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2nd Edition

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Legal Principles

Second Edition

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Malaysia

Authors
Steven Hoe *Advocate & Solicitor (Malaya), Barrister-at-Law (Middle Temple), BPTC (BPP University College, London), CPE (South Bank University, London), BA (Hons) (Portsmouth University, United Kingdom), PG Dip. NVQ Level 4 (Criminal Justice Studies), LL.B. (Wolverhampton University, United Kingdom)*
Dr Nurjaanah Chew Li Hua *LLB (Hons) (Mal), LLM (Mal), PhD (Manchester)*

Reviewers (1st Edition)
K Karunamoorthy *B.Sc. (U.Mal), LL.B (Hons) (Lond), CLP, ACII (Lond), Associateship of Malaysian Insurance Institute (AMII), CFP, FChFP, Syariah RFP*
Dr Nurjaanah Chew Li Hua *LLB (Hons) (Mal), LLM (Mal), PhD (Manchester)*

Reviewers (2nd Edition) Updated
Sam Cheah You Sum *LL. B (Hons), LL.M (Lond), Ph.D (UKM)*
Wong Eng Yew, Joseph *Associateship of Malaysian Insurance Institute (AMII), Associateship of Chartered Insurance Institute (ACII), CLP, Chartered Insurer, LLB (Hons), MBA*
Dato' T.Tharuma *D.S.P.N, D.J.N, Advocate and Solicitor (Malaya), LLB (Hons) London, Barrister (Middle Temple), Mediator (MIMC), (USM-ADRC) Sports Arbitrator (A.I.A.C)*

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Asian Institute of Insurance

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The Development Team

Asian Institute of Insurance would like to express its sincere appreciation to all the organisations and individuals involved for their invaluable contribution, support, and assistance in making the publication of this new edition possible.

Your Learning Outcomes

By the end of this course, you should be able to:

1. Identify and explain the key features of the Malaysian legal system
2. Acquire a sound of understanding of the legal aspects of the law affecting businesses
3. Understand and identify tortious situations from a legal perspective
4. Identify and explain the essential principles relating to the formation, content and remedies for breach of contract
5. Explain the rules of agency as they apply to sole traders, partnerships and companies
6. Acquire an understanding of the basic insurance principles

1

Malaysian Legal System

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Learning Outcomes

After completing this topic, you should be able to:

- *Define the concept of law in Malaysia in relation to the State and the Constitution*
- *Define and describe what "law" is*
- *Grasp the interrelationships amongst law in Malaysia, the State and the Constitution*
- *List the various classifications of law and describe what public law, international law, and private law are*
- *Explain how Malaysian law evolved*
- *Discuss the main sources of Malaysian Law – Written Law, Unwritten Law, and Islamic Law*
- *Summarise the judicial system in Malaysia*
- *Describe the Court structure, the hierarchy of the Courts, their jurisdiction, and powers in general*
- *State the composition of Subordinate Courts in Peninsular Malaysia – the Magistrates' Courts, Court for Children, and the Sessions Courts*
- *Identify and describe the Superior Courts in Malaysia – the High Court, the Court of Appeal, the Federal Court, and the Special Court*
- *Understand judicial precedent and judicial interpretation of statutes*
- *Differentiate between civil and Criminal law*

Why this Topic is Important

This topic is important because it provides the fundamental understanding that law is basically a means or device to regulate the economic and social behaviour of society. Its purpose is mainly to preserve the economic and social welfare of our society by implementing the element of control into the day-to-day activities of its citizens and its businesses. As human beings do not live in isolation and because they carry on economic activity and need to recognise and be subject to some superior authority, there is a need for law to exist. Law is needed to regulate and control the affairs of society. As members of our society interact with each other, conflicts will inevitably arise from the different needs and wants of these members. Thus, law being a regulatory device, provides the mechanism for society to function through tools such as "legislation" and "caselaw". Law also plays other roles such as guaranteeing our freedoms, enabling free enterprise, and providing a means to settle disputes amicably.

The process of instituting and maintaining or defending a legal action (called "litigation") is both time-consuming and costly due to the complex procedural rules employed within the Malaysian Court system. As a rule of thumb, the higher the Court in the Court hierarchy, the greater the legal costs. Therefore an understanding of the Court structure and its jurisdiction and powers in general, is important.

Introduction

Malaysia is a Federation of thirteen states and three federal territories, namely, Kuala Lumpur, Putrajaya, and Labuan. The Federation has a central government. The legislative and executive powers of the federation are divided between the central and state governments. Important matters such as defence, external affairs, and others are under the Federal Government and matters of local concern, for example, land, mining, and agriculture are under the state law.[1]

The common sources of law in Malaysia include:

- Common Law – an evolved law comprising of the body of law developed as a result of custom and judicial decisions from the English Courts over the centuries.
- Statutes - a formal and written law of Malaysia. When Parliament passes a law, it becomes an "Act" which is also known as "statute law".
- Customary or Native Law – it is of little relevance to the communities in West Malaysia today. However, for the natives of Sabah and Sarawak, customary law remains an important source of law.
- *Syariah* Law – applies only to Muslims and comes under the jurisdiction of the *Syariah* Court. It covers matters such as marriage, divorce, adoption, wills and other offences under Islamic law.[2]
- International Law.

1.1 Classification of Laws

Section 3 of the *Interpretation Acts 1948* and *1967 (Act 388)* states that "law" has the meaning assigned by Article 160(2) of the *Malaysian Federal Constitution 1957*. The term "law" is in turn defined by Article 160(2) of the *Malaysian Federal Constitution 1957* to include:

a) the written law;
b) common law in so far as it is in operation in the Federation or any part thereof; and
c) any custom or usage having the force of law in the Federation or in any part thereof.

The Malaysian legal system is a common law system where legal principles are developed by judges through caselaw. This system was inherited from England and similar systems are found in former British colonies such as Australia, the United States, Canada, New Zealand, and Singapore. Under the common law system, as practised in Malaysia, law has been classified into three broad divisions: namely, public law, international law, and private law.

What is "law"?

Law comprises of the general rules, which seek to govern and control the behaviour of people in society.

1 *Federal Constitution of Malaysia.* Ninth Schedule.
2 *Federal Constitution of Malaysia.* Ninth Schedule, Section 1, List II – State List.

1.1.1 Public Law

"Public law" is basically the law, which governs the relationship between individuals and the state. Public law may be further subdivided into two categories:

i) Constitutional law, and
ii) Criminal law.

The Federal Constitution of Malaysia established Malaysia as a Federation and lays down the basic features of government. These include the system of parliamentary democracy and the establishment of constitutional monarchy. The Constitution is declared to be the supreme law in the federation under Article 4(1). It is the main source of law in Malaysia. The basic rights of individuals are laid down as fundamental liberties in Part II.

Constitutional law deals with the rights of citizens and areas dealing with state and federal powers.

Case Law *Meaning of "Law"*

CASE 1-1 *Ong Ah Chuan -v- Public Prosecutor* [1981] 1 MLJ 64

In the Privy Council case of *Ong Ah Chuan -v- Public Prosecutor,* **Lord Diplock** pointed out the serious error in treating the word "law" in the Singapore Constitution as meaning only *written* law as 'law' is defined as including 'written law'. References to "law" in such constitutional contexts as "in accordance with law", "equality before the law", "protection of the law" and the like was held to refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.

ACTIVITY

Conduct research and find out which branch of law relies primarily on punishment as an adverse consequence to the perpetrator?

Criminal law codifies the various offences committed by individuals against the state, such as murder, cheating, criminal breach of trust, forgery causing grievous hurt, theft, robbery, and counterfeiting. It aims at punishing criminals and suppressing crime. Thus, Criminal law imposes on individuals, the obligation not to commit crimes. A crime is a wrong against the state for which punishment is inflicted by the state, the proceedings being brought by the Public Prosecutor. The essential elements of crime are *actus reus* (a wrongful act) and *mens rea* (a guilty mind). For example, *X* strangles (*actus reus*) *Y* with intent to kill (*mens rea*). *Mens rea* is not a necessary element for certain statutory offences.

1.1.2 International Law

"International law" may be defined as that body of law, which is composed for its greater part, of the principles and rules of conduct, which states feel themselves bound to observe, and

consequently commonly do observe, in their relations with each other. It may be subdivided into two categories – "public international law" and "private international law".

Public international law is the law that prevails between states, whereas private international law – or "conflict of laws" as it is often called – is a part of municipal law, as a result of which, in every country there will be a different version of it. It consists of the rules that guide a judge when the laws of more than one country affect a case.

Malaysia has ratified many treaties and conventions (agreements), and once ratified, the Government is obliged to conform to the convention and act in accordance with the treaty. Examples include the United Nations treaties and conventions, such as the *United Nations Convention against Transnational Organised Crime, Convention concerning Forced or Compulsory Labour,* and *Geneva Convention relative to the Treatment of Prisoners of War*.

1.1.3 Private Law

The third broad division of law is "private law". Private law is concerned with matters that affect the rights and duties of individuals amongst themselves. Basically, private or Civil law is intended to give compensation to persons injured, to enable property to be recovered from wrongdoers, and to enforce obligations (contracts and trusts).

Contracts are based on agreement. The law of Contract is the branch of Private law which determines when a promise or a set of promises is legally enforceable.

"Tort" is based on an obligation imposed by law. A tort is a civil wrong. It is the breach of a general duty which is imposed by the law (and not agreed between the parties). It is remediable by a civil action for unliquidated damages. Any person whose legal right is infringed may sue that wrongdoer. The essential elements of a tort are that there must be an act or omission done intentionally or negligently, and there must be damage caused by such act or omission, which is not remote.

