputation that the claimant was the abuser. Particular care needs to be taken where the words are published in a political context, especially during election time. Whilst the rules of meaning require no adaptation where the individual said to be defamed is a political or civil servant, it is necessary to avoid an over-elaborate analysis.[132] The Supreme Court confirmed the importance of context in *Stocker v Stocker*,[133] in which the fact that publication was in a Facebook post was critical, as Facebook is a casual medium, where an ordinary reader would read a post quickly and move on. The first instance judge was wrong to consider the dictionary definition of words in determining meaning. The meaning of the words "He tried to strangle me" in a Facebook post was that the claimant had grasped the defendant by the throat and applied force to her neck rather than that he had tried to kill her; as such the defendant's justification defence succeeded. In *Bukovsky v Crown Prosecution Service*[134] the words complained of were contained in a charging announcement published by the Crown Prosecution Service. In that context, the court upheld the judge's finding that the ordinary reasonable reader would not have understood that the claimant, having been charged with "making" indecent photographs of children, was present at the scene of the abuse and took the photographs himself. Rather, they would understand that words have special meanings when used in statutes, and would understand that the claimant had been charged with making indecent photographs of children contrary to the Protection of Children Act 1978 s.1. The Court of Appeal added that it would proceed cautiously when asked to substitute its view on meaning for that of the first instance judge and would only do so where it was satisfied that the judge was wrong. Whether any antidote in a piece will reduce the gravity of the meaning of a publication taken overall is highly dependent upon context.[135]

21-27 Material behind a hyperlink in online words complained of may need to be taken into account as part of the context when determining meaning.[136] In *Falter v*

[132] *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] E.M.L.R. 17 at [66]; *Thompson v James* [2014] EWCA Civ 600; [2014] B.L.G.R. 664; *Mughal v Telegraph Media Group Ltd* [2014] EWHC 1371 (QB).

[133] [2019] UKSC 17; [2019] 2 W.L.R. 1033. See also *Banks v Cadwalladar* [2019] EWHC 3451 (QB) on the interpretation of language used on social media (and also more generally); and *Abdulrazaq v Hassan* [2019] EWHC 2930 (QB) applying the same to WhatsApp.

[134] [2017] EWCA Civ 1529; [2018] 4 W.L.R. 13.

[135] *Poroshenko v BBC* [2019] EWHC 213 (QB); *Zarb-Cousin v Association of British Bookmakers* [2018] EWHC 2240 (QB); *Kirekegaard v Smith* [2019] EWHC 3393 (QB).

[136] *Greenstein v Campaign Against Anti-Semitism* [2019] EWHC 281 (QB); *Monroe v Hopkins* [2017] EWHC 433 (QB); [2017] 4 W.L.R. 68; *Banks v Cadwalladar* [2019] EWHC 3451 (QB); *Kirekegaard v Smith* [2019] EWHC 3393 (QB); and as to the limits *Caine v Advertiser & Times Ltd (No. 2)* [2019] EWHC 2278 (QB); see also in a different context *R. (Chabloz) v CPS* [2019] EWHC 3094

commercially, then the inclusion of such a term in the third party's contract with the defendants might have been intended to secure the claimant's position.

23-116 It is submitted that the difficult question when a breach of contract can constitute "unlawful means" for the purposes of the tort of unlawful means conspiracy should be answered by distinguishing between three situations: (i) where defendants combine to break a contract (or contracts) between them and the claimant; (ii) where defendants combine to break a contract (or contracts) between them and a third party; and (iii) where defendants combine to break a contract and by doing so also commit some other tort to the claimant, such as intimidation. In the first of these situations, the breach of contract will be an actionable civil wrong to the claimant, so there seems little scope for conspirators to argue that they should be left at liberty to combine to use such a method of intentionally inflicting harm on the claimant. Indeed, where several defendants combine to co-ordinate the breaking of contracts that they have with the claimant in order to amplify the harm inflicted, the case for allowing the claimant to sue for unlawful means conspiracy seems strong. So far as there is any basis for hesitation in cases falling within the first situation, it might be that a court should be cautious before finding that a defendant has joined a conspiracy to break a contract where (i) that defendant was not itself a party to any contract broken; *and* (ii) that defendant would not have been held to have procured any breach of contract. Such hesitation would be particularly appropriate if it appeared that a claim was formulated as being for an unlawful means conspiracy primarily to circumvent obstacles to a finding that the defendant had committed the tort of procuring a breach of contract. With respect to the second situation, where defendants combine to inflict loss on a claimant by breaking a contract (or contracts) between them and a third party, it is submitted that such behaviour should not normally be classified as "unlawful means", since, as noted above, such behaviour will only ordinarily be wrongful vis-à-vis the third party. The possibility of liability in the third situation, however, will play an important role in reducing the significance of the presumption against liability in the second situation. Thus a combination to cause loss to a claimant by breaking a contract with a third party *in order to prevent* that third party from dealing with the claimant can be treated as a conspiracy to commit the tort of causing loss by the use of unlawful means, and a combination to cause loss to a claimant by threatening to break a contract with a third party *in order to persuade* that third party to cease dealing with the claimant can be treated as a conspiracy to commit the tort of intimidation: in such cases the claims can be built on the combination being pursued by means of committing an economic tort to the claimant, rather than directly on any breach of contract.