A trust is an equitable obligation binding a person (who is called a "trustee") to deal with property over which he has control (which is called "trust property") for the benefit of persons (who are called "beneficiaries" or *cestui que trust*) of whom he may himself be one and any one of the beneficiaries may enforce the obligation.

Which classification of law are the rules governing insurance categorised in?

The rules governing insurance in Malaysia are principally found in the *Financial Services Act 2013*, *Contracts Act 1950* and the common law, particularly the law of torts and agency law.

1.2 Features of Malaysian Legal System

Malaysia is a Federation, which consists of Peninsular Malaysia, Sabah, and Sarawak. It is one political unit but it is not governed by the same set of laws. The Malaysian Parliament legislates for the whole country, while the Federal Court acts as a final Court of appeal for the whole country.

It is important that we should know the meaning of the word "State". This is because legal systems are administered almost entirely on the basis of the political unit known as the State. For international purposes, Malaysia is one state. Within Malaysia however, there are thirteen states altogether, namely, Kedah, Perlis, Kelantan, Terengganu, Penang and Province Wellesley, Perak, Pahang, Selangor, Negeri Sembilan, Johore, Malacca, Sabah, and Sarawak, and the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya.

Each state has a government and has rules, which lay down who shall govern and how it should be governed. Unlike the United Kingdom where there is an unwritten constitution derived generally from the common law, statutes, and conventions, Malaysia has a written constitution. This written constitution is called the "Federal Constitution". The Federal Constitution declares itself to be the supreme law of the Federation. Article 4(1) of the Federal Constitution states:

> *…Supreme law of the Federation*
>
> *4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void…*

Thus, even laws enacted by Parliament, which are inconsistent with the Federal Constitution may be declared to be *ultra vires* the Federal Constitution by the Courts and be therefore void and of no effect.

Case Law *Supremacy of the Federal Constitution*

CASE 1-2 *Danaharta Urus Sdn Bhd -v- Kekatong Sdn Bhd* [2004] 2 MLJ 257

In the Malaysian Federal Court case of *Danaharta Urus Sdn Bhd -v- Kekatong Sdn Bhd*, the respondent ("Kekatong") was the registered proprietor of certain lands. These lands were charged by way of a third-party charge to a bank, which had availed facilities to a borrower. The borrower had defaulted and judgement was entered against him. The bank commenced foreclosure proceedings and obtained an order for sale, which was subsequently, on appeal, set aside.

Upon the implementation of the *Pengurusan Danaharta Nasional Act 1998* ("the Act"), the bank sold the loan and the securities to the respondent ("Danaharta"), with whom, pursuant to the provisions of the Act the land vested. Kekatong applied to the High Court seeking to restrain Danaharta from exercising any rights under the Actor under the vesting order and with particular regard to Section 57 of the Act and paragraph 5 of the 15th Schedule to the National Land Code ("the NLC"). The High Court refused the injunction on the basis that there was no serious question to be tried and in any event, it had no jurisdiction to grant an injunction by reason of Section 72 of the Act.

Kekatong appealed to the Court of Appeal.

The Court of Appeal held that Section 72 was unconstitutional as it contravened Article 8 of the Federal Constitution. The appellant appealed and the issue for consideration was whether Section 72 was unconstitutional.

The Malaysian Federal Court in allowing the appeal, held:

1) Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximise recovery values.
2) In order to accomplish these objectives, the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facilities by way of statutory vesting; to manage the affairs of corporate borrowers through special administrators appointed to formulate work-out plans in order to repay debts owing to creditors, and finally to dispose of charged assets. Thus, insofar as a disposition of assets was concerned the appellant was given additional power to sell charged lands by private treaty, without securing the usual Court order as banks and other secured lenders are obliged to do so under the NLC.
3) That clearly is the purpose of Section 72 which applies to all persons in the same position as the respondent. Thus, it applied equally to all persons who were similarly circumstanced. This was a reference to all persons whose assets and liabilities had been acquired by the appellant pursuant to the Act. Surely it could not include the appellant itself for reasons which were too plain to state.
4) The law that the Federal Court referred to thus, far made it clear beyond doubt that there would be a violation of Article 8(1) only if legislation does not apply to a person who is similarly circumstanced as the other persons in the classification and not to someone like the appellant outside it. The conclusion of the Court of Appeal was therefore wholly unsustainable as it was a total deviation from the law regulating Article 8(1). It was therefore the Federal Court judges' unanimous view that there was a rational basis between the classification in Section 72 and its object in relation to the Act. Section 72 therefore satisfied the requirements of the reasonable classification test and is not unconstitutional.

Case Law *Supremacy of the Federal Constitution*

CASE 1-3 *Repco Holdings Bhd -v- Public Prosecutor* [1997] 4 CLJ 740

In the Malaysian High Court case of *Repco Holdings Bhd -v- Public Prosecutor,* the applicant, Repco Holdings Bhd, was charged by the Securities Commission for infringing Section 86 of the *Securities Industry Act 1983*. The prosecution was to be conducted by two officers pursuant to Section 126(2) of the *Securities Industry Act 1983* and Section 39(2) of the *Securities Commission Act 1993*. At the hearing, a preliminary objection was raised on the *locus standi* of the two officers, as the stated provisions were *ultra vires* Article 145(3) of the Federal Constitution and were void to that extent.

The Sessions Court referred to the High Court for the question to be determined.

The Malaysian High Court declaring both Section 126(2) of the *Securities Industry Act* and Section 39(2) of the *Securities Commission Act* to be unconstitutional, null and void, held:

1) Section 126(2) of the *Securities Industry Act* and Section 39(2) of the *Securities Commission Act* are *ultra vires* and wholly contravene Article 145(3) of the Federal Constitution.
2) By reason of Article 4(1) of the Federal Constitution law, which is inconsistent with the Constitution is void and unconstitutional.

Gopal Sri Ram JCA, in delivering the judgement of the Court, held that once it has been amply demonstrated that an Act of Parliament contains provisions that are in direct conflict with the supreme law, it is the duty of the Court to say so clearly and unequivocally.

The Federal Constitution confers legislative power to the Federal Parliament and the State legislatures.

Article 73 reads:

> *…Extent of federal and State laws*
>
> *73. In exercising the legislative powers conferred on it by this Constitution —*
>
> *(a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation;*
>
> *(b) the Legislature of a State may make laws for the whole or any part of that State…*

Thus, Parliament may make laws for the whole of Malaysia. Article 74 of the Federal Constitution further provides that Parliament may make laws with respect to any of the matters enumerated in the "Federal List" under List 1 of the Ninth Schedule or the "Concurrent List" under List 3 of the Ninth Schedule.

The provisions of the *Federal List* (List 1 of the Ninth Schedule) may be summarised as follows:

1) External affairs
2) National defence
3) Internal security
4) Civil and Criminal law and procedure and the administration of justice
5) Federal citizenship and naturalisation; aliens
6) The machinery of government
7) Finance
8) Trade, commerce and industry
9) Shipping, navigation and fisheries
10) Communications and transport
11) Federal works and power
12) Surveys, inquiries and research
13) Education
14) Medicine and health
15) Labour and social security
16) Welfare of the aborigines
17) Professional occupations
18) Holidays; standard of time
19) Unincorporated societies
20) Control of agricultural pests; protection against such pests; prevention of plant diseases
21) Newspapers; publications; publishers; printing and printing presses
22) Censorship
23) Theatres; cinemas; public amusements
24) Repealed
25) Co-operative societies
25A) Tourism
26) Prevention and extinguishment of fire, including fire services and fire brigades

Case Law *Supremacy of the Federal Constitution*

CASE 1-4 *Tan Sri Abdul Khalid -v- Bank Islam (M) Bhd* [2013] 3 MLJ 269

In the Malaysian Court of Appeal case of *Tan Sri Abdul Khalid -v- Bank Islam (M) Bhd*, the appellant ("Khalid") and the respondent ("Bank Islam") had separately sued each other over the grant by Bank Islam to Khalid of an Islamic financing facility ("the facility"). Khalid sought to declare the facility and the agreements executed in connection with it as invalid and in contravention of the *Islamic Banking Act 1983* (IBA) while Bank Islam's suit was to recover from Khalid the monies he owed under the facility. After both suits were consolidated Bank Islam applied to the High Court to refer certain *Syariah* questions arising in the suits to Bank Negara's *Syariah Advisory Council* (SAC) for its ruling pursuant to Section 56 of the *Central Bank of Malaysia Act 2009* ('the Act'). Section 56, *inter alia*, mandatorily required any *Syariah* question arising in proceedings relating to Islamic financial business before any Court or arbitrator to be referred to the SAC for a ruling. Such a ruling was binding on the Court or arbitrator under Section 57 of the Act.

The High Court granted the application and referred certain questions to the SAC for its ruling prompting Khalid to file the instant appeal to the Court of Appeal. He contended that:

i) Sections 56 and 57 were unconstitutional for being in contravention of Part IX and Articles 8 and 74 of the Federal Constitution ("Constitution");
ii) the SAC usurped the functions of the Courts in ascertaining issues pertaining to Islamic law; and
iii) the High Court erred in holding Sections 56 and 57 had retrospective effect.

The Malaysian Court of Appeal, in dismissing the appeal with costs, held:

1) Sections 56 and 57 were valid and constitutional. They were within Parliament's power to enact. Article 74(1) of the Constitution empowered Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1) or the Concurrent List (List 3) of the Ninth Schedule of the Constitution. Item 4(k) of List 1 empowered Parliament to make laws in respect of civil and Criminal law and procedure and the administration of justice including the ascertainment of Islamic law and other personal laws for purposes of federal law. Banking was a matter within the Federal List and the *Islamic Banking Act* 1983 and the Act were clearly federal laws.
2) Sections 56 and 57 were applicable without discrimination to all parties who were in the same circumstances and so it could not be said that they contravened Article 8 of the Constitution.
3) The judicial functions of the Court were not usurped by the SAC. The fact that the Court was bound by the SAC's ruling under Section 57 did not detract from the judicial functions and duties of the Court in providing a resolution to the dispute between the parties. In applying the SAC ruling to the particular facts of the case before the Court, the judicial functions of the Court to hear and determine a dispute remained inviolate. The SAC, like any other expert, did not perform any judicial function in the determination of the ultimate outcome of the litigation before the Court.
4) The High Court was correct in holding Sections 56 and 57 had retrospective effect. Khalid was not deprived of his pre-existing rights. Under the previous *Central Bank of Malaysia Act 1958,* the SAC's statutory duties and powers to rule on *Syariah* questions referred to it in connection with Islamic financial matters or business already existed. Under the 1958 Act the Court had discretionary power to refer such questions to the SAC whereas under the 2009 Act the reference was made mandatory.

The provisions of the *Concurrent List* (List 3 of the Ninth Schedule) are summarised as follows:

1) Social welfare, social services, protection of women, children and young persons
2) Scholarships
3) Protection of wild animals and wild birds; National Parks
4) Animal husbandry
5) Town and country planning
6) Vagrancy and itinerant hawkers
7) Public health, sanitation and prevention of diseases
8) Drainage and irrigation
9) Rehabilitation of mining land and land which has suffered soil erosion

9A) Fire safety measures and fire precautions in the construction and maintenance of buildings
9B) Culture and sports
9C) Housing and provision for housing accommodation:improvement trusts
9D) Subject to the Federal List, water supplies and services
9E) Preservation of heritage

The matters enumerated in the Concurrent List may also be the subject matter of laws made by the state legislatures. Of more importance is the fact that the Legislature of a state may also make laws with respect to any of the matters enumerated in the "State List" under List 2 of the Ninth Schedule.

The provisions of the State List (List 2 of the Ninth Schedule) cover matters such as the following:

1) Islamic law and personal and family law of Muslims; Malay customs; offences by Muslims; *Syariah* Courts
2) Land
3) Agriculture and forestry
4) Local government
5) Local services
6) State works and water
7) Machinery of the State Government
8) State holidays
9) Offences against State Law
10) Inquiries for State purposes
11) Indemnity
12) Turtles and riverine fishing

Case Law *Right of the State Legislature to enact laws*

CASE 1-5 *Menteri Dalam Negeri & Ors -v- Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468

In the Malaysian Court of Appeal case of *Menteri Dalam Negeri & Ors -v- Titular Roman Catholic Archbishop of Kuala Lumpur,* the Malaysian Court of Appeal held that the right of the State Legislature to enact laws, to ensure the protection and sanctity of Islam, under Article 11(a) of the Federal Constitution was constitutional.

Such constitutional right of the states, especially where there are Rulers who are Heads of the religion of Islam, fortified the position of Islam in the Federation that it should be immune to any threat or attempt to weaken Islam's position as the religion of the Federation. Furthermore, any act or attempt of propagation on the Islamic population by other religions is an unlawful act. Article 11(4), Federal Constitution permits the control or restriction of the propagation of any religious doctrine or belief among Muslims by state law or federal law. The respective state law provides that such an act is an offence.

Case Law *Supremacy of the Federal Constitution*

CASE 1-6 *Mamat bin Daud & Ors -v- Government of Malaysia* [1988] 1 MLJ 119

In the Malaysian Supreme Court case of *Mamat bin Daud & Ors -v- Government of Malaysia*, the petitioners were charged for an offence under Section 298A of the Penal Code for doing an act which is likely to prejudice unity among persons professing the Islamic religion. They were alleged to have acted as an unauthorised Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu without being so appointed under the *Terengganu Administration of Islamic Law Enactment 1955*.

The issue is whether the said Section which was enacted by Parliament by an amending Act in 1983 is *ultra vires* Article 74(1) of the Federal Constitution, since religious matters are reserved for the state legislatures and therefore beyond the legislative competency of Parliament. The respondent contended that the Section was valid because it is a law passed by Parliament on the basis of public order, internal security and also Criminal law according to Article 11 clause (5) and items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.

The Malaysian Supreme Court held by a majority that:

1) Section 298A of the Penal Code is a colourable legislation in that it pretends to be legislation on public order, when in pith and substance it is a law on the subject of religion with respect to which only the States have pothe wer to legislate under Articles 74 and 77 of the Federal Constitution.
2) There must be a declaration that Section 298A of the Penal Code is a law with respect to which Parliament has no power to make law and a declaration that Section 298A of the Penal Code is invalid and therefore null and void and of no effect.

In addition, Article 75 provides that if any state law is inconsistent with a Federal law, the Federal law shall prevail. The said Article reads as follows:

> *…Inconsistencies between federal and State laws*
>
> *75. If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void…*

1.3 Sources of Malaysian Laws

The main sources of Malaysian law comprise of *written* and *unwritten* law. Written law (comprising the Federal Constitution, state constitutions, statute law and delegated legislation) and unwritten law (mainly common law and equity) are most important. Another source of law, which strictly speaking is not yet a main source of law but is becoming increasingly important, are international treaties.

Written law is the most important source of law. It refers to that portion of Malaysian law which includes the following:

1) The Federal and State Constitutions – the Federal Constitution is the supreme law of the land. There are also Constitutions of the thirteen States comprising the Federation, which form part of the written law in Malaysia – State Constitutions.
2) Legislation enacted by Parliament and the State Assemblies (e.g. Acts of Parliament, Ordinances, Enactments, etc.).
3) Subsidiary legislation made by persons or bodies under powers conferred on them by Acts of Parliament or State Assemblies (e.g. Rules and Regulations, By-laws, Guidelines, etc.).

Written law is also referred to as "statute law". As seen earlier, this is a law made by Parliament and any subordinate bodies to whom Parliament has delegated power to legislate. Statutes assume the existence of common law, and in many cases they reaffirm common law principles; for example, the *Sale of Goods Act 1957* and the *Bills of Exchange Act 1949*.

Where statute law and common law conflict, statute law will prevail to the extent of the conflict. Once an Act of Parliament comes into existence, it remains law until it is repealed by a later Act of Parliament. Most Acts of Parliament set out the law on a particular matter in broad terms. They also contain a provision stating that detailed rules necessary to give effect to the legislation can be found in the relevant regulations or guidelines. For example, under the *Financial Services Act 2013*, the Finance Minister may make regulations whilst Bank Negara Malaysia may grant or issue approvals, consents, specifications, notices, requirements, directions, standards, codes or measures thereunder.

Unwritten law is simply that portion of Malaysian law which is not written, i.e. law which is not being enacted by Parliament or the State Assemblies and which is not found in the written Federal and State Constitutions. Unwritten law is found in cases decided by the Courts, local customs, etc. Unwritten law comprises the following:

1) Principles of English law applicable to local circumstances;
2) Judicial decisions of the superior Courts, i.e. the High Courts, Court of Appeal and the Federal Court; and
3) Customs of the local inhabitants, which have been accepted as law by the Courts.

One other important source of Malaysian law is Islamic law. In Malaysia, *Syariah* or Islamic law is being increasingly applied to our local laws. For instance, currently there is a move to incorporate Islamic principles into land law and banking law. Islamic law applies to all persons who are Muslims and is of particular importance in matters relating to family disputes (e.g. marriage and divorce) and to issues pertaining to estate matters such as the division of property and assets upon a person's death.

International treaties and conventions are not part of municipal or domestic law unless they are given express legislative approval by Parliament. This approval is in the form of an enabling Act and must be expressly provided. The negotiation, signature and ratification of international treaties and conventions are Federal matters.

ACTIVITY

Visit the Commonwealth Legal Information Institute website (http://www.commonlii.org/) and explore the Malaysian databases.

1.3.1 Civil Law Act 1956

It is highly likely that there was a case for having a general provision for the Court to apply the common law of England and the rules of equity subject to necessary conditions. The legal and judicial system established by the British was the English Legal system. Common law and rules of equity form an important part of the law applicable by the Courts. Malaya did not exist then. Written laws, as existed then, were perhaps inadequate. The written laws which had been made were common law based. In areas where no written law had been made, the Courts applied the common law of England and the rules of equity.

Indeed, with or without the provisions, the lawyers would still resort to and the Courts would apply the same, without any guidance. Where else would they look to? They were all trained as common law lawyers, at that time, all in England. In the circumstances, it was natural for the applicability of the common law of England and the rules of equity to be spelled out clearly by law.

Nonetheless, the *Civil Law Enactment 1937* gave statutory authority for the introduction of English Common Law and equity to the then Federated Malay States. The *Civil Law (Extension) Ordinance 1951* extended the application of the enactment to the Unfederated Malay States when they became part of the Federation of Malaya in 1948. Both were then replaced by the *Civil Law Ordinance 1956*. This was later superseded by the *Civil Law Act 1956 (Revised 1972)* to harmonise the law with Sabah & Sarawak, when Malaysia was established in 1963.

The purpose of the *Civil Law Act 1956* (Act 67) is still relevant as we may still need to refer to the common law of England, particularly in the law of tort. In the same way, we may still need to refer to the rules of equity, particularly in the law of trust.