23-117 **Breach of fiduciary duties and equitable wrongs** It was noted above that in *JSC BTA Bank v Ablyazov (No.14)* the Supreme Court left open the actionability of a combination to cause loss by means of breach of fiduciary duty because of the "complex problems" that stem from the fact that such duties are specific to particular relationships.[565] In such cases there is also the risk of liability for the conspiracy tort being inconsistent with the principles under which third parties can be held liable in equity for "knowing receipt" or "knowing assistance".[566] Recent

[565] *JSC BTA Bank v Ablyazov (No.14)* [2018] UKSC 19; [2018] 2 W.L.R. 1125 at [15]. See above, para.23-108.

[566] See *Lewin on Trusts*, 20th edn (2020) Chs 42 and 43.

cases have proceeded on the basis, however, that a breach of fiduciary duty can amount to "unlawful means" for the purposes of the conspiracy tort.[567]

Justification The question whether a defendant can rely on a defence of justification to avoid liability for unlawful means conspiracy is not straightforward. Two obstacles face the submission that such a defence should be recognised: it would only have logical space to operate in cases where whatever justification the defendant invoked was both insufficient to prevent the means being categorised as unlawful and insufficient to permit a finding that the defendant never intended to harm the claimant. In *Palmer Birch (a partnership) v Lloyd*[568] HH Judge Russen QC expressly rejected the possibility of justification being a defence "to an otherwise established unlawful means conspiracy". However, an apparently contrary position was adopted by Toulson LJ in *Meretz Investments NV v ACP Ltd* where the three alleged conspirators had acted so as to: (i) lawfully exercise a power of sale of a lease, granted as security for the loan of money to carry out property development; which (ii) prevented the borrower from performing its contractual promise to leaseback the premises to the claimant. Despite the fact that the transaction brought about a breach of contract by the borrower, Toulson LJ reasoned that because the purchaser of the lease "had a perfectly legitimate reason for acting as he did [i]t would therefore be wrong to classify such conduct as founding an action for unlawful means conspiracy".[569] It is submitted that the *Meretz* case reveals that where a claim alleges a *conspiracy* to breach a contract it may be appropriate to recognise a defence of justification of a breadth equivalent to the potential defence of justification for *procuring* a breach of contract.[570] Otherwise, a party who could rely on his "equal or superior right" as a justification for procuring a breach could nonetheless end up liable—as a conspirator—for having combined with the party in breach to cause loss to the claimant by means of the breach. **23-118**

(iii) "Indeed the means"

23-119 In the *Total Network* case, Lord Walker counter-balanced the extension of the concept of "unlawful means" to cover acts that would not be actionable if performed by a solitary defendant, such as some crimes, by insisting that to form the basis for a conspiracy claim such acts must have been "indeed the means … of intentionally inflicting harm",[571] and this approach was endorsed by Lords Sumption and

[567] See, e.g. *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at [170]–[172], where Morgan J expressly raised the concern about the overlap with secondary liability in equity; *Keymed (Medical & Industrial Equipment) Ltd v Hillman* [2019] EWHC 485 (Ch) at [122]. In *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [455]–[456] it was conceded that "knowing receipt" or "knowing assistance" could themselves amount to unlawful means for the purposes of an a unlawful means conspiracy (appeal dismissed without reference to this point: [2020] EWCA Civ 245; [2020] 3 W.L.R. 109); *Iranian Offshore Engineering & Construction Co v Dean Investment Holdings SA* [2019] EWHC 472 (Comm) at [172].