There are provisions in the *Civil Law Act* which lead to inconsistency in the reception of English law between the different states. Nevertheless, the *Civil Law Act 1956* (Act 67) still serves a useful purpose as it provides guidance to the Court in applying such rules.

1.3.2 The Laws of England and Malaysia

The *Laws of England* is the legal system of England and Wales, and is the basis of common law legal systems used in most Commonwealth countries and the United States (as opposed to Civil law or pluralist systems in use in other countries). It was exported to Commonwealth countries while the British Empire was established and maintained, and it forms the basis of the legal systems of most of those countries. England and Wales are constituent countries of the United Kingdom; Scotland and Northern Ireland have their own legal systems, although in some areas of law there are no differences between the jurisdictions. Whilst Wales has a devolved Assembly, its power to legislate is limited by the *Government of Wales Act 2006*.

ACTIVITY

Research the Latin term "stare decisis". How does it relate to the modern term "judicial precedent"?

English law is a mixture of common law, legislation passed by the UK Parliament (or subordinate legislation made under delegated authority) and European law. The essence of common law is that it is made by judges sitting in Courts, applying their common sense and knowledge of legal precedent (*stare decisis*) to the facts before them. A decision of the highest appeal Court in England and Wales, the Supreme Court of the United Kingdom, is binding on every other Court in the hierarchy. Common law can be altered by Parliament through enactment of Statutory Legislation.

European law used to apply in England and Wales because the UK at the time was a member of the European Union, and so the European Court of Justice can direct English and Welsh Courts on the meaning of areas of law in which the EU has passed legislation.

However, the UK ceased to be an EU Member State at 11 pm on 31 January 2020 (exit day). As of that point, directly applicable EU law ceased to apply to the UK under EU Treaties and the UK ceased to be bound by the obligations under those treaties which require EU member States to ensure that their domestic legislation meets the EU obligations set out in EU laws.[3]

One of the major problems in the early centuries was to produce a system that was certain in its operation and predictable in its outcomes. Too many judges were either partial or incompetent, acquiring their positions only by virtue of their rank in society. Thus, a standardised procedure slowly emerged, based on a system termed *stare decisis* which basically means *"let the decision stand"*. The doctrine of precedent which requires similar cases to be adjudicated in a like manner falls under the principle of *stare decisis*. Thus, the *ratio decidendi* (reason for decision) of each case will bind future cases on the same generic set of facts both horizontally and vertically in the Court structure. The highest appellate Court in the UK is the Supreme Court of the United Kingdom and its decisions are binding on every other Court in the hierarchy which are obliged to apply its rulings as the law of the land. The Court of Appeal binds the lower Courts, and so on.

When the judges follow a "precedent", they are actually following the principle established in an earlier case. What are the three elements that constitute this principle?

This principle is referred to by the Latin term *ratio decidendi* (the reason for deciding). It is based on:
1) The material facts of the case
2) The decision of the judge(s)
3) The reasons for the decisions

Britain is a dualist in its relationship with international law, i.e., international obligations must be formally incorporated into English law before the Courts are obliged to apply supranational laws. For example, the European Convention on Human Rights and Fundamental Freedoms was signed in 1950 and Britain allowed individuals to directly petition the European Commission on

3 "Effect of Brexit on EU Law in the UK." *LexisNexis,* https://www.lexisnexis.co.uk/legal/guidance/the-status-of-eu-law-in-the-uk-after-brexit . Accessed 21 June 2021.

Human Rights from 1966. Section 6(1) of the *Human Rights Act 1998 (HRA)* makes it unlawful *"... for a public authority to act in a way which is incompatible with a convention right"*, where a *"public authority"* is any person or body which exercises a public function, expressly including the Courts but expressly excluding Parliament.

In light of the recent Brexit (where the UK has left the European Union), it is still early to tell what the UK would do with regard to English laws that were enacted to incorporate Community laws of the European Union into the country, and to what extent the UK would comply if it does not repeal those Acts, including the Human Rights Act 1998.

The *Laws of Malaysia* are mainly based on the common law legal system. This was a direct result of the colonisation of Malaya, Sarawak, and North Borneo by Britain between the early 19th century and the 1960s. The supreme law of the land – the Federal Constitution of Malaysia – sets out the legal framework and rights of individuals and that of Malaysian citizens. Federal laws enacted by the Parliament of Malaysia apply throughout the country. There are also state laws enacted by the State Legislative Assemblies which apply in a particular state. The Federal Constitution of Malaysia also provides for a unique dual justice system – the secular laws (criminal and civil) and *Syariah* laws.

Article 121(1A) of the Constitution of Malaysia seeks to establish exclusive jurisdiction for the *Syariah* Courts for any matter within their jurisdiction. Article 3 states Islam as the religion of the Federation and establishes the Head of the religion of Islam in the respective states, including the states without a Ruler, where the *Yang di-Pertuan Agong* (YDPA) or the King is then accorded the position. Article 74(2) confers power to the State Legislative Assembly to make laws on Islamic laws for persons professing the religion of Islam. The scope of Islamic laws is described in Section 1 of List II of the Ninth Schedule, Federal Constitution. Islamic law refers to the "Shariah law", and in Malaysia it is known and spelled as *Syariah*. The Court is known as the *Syariah Court*. Looking at the Malaysian legal system as a whole, *Syariah* law plays a relatively small role in defining the laws of the country. It only applies to Muslims.[4] The *Syariah* Courts have jurisdiction in personal law matters, for example marriage, inheritance, and apostasy. In some states there are *Syariah* Criminal laws, for example there is the *Kelantan Syariah Criminal Code Enactment 1993*. Their jurisdiction is however limited to imposing fines for an amount not more than MYR5,000, and imprisonment to not more than 3 years.

Prior to achieving independence in 1957, many of the legal issues that were brought before the Courts were decided based on English law. Malaysian law is also based on other jurisdictions namely Australia and India. The Criminal law in Malaysia, the Penal Code, was based on the Indian Penal Code. Similarly, the *Contracts Act* is based on the Indian model. Malaysian land law, the National Land Code, is based on the Australian Torrens system.

The principle of *stare decisis* also applies in Malaysian law. This means that any decisions by a Court higher in the hierarchy will be binding upon the lower Courts.

4 *Federal Constitution of Malaysia.* Ninth Schedule, Section 1, List II.

1.3.3 Applicability of English Laws in Malaysia

English law forms part of the laws of Malaysia. English law can be found *inter alia* in the English common law and rules of equity. However, not all of England's common law and rules of equity form part of Malaysian law. Section 3(1) of the *Civil Law Act 1956* (Act 67) provides that, in Peninsular Malaysia, the Courts shall apply the common law of England and the rules of equity as administered in England on 7 April 1956. In Sabah and Sarawak, the Courts shall apply the common law of England and the rules of equity together with statutes of general application, as administered or in force in England on 1 December 1951 and, 12 December 1949 respectively.

It is noted that Section 3 of the *Civil Law Act 1956* (Act 67) only requires any Court in Peninsular Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956.

Case Law *Applicability of English laws in Malaysia*

CASE 1-7 *Commonwealth of Australia -v- Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475

The Malaysian Supreme Court in the case of *Commonwealth of Australia -v- Midford (Malaysia) Sdn Bhd & Anor,* held that the developments of common law after 1956 may well be applicable in Malaysia. In this case, the restrictive doctrine of sovereign immunity as developed in the common law after 1956 was held to be applicable in Malaysia.

Gunn Chit Tuan SCJ, when delivering the judgement of the Malaysian Supreme Court, stated that the requirement to apply the common law and rules of equity as administered in England on 7 April 1956 does not mean that the common law and rules of equity as applied in Malaysia must remain static and not develop.

The restrictive doctrine of sovereign immunity, which was developed in the common law after 1956, should apply in Malaysia although the common law position of Malaysia could well be superseded and changed by an Act of Parliament later on, should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in the country.

Case Law *Applicability of English laws in Malaysia*

CASE 1-8 *Jamil bin Harun -v- Yang Kamsiah & Anor* [1984] 1 MLJ 217

In the Privy Council case of *Jamil bin Harun -v- Yang Kamsiah & Anor,* the Privy Council held that it is for the Courts in Malaysia to decide, subject always to the statute law of the Federation, whether to follow English law.

Modern English authorities may be persuasive but are not binding. In determining whether to accept their guidance, the Courts will have regard to the circumstances of the States of Malaysia and will be careful to apply them only to the extent that the written law permits, and no further than, in their view, it is just to do so.

However, the application of the law of England throughout Malaysia is subject to two limitations. First, it is applied only in the absence of local statutes on the particular subjects. Local law takes precedence over English law as the latter is only meant to fill in the lacuna in the legal system in Malaysia. Secondly, only that part of the English law that is suited to local circumstances will be applied – proviso to Section 3(1) of the *Civil Law Act 1956* (Act 67). The proviso states that "*the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary*". This proviso is necessary as the population in Malaysia comprises diverse races practising a variety of customs and religions, most of which are totally different from those of England.

Case Law *Application of English law in Malaysia*

CASE 1-9 *Syarikat Batu Sinar Sdn Bhd & Ors -v- UMBC Finance Bhd & Ors* [1990] 3 MLJ 468

In the Malaysian High Court case of *Syarikat Batu Sinar Sdn Bhd & Ors -v- UMBC Finance Bhd & Ors*, issues concerning ownership of a second-hand tractor arose. The problem of double financing arose because the first purchaser's (UMBC Finance's) ownership was not indorsed on the registration card of the vehicle. UMBC Finance Bhd wanted to repossess the tractor. The plaintiffs sued them, seeking a declaration that the defendants were not entitled to the tractor.