[568] [2018] EWHC 2316 (TCC); [2018] 4 W.L.R. 164 at [193].

[569] [2007] EWCA Civ 1303; [2008] Ch. 244 at [170], per Toulson LJ.

[570] See paras 23-57 to 23-61.

[571] *Revenue & Customs Commissioners v Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174 at [95], per Lord Walker. He equated this requirement with one proposed by Lord Nicholls in *OBG Ltd v Allen* [2008] 1 A.C. 1 at [159], using the wording that the unlawful means must be the "instrumentality".

that it will be broken); then protection is removed by s.225(2) if *one* of the reasons for the act is the fact or belief that the supplier (being a person other than the employer under the employment contract) does not, or "might not", recognise, negotiate or consult with a trade union.[773] The removal of immunity is thus wider than the tort in respect of a breach of s.187.

23-148 None of these sections justified the description that they made the closed shop "unlawful"[774]; but they made it virtually impossible to use commercial or industrial pressure to operate such an arrangement lawfully. It was—and remains—the case that a "union membership agreement or arrangement" is per se lawful.[775] But s.222(1) and (2), first introduced in 1988, added a new dimension. The trade dispute immunity of s.219 of TULRCA 1992 is now disapplied, where *one* of the reasons for the defendant's act is the fact or belief that an employer employs, has employed, or "might employ", a person who is not a member of any union, a particular union, one of a number of unions or a particular branch or section of a union.[776] So, too, the immunity is lost if the fact or belief supporting the act is that an employer is failing "or might fail" to discriminate against any such worker.[777] It may be noted that if a union calls or threatens industrial action to prevent a non-member being engaged by an employer, it may be joined as a respondent in the non-member's claim for compensation before an employment tribunal; but no liability in tort arises.[778] Lastly, TULRCA 1992 ss.144 and 186, make any term in a contract for the supply of goods or services "void" in so far as it either requires work to be done by persons who are (or are not) members of trade unions or a particular union, or requires a party to recognise, negotiate or consult with a trade union (whether or not specified in the contract). Sections 222(3)(a) and 225(1)(a) proceed to withdraw the protection of s.219 from an act whereby a person induces, or attempts to induce, another to insert such a term in a contract.

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[773] As first introduced in s.14(3) of the Employment Act 1982, the test was: "does not or is not likely to" (being changed to "might not" in para.4 of Sch.3 to the Employment Act 1988). This example illustrates the point that it is often necessary to look at the antecedent statutes which frequently made such changes step by step, gradually lessening the range of the trade dispute protection, between 1980 and 1993. See the Table of Derivations TULRCA 1992, p.169.

[774] *Messenger Newspapers Group Ltd v NGA* [1984] I.R.L.R. 397 at 399, per Caulfield J.

[775] The provisions enabling an employer to enforce a closed shop by way of dismissal were repealed finally by the Employment Act 1988 s.11 and Sch.4.

[776] TULRCA 1992 s.222(1)(5).

[777] TULRCA 1992 s.222(1)(b). Discrimination arises if the employer engages in conduct, in relation to persons employed by him, or who apply or are considered for employment, or in relation to provision of employment generally, which is different in some or all cases according to whether persons are not members of a union (or a particular union etc), and that conduct is more favourable to those who are members: s.222(2). In *Birmingham CC v Unite the Union* [2019] EWHC 478 (QB); [2019] I.R.L.R. 423, Freedman J held that the union did not lose its immunity under s.222(1)(b) where it was seeking parity for its members, rather than advantageous treatment. Acts done in furtherance of a trade dispute to induce the employer to hire or favour non-union workers appear to retain protection; but see the restrictions in s.137 (hiring), ss.145A and 145B (inducements), s.146 (detriment) and s.152 (dismissal). Ss.145A and 145B were inserted by the ERA 2004 and s.146 was amended by the ERA 1999 and ERA 2004 to counter the effects of *Associated British Ports v Palmer and Associated Newspapers Ltd v Wilson* [1995] 2 A.C. 454 HL, and to remedy the failure of the law to comply with art.11 of the ECHR identified by the European Court of Human Rights in *Wilson v United Kingdom* [2002] I.R.L.R. 568. See Wedderburn (2000) 29 I.L.J. 1, 18-20; Ewing (2003) 32 I.L.J. 1, 5–15.