The Malaysian High Court allowed the plaintiffs' application and held:

1) All buyers of second-hand cars in Peninsular Malaysia have always depended on the absence of any registered endorsement of claim to ownership in the registration card as a "green light" to deal with sellers whose names are registered as owners on the registration cards or their mercantile agents.
2) The practice in Peninsular Malaysia combined with local statutory provisions in regard to the registration of ownership claims would constitute such a distinctive local circumstance of the inhabitants of Peninsular Malaysia that the decisions in English cases on the point of failure to have an ownership claim registered should not be followed.

Peh Swee Chin J, in rejecting the English position on the matter concluded that the practice in West Malaysia combined with the statutory provisions of the *Road Traffic Ordinance 1958* in regard to the registration of ownership claim, constitute such a distinctive local circumstance of the local inhabitants of West Malaysia that the decision of *Moorgate* [1977] AC 890 and other cases directly and indirectly on the point of failure to have an ownership claim registered should not be followed.

Case Law *Application of English law in Malaysia*

CASE 1-10 *United Malayan Banking Corporation Bhd & Anor -v- Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87

In the Privy Council case of *United Malayan Banking Corporation Bhd & Anor -v- Pemungut Hasil Tanah, Kota Tinggi,* the Johore State Authority alienated land to a certain proprietor in consideration of certain conditions and a specified annual rent. The rent and penalties for arrears were not paid despite notices being served by the Authority. The land was forfeited and the appellants appealed to the High Court and the High Court gave judgement in favour of the appellants (UMBC and the land proprietor), granting relief against forfeiture. The Collector of Land Revenue appealed to the Federal Court which gave judgement allowing the appeal. UMBC and the proprietor appealed to the Privy Council.

The Privy Council held:

1) The granting of an application for relief against forfeiture would constitute the setting aside of the order for forfeiture within the meaning of subsection 134(2) of the *National Land Code 1965* and the provisions of the code evince an intention that the English rules of equity should not be available to proprietors of alienated land.
2) Section 3(1) of the *Civil Law Act 1956* (Act 67) cannot be relied on by the appellants for the importation of the English rules of equity as the provisions of the National Land Code are inconsistent with such rules.
3) Laws relating to tenure, which are referred to in Section 6 of the *Civil Law Act 1956* (Act 67), must embrace all rules of law which govern the incidents of the tenure of land and among these incidents is the right, in appropriate circumstances, to the grant of relief against forfeiture.
4) The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it as well as other important matters affecting land and there is no room for the importation of any rules of English Law in that field except in so far as the Code itself may expressly provide for this.

Section 3(2) of the *Civil Law Act 1956* (Act 67) provides that in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail. Under Section 5, the reception of English law, whether common law or statute law, in relation to the stated subjects is limited to the laws as existed on April 7, 1956 when the *Civil Law Act* came into force. Together, Sections 3 and 5 of the *Civil Law Act* allow for the application of English common law, equity rules, and statutes in Malaysian civil cases where no specific laws have been made.

1.4 The Structure of The Malaysian Courts, The Judiciary and Judicial Precedent

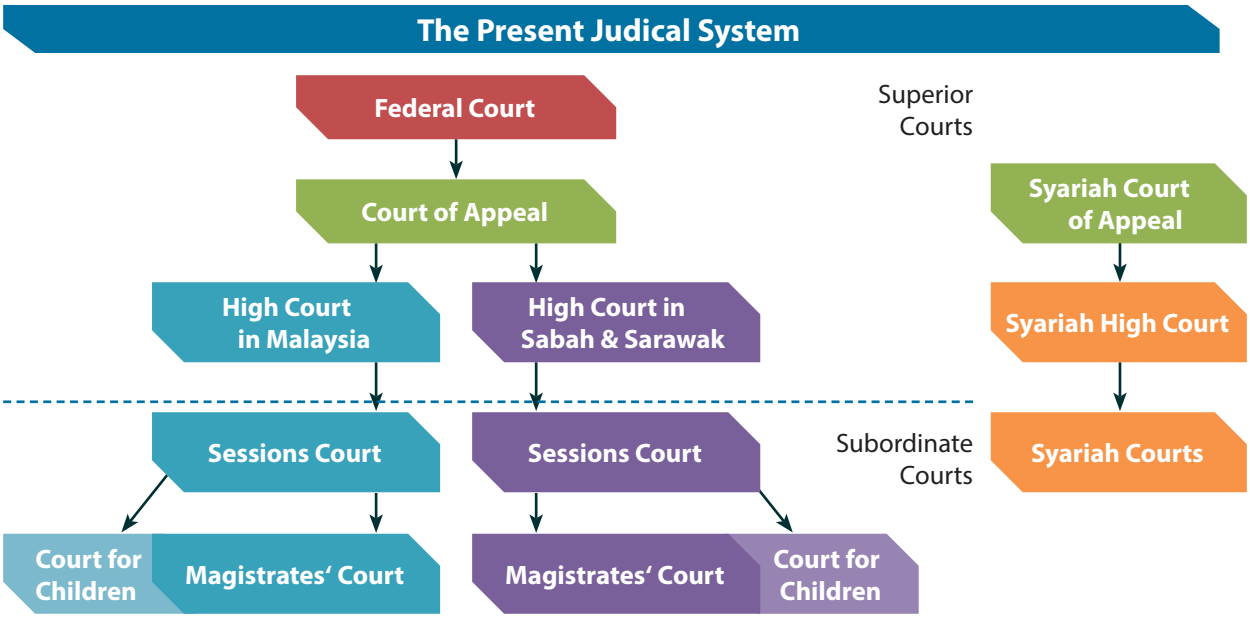
Malaysian law can also be found in the judicial decisions of the High Court, Court of Appeal and the Federal Court, the then Supreme Court and the Judicial Committee of the Privy Council.

ACTIVITY

Visit the Malaysian Bar website (http://www.malaysianbar.org.my/links/legal_resources/) and explore the collection of web links listed on their website.

1.4.1 Hierarchy of Malaysian Courts

The functioning of the system of precedents is based on the hierarchy of decisions and inevitably the hierarchy of Courts. The general rule regulating the hierarchy of precedents is based on the principle that decisions of higher Courts bind lower Courts, and some Courts are bound by their own decisions. In order to understand this principle, one should understand the Court system in Malaysia. In particular, *Syariah* Courts are in a parallel system and have their own structure and hierarchy. Similarly, the Native Courts in Sabah and Sarawak have their own structure and hierarchy. Both the *Syariah* Courts and the Native Courts are not within the structure of the civil Courts. Strictly speaking, Malaysia has three parallel legal systems. However, the jurisdiction of *Syariah* Courts and Native Courts are limited to Muslims and natives respectively and the scope of laws applicable is defined and limited. Additionally, there is the Special Court for the Rulers, which stands on its own.



■ **Figure 1-1** *Hierarchy of Malaysian Courts*

Prior to 1 January 1978, the Privy Council, which sits in England, was the final appellate Court of Malaysia. A decision of the Judicial Committee of the Privy Council was in the form of an advice to the *Yang di-Pertuan Agong* who was obliged to give effect to it. Appeals to the Privy Council on

criminal and constitutional matters were abolished on 1 January 1978. Between 1 January 1978 and 1 January 1985, appeals were limited to civil matters only. Effective from 1 January 1985, no more appeals could be made to the Privy Council, and the highest appellate court then was the Supreme Court.

The Supreme Court was set up to be the highest Court until 23 June 1994. Subsequent amendments to the *Courts of Judicature Act 1964* resulted in a change of structure. The highest Court now is the Federal Court, followed by the Court of Appeal and the High Court.

Nevertheless, the decisions of the Judicial Committee of the Privy Council remain binding on all Courts in Malaysia in the following circumstances:

- if the law decided is given on appeal from Malaysia; or
- if the decision is given on appeal from another Commonwealth country and the law is in *pari materia* or similar to the law in Malaysia.

Case Law *Binding nature of Judicial Committee decisions*

CASE 1-11 *Khalid Panjang & Ors -v- Public Prosecutor (No 2)* [1964] 30 MLJ 108

In the Malaysian Federal Court case of *Khalid Panjang & Ors -v- Public Prosecutor (No 2),* the High Court judge refused to follow the Privy Council's previous decision which interpreted Section 10 of the *Indian Evidence Act* which was word for word the same as the corresponding Section of a local statute in Malaysia.

Thompson LP, in delivering the judgement of the Malaysian Federal Court held that the decision of their Lordships in the Privy Council is binding on the Federal Court and is also binding on every High Court in Malaysia. No judge is at liberty, whatever his private opinion may be, to disregard it.

The English Supreme Court (previously the House of Lords) is the highest Court of appeal in the United Kingdom. Its decisions are binding on Malaysian Courts, being a part of the common law and by virtue of Section 3(1)(a), (b) and (c) and Section 5 of the *Civil Law Act 1956*. This is subject to the date and the "local circumstances" provision mentioned in the Sections.

The Federal Court's decision binds all the courts below it whereas the Court of Appeal's decisions bind the High Courts and all the subordinate Courts. A High Court's decision is binding on all subordinate Courts but the High Court judge is not bound to follow the decision of another High Court judge. However, he may decide to follow the decision as a matter of "judicial comity". The subordinate Courts, i.e. the Sessions Courts and the Magistrates' Courts, are bound by precedents laid down by all superior Courts. The decisions of the subordinate courts are not binding on any Court.