[778] See TULRCA 1992 ss.137, 142 and 143(4) ("no other legal liability arises", save liability to pay such compensation). This would appear to exclude the remedy of injunction in the High Court, even on the reasoning in *Associated British Ports v TGWU* [1989] 1 W.L.R. 939 CA (reversed on other grounds, [1989] 1 W.L.R. 939 HL).

The structure of these sections of TULRCA 1992 suggests that the liability of a trade union which attempts to induce breaches of the code of commercial dealing laid down, whether it be in order to have a void clause incorporated in a contract or to have the employers unlawfully exclude suppliers who are, or may be, non-union enterprises, or who refuse to consult with trade unions, is to be judged by the normal common law principles about liability for the economic torts. This may explain the extent to which the trade dispute immunities are excluded by s.222(3) and, especially, s.225(2) which applies to interference with any supply of goods or services where *one* of the reasons is a belief that the employer might not consult. It would not necessarily follow that a union which attempted to induce an employer not to contract with a supplier who might refrain from consulting a trade union in respect of his employees would itself become a joint tortfeasor, or conspirator, with the guilty employer, so that the statutory tort (under s.145 or s.187) could be deployed against it.[779] Those sections expressly refrain from laying any duty upon third parties.[780] If the union were jointly liable for the statutory torts, removal of the immunities in trade disputes by ss.222 and 225 would be unnecessary. The point is most likely to arise in relation to the range of claimants. In extending that range to any person "adversely affected"[781] the new statutory code on commercial dealing goes wider than the common law, to such an extent that it would be wrong to impose that range of liability upon persons not expressly subjected to the statutory tort itself.[782] **23-149**

(e) Dismissals and immunities

When the law on unfair dismissal was first enacted in 1971 it was expressly provided that the dismissal of an employee who was taking part in a strike or irregular action short of a strike was not unfair unless other employees who took part were not dismissed and the reason for the dismissal of the employee was his exercising his statutory right to belong to or take part in the activities of a trade union.[783] After the re-enactment of the law on unfair dismissal in 1974, this was amended in 1975 to a general exclusion from the right to complain of unfair dismissal of employees who at the time of their dismissal were taking part in a strike or other industrial action except where there was "victimisation" in the sense that some workers who took part in the action were dismissed while others who took part were not. In "victimisation" situations the dismissed workers could make unfair dismissal **23-150**

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[779] By analogy with Silverthorne in *Rookes v Barnard* [1964] A.C. 1129 HL; see para.23-155, and the "common design" cases, *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] A.C. 1013 HL. cf. per Lord Woolf MR *Credit Lyonnais Bank Nederland v Export Credits Guarantee Dept* [2000] 1 A.C. 486; [1999] 2 W.L.R. 540 HL at 550–551.

[780] Compare the principles for determining whether a breach of statutory duty gives rise to a cause of action approved in *Lonrho Ltd v Shell Petroleum (No.2)* [1982] A.C. 173 HL; see para.23-89. Indirect inducement to break the obligations in ss.145 and 187 of TULRCA 1992 would require extraneous unlawful means to be potentially actionable as an instance of the tort of causing loss by unlawful means: see para.23-78 onwards; *Barretts & Baird (Wholesale) Ltd v IPCS* [1987] I.R.L.R. 3 at 10.

[781] See ss.145(5) and 187(3) of TULRCA 1992.

[782] On the range of claimants at common law see *DC Thomson & Co Ltd v Deakin* [1952] Ch. 646 CA, especially, per Jenkins LJ at 696-698; *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 N.Z.L.R. 354 (on the need to find causative intention: at 359–361); and see *Thomas v NUM (South Wales Area)* [1986] Ch. 20 at 54 (claimants restricted to breach of duty by pickets at their own pit); *Timeplan Education Group v NUT* [1997] I.R.L.R. 457 CA; but compare *Falconer v ASLEF* [1986] I.R.L.R. 331 (County Court).

[783] See Industrial Relations Act 1971 s.26.