Magistrates' Courts

The Magistrates' Court deals with minor criminal cases and civil matters. Under Section 85 of the *Subordinate Courts Act 1948* (Revised 1972), a First Class Magistrate has jurisdiction to try

all offences for which the maximum punishment does not exceed ten years imprisonment or are punishable with fine only. The offences under Sections 392 and 457 of the Penal Code (Section 392 of the Penal Code deals with punishment for robbery while Section 457 deals with lurking, house-trespassing or housebreaking at night) are also under the jurisdiction of the Magistrates' Court. Where a person is found guilty and convicted after trial, the magistrate may pass any sentence allowed by law not exceeding:

a) five years' imprisonment;
b) a fine of ten thousand ringgit;
c) whipping of up to twelve strokes; or
d) a combination of any of the above mentioned.

A Second Class Magistrate has jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed twelve months' imprisonment or offences punishable with a fine only. A Second Class Magistrate may pass any sentence allowed by law:

a) not exceeding six months' imprisonment;
b) a fine of not more than one thousand ringgit; or
c) any sentence combining either of the aforesaid sentences.

As regards civil matters, the First Class Magistrate has the jurisdiction to try all actions and suits where the amount in dispute or value of the subject-matter does not exceed RM100,000. A Second Class Magistrate can only deal with actions or suits of a civil nature where the plaintiff seeks to recover a debt or liquidated demand on money payable by the defendant, not exceeding RM10,000.

What are the consequences of "breaking the law"?

"Breaking the law" results in the application of adverse consequences to the perpetrator. This may be in the form of punishment, payment of compensation to the person harmed or such other measures.

Court for Children

The Court for Children, previously known as the "Juvenile Court", hears all cases involving minors except cases carrying the death penalty, which are heard in the High Court. Cases involving child offenders are governed by the *Child Act 2001*. A "child" is defined as any person below the age of eighteen.

Courts for Children are constituted in accordance with the *Child Act 2001* and sit for the purpose of:

- hearing, determining or disposing of any charge against a child; or
- exercising any other jurisdiction conferred or to be conferred on Courts For Children by or under the *Child Act 2001* or by any other written law.

A Court for Children consists of a Magistrate who is assisted by two advisers, whose functions are to inform and advise the Court for Children with respect to any consideration affecting the order made upon a:[5]

- finding of guilt or other related treatment of any child brought before it; and
- if necessary, to advise the parent or guardian of the child.

If a child is charged with any offence, the child's parents or guardian are required to attend the proceedings at the Court for Children. If the Court for Children is satisfied that an offence has been proved the Court shall have the power to:

- admonish and discharge the child;
- discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;
- order the child to be placed in the care of a relative or other fit and proper person;
- order the child to pay a fine, compensation or costs;
- make a probation order under Section 98 of the *Child Act 2001*;
- order the child to be sent to an approved school or a Henry Gurney School;
- order the child, if a male, to be whipped with not more than ten strokes of a light cane;
- impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subSection 96(2) of the *Child Act 2001*, any term of imprisonment which could be awarded by a Sessions Court.

A Court for Children may also make an order relating to:

- the detention of a child in an approved place of detention;
- the supervision of a child by a Social Welfare Officer or probation officer; or
- any probation period, beyond the date on which the child attains the age of eighteen years.

A child cannot be sentenced to death. In lieu of a death sentence, the Court shall order the child to be detained in a prison during the pleasure of the *Yang di-Pertuan Agong,* if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; and the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

Where a child is found guilty but the Court for Children is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the child, it is appropriate to do so, the Court for Children may make a probation order. This discretion is however, not applicable to:

- any grave crime;
- the offence of voluntarily causing grievous hurt, rape, incest or outraging modesty; or
- an offence under Sections 377B, 377C, 377D or 377E of the Penal Code.

5 Except when making an order under subSection 39(4), 42(4), 84(3) or 86(1)of the *Child Act 2001.*

Sessions Courts

The Sessions Court is the highest of the subordinate or inferior Courts. Each Sessions Court is presided over by a Sessions Court judge. Its criminal jurisdiction extends to all offences other than offences punishable by death. A Sessions Court may pass any sentence allowed by law other than the death sentence.

In civil matters, a Sessions Court has:

- unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, landlord and tenant;
- jurisdiction to hear and determine any action for the recovery of immovable property and to issue writs or warrants of distress for rent.
- jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed one million ringgit (RM1,000,000); and
- jurisdiction to try all actions and suits of a civil nature for the specific performance or rescission of contracts or for cancellation or rectification of instruments.

A Sessions Court may, in respect of any action or suit within the jurisdiction of the Sessions Court, in any proceedings before it:

- grant an injunction; and
- make a declaration,

whether or not any other relief, redress or remedy is or could be claimed.

Superior Courts in Malaysia

The Superior Courts of Malaysia comprise of the two High Courts – the High Court of Malaya and the High Court of Sabah and Sarawak, the Court of Appeal and the Federal Court at the apex.

High Court

The High Court consists of two Chief Judges, one in Peninsular Malaysia and one in Sabah and Sarawak. As of 21st May 2021, there are ninety-nine judges and Judicial Commissioners, with fourteen in Sabah and Sarawak and eighty-five in Peninsular Malaysia.

The High Court has original, appellate and supervisory jurisdictions.

The High Courts have unlimited civil jurisdiction, and generally hear actions where the claim exceeds RM1,000,000, other than actions involving motor vehicle accidents, landlord and tenant disputes and distress. The High Courts hear all matters relating to:

- The validity or dissolution of marriage (divorce) and matrimonial causes
- Bankruptcy and matters relating to the winding-up of companies

- Guardianship or custody of children
- Grants of probate, wills and letters of administration of estates
- Injunctions, specific performance or rescissions of contracts
- Legitimacy of persons
- Judicial review

For criminal matters, the High Courts have jurisdiction in all criminal matters except criminal matters under the exclusive jurisdiction of the Syariah Courts. Only the High Courts have original jurisdiction in criminal cases punishable by death. Cases are heard by a single judge or by a judicial commissioner in the High Court.

In the exercise of its appellate jurisdiction, the High Court hears civil and criminal appeals from the Magistrates' and Sessions Courts. The High Court also possesses the power to refer any points of law arising in the appeal for the decision of the Court of Appeal if it feels that it is in the public interest and of paramount importance.

Under Section 35(1) of the *Courts of Judicature Act 1964*, the High Court has been conferred general supervisory and revisionary jurisdiction over all subordinate Courts. In the interest of justice and when it appears desirable, the High Court may call for the records of any proceedings in the subordinate Courts, whether civil or criminal, at any stage of such proceedings. It may also remove the case to the High Court or give such directives to the subordinate Courts as it thinks necessary. When the High Court calls for any records, all proceedings will be stayed pending the further order of the High Court.

Court of Appeal

The Court of Appeal constitutes the President of the Court of Appeal and 27 Court of Appeal judges. An appeal before the Court of Appeal is heard by three judges or such greater uneven number of judges. The Court of Appeal has jurisdiction to hear and determine any appeal against any High Court decision on civil and criminal matters. It is also the final appellate Court for matters that originate from the subordinate Courts.

Generally, the Court of Appeal has jurisdiction to hear and determine civil appeals for cases where the amount or value of the subject matter of the claim is at least RM250,000. Leave of the Court of Appeal must first be obtained in cases where the claim is less than RM250,000 or the judgement or order relates to costs only or against decisions of a judge in chambers on an interpleader summons on undisputed facts. The Court of Appeal has no power to re-open, re-hear or to re-examine its own decision.

Federal Court

The Federal Court is the highest judicial authority in the country. It was established pursuant to Article 121(2) of the Federal Constitution. Its decision binds all the Courts below. Prior to 1 January 1985, the superior Courts system in Malaysia was three-tiered, namely:

1) The Privy Council.
2) The Supreme Court.
3) The High Court, Malaya and the High Court, Borneo.

The Privy Council was the highest Court of appeal for Malaysia until 31 December 1984. On 1 January 1985, all appeals from Malaysia to the Privy Council were abolished. In its place, the Supreme Court was established making it the final Court of Appeal in the country. The abolishment of appeals to the Privy Council resulted in a change from the three-tiered system of superior Courts to a two-tiered system, which was the Supreme Court and the two High Courts. In 1994, a significant change took place in the Judiciary when Parliament amended the Federal Constitution. With the amendment, the Court of Appeal was established. The Supreme Court was renamed the Federal Court. As a consequence, the three-tiered system of the superior Courts was Thus, restored:

1) The Federal Court
2) The Court of Appeal
3) The High Court of Malaya and the High Court of Sabah and Sarawak

The Federal Court is headed by the Chief Justice. Prior to the amendment, the post was known as the "Lord President". According to Article 122(1) of the Federal Constitution, the Federal Court shall consist of the Chief Justice, the President of the Court of Appeal, the two Chief Judges of the two High Courts and ten other judges.

Every proceeding in the Federal Court is to be heard and disposed of by three judges or such greater uneven number of judges as the Chief Justice may determine. In the absence of the Chief Justice, the most senior member of the Court shall preside.

The Federal Court sits on such dates and at such places as the Chief Justice may from time to time direct. Normally the Federal Court sits at the Palace of Justice in Putrajaya. However, the Federal Court also goes on circuit to the major towns of Penang, Ipoh, Kota Bharu, Johor Bahru, Alor Setar, Kuantan, Malacca, Kuching, and Kota Kinabalu. Article 121(2) of the Federal Constitution confers the Federal Court with the following jurisdiction:

a) to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
c) such other jurisdiction as may be conferred by or under federal law.

All civil appeals from the Court of Appeal are heard by the Federal Court only after leave is granted by the Federal Court. The Federal Court also hears criminal appeals from the Court of Appeal only in respect of matters heard by the High Court in its original jurisdiction.

The referral jurisdiction of the Federal Court is provided for in Article 128(2) of the Federal Constitution which reads:

> *…Jurisdiction of Federal Court*
>
> *128…*
>
> *(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another Court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of Court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other Court to be disposed of in accordance with the determination…*

The advisory jurisdiction of the Federal Court is provided for in Article 130 of the Federal Constitution which reads:

> *…Advisory jurisdiction of Federal Court*
>
> *130. The Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open Court its opinion on any question so referred to it.*

In summary, the Federal Court has jurisdiction in matters including the following:

1) To hear civil and criminal appeals from the Court of Appeal. This appellate function occupies the bulk of the Court's work. In civil appeals, a litigant may appeal on a point of law or upon the rejection or admission of evidence in a lower Court. In criminal cases, an appeal may be made against acquittal or conviction or against sentence on a point of law or fact.
2) To exercise exclusive original jurisdiction on those matters conferred on it under Article 128(1) and (2) of the Federal Constitution. It can hear disputes on any matter between any State and the Federal Government. It can also pronounce on the validity of any federal or state legislation.
3) To determine constitutional questions, which have arisen in the proceedings of the High Court but referred to the Federal Court for a decision.
4) To give its opinion on any question referred to it by the *Yang di-Pertuan Agong* concerning the effect of any provision of the Constitution which has already arisen or appears likely to arise.

Case Law *Jurisdiction of the Federal Court*

CASE 1-12 *Dato' Seri Anwar bin Ibrahim -v- PP* [2010] 7 CLJ 397

In the Malaysian Federal Court case of *Dato' Seri Anwar bin Ibrahim -v- PP*, the applicant was charged with an offence under Section 377B of the Penal Code. The applicant filed a notice of motion for an order to compel the respondent and/or other persons having care, custody and control to produce to the applicant documents, certain materials and items.

The learned High Court judge ordered the respondent to comply with almost all of the prayers in the application. The respondent appealed against this decision and the applicant cross appealed against the decision not allowing certain parts of the applicant's application. The Court of Appeal dismissed the cross appeal and allowed the respondent's appeal in parts. The applicant appealed to the Federal Court by way of three appeals against the decisions of the Court of Appeal. The Federal Court dismissed all the appeals and affirmed the findings of the Court of Appeal. The appeals were decided on merits. The applicant then filed the present application pursuant to rule 137 of the *Rules of the Federal Court 1995* ("the Rules") for an order for the Federal Court to review its judgement.

The Malaysian Federal Court, in dismissing the application, held that the Federal Court still has the limited "inherent power" or "inherent jurisdiction" in order to maintain its character as a Court of justice to hear any application or to make any order to prevent injustice or to prevent an abuse of the process of the Court. There is an important difference between the nature of the inherent jurisdiction of the Court and its statutory jurisdiction. The source of the statutory jurisdiction of the Court is the statute itself which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the Court is derived from its nature as a Court of law and that the limits of such jurisdiction are not easy to define.

1.4.2 Doctrine of Judicial Precedent

Case law or precedent may comprise *res judicata*, *ratio decidendi* and *obiter dictum*.

Res judicata is the final order of the Court binding the immediate parties to the decision. The doctrine of *res judicata*, applies only to the immediate parties to the case. It assumes that there are two opposing parties, there is a definite issue and the Court has so decided the issue acting within its jurisdiction. It means that the decision and final order of the Court binds the parties to the proceedings. It is the judgement in the strictest sense. Other parties in similar disputes in the future are not so bound. In short, *res judicata* applies only to the immediate parties. The parties are not allowed to re-litigate the same issues again unless it is an appeal to a higher Court.

Ratio decidendi is basically the reason or rationale for the decision. In a case, in addition to the *res judicata,* the legal reasoning upon which the decision in that case was based may be used by judges in future cases when confronted with similar facts. This is called the *ratio decidendi* of the case. Nowadays, it has become easier to identify the *ratio decidendi* of a case as all modern law reports tend to have a short summary of the case and a summary of the decision of that case before the full judgement.

Anything else said about the law in the course of a judgement that does not form part of the matters at issue is called *obiter dictum* (sayings by the way). *Obiter dictum* has no binding power, although it can exercise an extremely strong influence in a lower Court, and even in a Court of equivalent standing depending on the Court and the judge.

The doctrine of precedent was instrumental in the evolution of and building up of both common law and equity. A precedent is basically a judgement or decision of a Court of law cited as an authority for the legal principle embodied in its decision. Thus, "following a precedent" means that a question should be resolved in a certain way today because a similar question has been so decided before. This process of following an established procedure is called *stare decisis,* which literally means "to stand by a decision".

Precedent aims at ensuring fairness and equality as it enables everyone to conduct their affairs knowing that certain rules and procedures operate to make it possible to predict, with a fair degree of certainty, what the likely outcome will be in the event of a dispute.

Some of the advantages of precedents are that they promote consistency, coherence, and certainty. Precedents also promote efficiency and justice, ensuring equality and fairness. However, there are some disadvantages. A certain precedent may not be relevant in today's circumstances but the judge may nevertheless have to follow it. Precedents may also be slow in responding to community changes and it is cumbersome to change them as they may require an Act of Parliament before they can be changed.

In order for precedent to operate there has to be a Court hierarchy where the lower Courts will be bound by the decisions of higher Courts in that hierarchy. Besides binding precedent, a precedent may be merely a persuasive precedent. A persuasive precedent can only influence a decision. Examples of persuasive precedents are judicial statements which are *obiter* from a Court of binding status within the same hierarchy, or decisions of equivalent or higher standing Courts from other hierarchies cited in argument in a local case being heard. For example, the House of Lords (now Supreme Court) decision (in England) or a High Court decision (in Australia) may be persuasive precedents in Malaysia.

In applying binding precedents, Malaysian law can be found in the judicial decisions of the High Court, the Court of Appeal, and the Federal Court, and the then Supreme Court and the Judicial Committee of the Privy Council. Decisions of these Courts were made, and still are being made, systematically by the use of what is called the "doctrine of binding judicial precedent". In the case of a binding precedent (the *ratio decidendi* of an earlier case decision), each Court is bound by the decisions of Courts of the same level or higher than it in the same hierarchy of Courts, whether or not it believes a decision is correct.

For example, if the Supreme Court made a certain decision in 1987 and assuming the facts and situation before a High Court judge deciding a case in 2014 are similar to the said Supreme Court case, the High Court judge must decide the case before him by applying the principles laid down by the Supreme Court in 1987.

Case Law *Doctrine of precedent*

CASE 1-13 *Mexaland Development Sdn Bhd -v- Score Option Sdn Bhd* [2011] 2 CLJ 709

In the Malaysian Court of Appeal case of *Mexaland Development Sdn Bhd -v- Score Option Sdn Bhd*, **Abdul Malik Ishak JCA**, in delivering the dissenting judgement of the Malaysian Court of Appeal, clarified at pages 743 – 744 paragraphs 69 – 73 that the doctrine of precedent or of stare decisis means that the decision of a higher Court acts as a binding authority on a lower Court. His Lordship explained that the doctrine of precedent or of stare decisis is related to the dispensation of justice and fair play as it is always desirable to have stability and certainty in the law.

Case Law *Binding nature of previous decisions of the Federal Court*

CASE 1-14 *Metramac Corporation Sdn Bhd -v- Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177

In the Malaysian Federal Court case of *Metramac Corporation Sdn Bhd -v- Fawziah Holdings Sdn Bhd*, one of the issues that arose was whether the Malaysian Court of Appeal is bound by a previous decision of the Malaysian Federal Court.

Augustine Paul FCJ, in delivering the judgement of the Malaysian Federal Court, held at pages 204 – 206 paragraph 21 that the Court of Appeal judge must adhere to the doctrine of stare decisis as he is bound to follow them whether he agrees with them or not.

If a judge applies an existing rule of law without extending it, his decision may be called a "declaratory precedent"; whereas if the case before him is without precedent then the decision made by him may be called an "original precedent". In this way, judges are constantly contributing to the growth of unwritten law in this country. The system of binding judicial precedent, called *stare decisis* in English law, is practised in England, Malaysia, and other common law countries.

Distinguishing Precedents

It is not in every case that judges apply earlier precedents. A judge may not wish to apply precedents in the following circumstances:

1) They may refuse to apply the earlier precedent if it is arrived at *per incuriam* (i.e. made in ignorance of a statute or a binding precedent).
2) They may distinguish the case when they find there are material differences in facts between the case before them and the case laying down the precedent.

In summary, there are advantages and disadvantages in applying the system of binding judicial precedents. The advantages are:

- Since the law evolved as a result of an actual dispute rather than a hypothetical situation, the law evolved is more practical since it evolved through actual experiences and is not a result of abstract theory.

- It is more flexible when compared to statute law enacted by Parliament as law once enacted can only be amended or repealed and legislative proceedings are often cumbersome and time-consuming. A judge can escape the effect of a binding precedent by distinguishing the facts before him from the facts of an earlier case wherein the binding precedent was laid down or he may overrule the decision of a lower Court if he is of the opinion that it has been wrongly decided.
- Case law is richer in legal detail than statute law.

The disadvantages are:

- As the number of cases decided can only increase, judges and lawyers are compelled to engage in greater research and reading. Due to the mass of material to be digested, there is a tendency to overlook some authorities inadvertently.
- It is sometimes difficult to tell whether a particular statement in a judgement is *ratio* or *dicta*. Judges seldom indicate the *ratio decidendi* or *obiter dicta* of a judgement. It is the *ratio decidendi* of a case which makes the decision a precedent for the future. On the other hand, an *obiter dictum* is not binding as a precedent.

1.5 Principal Legal Personnel and their Roles in the Legal System

1.5.1 The Attorney General

The Attorney General is the Head of the legal branch of the Judicial and Legal Service. He is assisted by the Solicitor General (at present, two Solicitors General) and other legal officers. The office of the Attorney General is established under Article 145 of the Federal Constitution.

The Attorney General is appointed by the *Yang di-Pertuan Agong* on the advice of the Prime Minister. Only a person qualified to be a judge of the Federal Court can be appointed to the office, pursuant to Article 145(1) of the Federal Constitution. It is implicit from Article 145(5) of the Federal Constitution that the Attorney General could be a political or non-political appointee. In either case, the Attorney General holds office at the pleasure of the *Yang di-Pertuan Agong*. This means the Attorney General has no security of tenure and, unless he is a minister in the Cabinet, no security of remuneration. This is quite unlike a judge of the Federal Court.

The Attorney General may resign at any time. Otherwise, an Attorney General who is a member of the Judicial and Legal Service may be dismissed in the same manner as public servants; but if the Attorney General was also a Cabinet minister, then he may be dismissed only on the advice of the Prime Minister. Malaysia has experienced both types of Attorneys General: the political and non-political. The first local Attorney General, appointed in 1963, was **Tan Sri Abdul Kadir Yusof,** then a member of the Judicial and Legal Service. Subsequently, he retired from the service and entered Parliament, first as a senator and later as a member of Parliament. He was simultaneously appointed Minister of Law and Attorney General. So was his successor, **Tan Sri Hamzah Abu Samah.** Their successors have been non-political appointees.

The Attorney General has the responsibility to:

- advise the government on legal matters;
- perform other duties of a legal character assigned by the government; and
- discharge the functions conferred by the Federal Constitution or any other written law.

In performing these functions, the Attorney General has the right of audience in, and takes precedence over all other persons before, any Courts or tribunal.

The function that has provoked controversy concerns criminal prosecutions. The Attorney General is the public prosecutor under Section 376 of the *Criminal Procedure Code* (Act 593). Article 145(3) of the Federal Constitution confers on the Attorney General the power *"exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native* Court *or a* Court *martial"*. This power is made more formidable by Article 145(3A) of the Federal Constitution which, authorises federal legislation to confer on the Attorney General, a member of the executive, what is, in fact, a judicial power, i.e. power to determine the Courts in which or the venue at which any proceedings which he is empowered to institute shall be instituted or transferred.

The Courts have given Article 145(3) of the Federal Constitution a very broad interpretation; one which confers on the Attorney General absolute control over criminal prosecutions. The Attorney General has complete discretion, unchallengeable in Court, whether to prosecute, and if so, under which provision to bring charges. Likewise, the Attorney General has unfettered discretion to choose the forum in which the accused is to be tried without having to provide any reasons for his choice. The Attorney General's discretion in choosing the forum is also not subject to judicial review.

Case Law *Public Prosecutor' s discretion*

CASE 1-15 *Long bin Samat -v- Public Prosecutor* [1974] 2 MLJ 152

In the Malaysian Federal Court case of *Long bin Samat -v- Public Prosecutor*, the issue that the Federal Court had to deal with was the unfettered discretion given to the Public Prosecutor (i.e. agent of the Attorney General) to decide whether to prosecute or not, and if so, on what charges.

Suffian LP, in delivering the judgement of the Malaysian Federal Court, held at page 158 that the law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the Courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

Other than the constitutional functions discussed above, the Attorney General is the protector and defender of public interests. This role, founded on the common law, is, in theory very important. A member of the public who seeks judicial intervention to protect a public right or interest can

sue the violator of that right or interest even if such person does not have an actual interest in the matter. That person can sue in the name of the Attorney General by way of a relative action. The litigant's lack of standing or *locus standi* is cured by the Attorney General lending his name to the action. Unfortunately, the relator action is a rarity in Malaysia. It is unrealistic to expect the Attorney General to lend his name as plaintiff in a relator action against the government to whom he owes a duty to give advice and to defend in Court.

Case Law *Realtor action*

CASE 1-16 *Lim Kit Siang -v- United Engineers (M) Bhd & Ors* [1987] CLJ (Rep) 722

In the Malaysian High Court case of *Lim Kit Siang -v- United Engineers (M) Bhd & Ors*, the plaintiff, being the Leader of the Opposition of the House of Representatives of the Malaysian Parliament, sought an interim injunction to prevent the defendants, one of whom was the Government of Malaysia, from concluding a building contract involving billions of Ringgit. One of the issues for the High Court was whether the plaintiff had any *locus standi* and if not, whether he could bring a relator action naming the Attorney General as the plaintiff.

VC George J, in delivering the judgement of the Malaysian High Court, dismissing the plaintiff's application for an interim injunction, at page 734 paragraphs b – g: distinguished the office of the Attorney-General in England from the Malaysia's Attorney-General and noted that one of the Attorney-General's main duties is to be the legal adviser to the government and it is he or members of his chambers who appears in the Courts as Counsel for the government and member of the government.

Case Law *Attorney General' s role*

CASE 1-17 *Government of Malaysia -v- Lim Kit Siang & Another* [1988] 1 CLJ (Rep) 63

In relation to the Attorney General's role as the protector and defender of public interests, the Malaysian Supreme Court case of *Government of Malaysia -v- Lim Kit Siang & Another,* provides an illuminating explanation.

Salleh Abas LP, held at page 76 paragraphs h –i that the Attorney -General is the guardian of public interest and as the Public Prosecutor, he, not the Court, is in control of all prosecutions.

An Attorney General who is a member of Parliament and the Cabinet is, of course, answerable to Parliament. In the past, Malaysia had a Ministry of Justice or Ministry of Law. Such ministry was abolished in 1980 or, more to the point, downsized to a division, the Legal Affairs Division, in the Prime Minister's Department. A minister in the Prime Minister's Department responsible for legal affairs is the de facto Law Minister who exercises the political functions normally exercised by a political Attorney General.

1.5.2 Solicitors General & Other Legal Officers

The Attorney General is assisted by the Solicitors General and a staff of legal officers. On 1 June 2007, a second Solicitor General was appointed, for the first time, to ease the mounting workload of the Attorney General. The Solicitors General and other legal officers are members of the Judicial

and Legal Service. The Solicitors General are authorised under Article 160(1) of the Federal Constitution, read together with the Eleventh Schedule and Section 40A of the *Interpretation and General Clauses Ordinance 1948* (MU Ordinance No 7 of 1948), to perform any of the duties and exercise any of the powers of the Attorney General in his absence.

Below the Solicitors General, the most prominent of the legal officers in the Attorney General's Chambers is the Parliamentary Draftsperson. The latter heads the Drafting Division which drafts Parliamentary Bills. There are seven Divisions in the Attorney General's Chambers in Putrajaya: advisory, litigation, criminal prosecution, drafting, international affairs, law revision and reform, and management.

At state level, the federal government is represented in legal matters by the State Legal Advisers (called the State Attorney General in Sabah and Sarawak). The office of the State Legal Adviser is established under the State Constitutions. These provide that the State Legal Adviser is an *ex officio* member of the State Executive Council. Most State Constitutions also provide that the State Legal Adviser is to be appointed by the Ruler or *Yang di-Pertua Negeri* on the recommendation of the Judicial and Legal Service Commission, after considering the advice of the *Menteri Besar* or Chief Minister. Before tendering his advice, the *Menteri Besar* or Chief Minister is required to consult the federal government.

In giving advice on state matters, the State Legal Adviser is completely independent of the Attorney General. As Senior Federal Counsel, however, the State Legal Adviser is responsible to the Attorney General for advising on federal matters within the state.

1.6 Elements of Civil Procedure

Civil litigation is regulated by rules of procedure. These rules are contained in statutes, Rules of Court and Practice Directions which are issued from time to time by the registrar or judges of the superior Courts, and case law. Case law plays a significant role because it applies and explains the rules and sometimes develops new principles of procedure.

The Rules of Court, namely the *Rules of the Federal Court 1995*, *Rules of the Court of Appeal 1994* and the *Rules of Court 2012* (RC) (which covers the High Court and all Subordinate Courts) provide the procedural framework of the civil process. These rules are subsidiary legislation. They are drafted by the respective Rules Committee comprising primarily of judges and legal practitioners.

The civil litigation process may be divided into three phases: pre-trial, the trial proper, and post-trial.

1.6.1 Pre-trial

Pre-trial procedure is designed to:

- enable the parties to prepare their cases for the trial as fully as possible;
- ensure that the issues in dispute between the parties to be determined at the trial are defined clearly and precisely;
- prevent either party from being taken by surprise at the trial as to the nature of the case and the documentary evidence in the possession of the other party; and
- eliminate those cases which may be properly disposed of without trial.

Before 21 September 2000, pre-trial procedure could be either very simple and speedy or very complex and lengthy. This was because throughout almost the duration of pre-trial procedure, the Court was more or less a passive observer and left the initiative to be taken by the parties. On 21 September 2000, pre-trial case management was introduced into the *Rules of the High Court 1980* under Order 34, which is now Order 34 of the RC.

Pre-trial case management brings about a greater involvement by the judge in the preparation of the case for trial. When the parties appear on the date stated in the notice referred to above ("the first pre-trial conference"), the judge may under Order 34 rule 4(1)of the RC make such orders and give such directions as to the future conduct of the action as will ensure its just, expeditious, and economical disposal and may give specific directions.

The judge may convene as many pre-trial conferences as he or she may deem necessary to give directions or further directions or for the amendment or variation of any direction already given. If any party fails to appear or to comply with any direction given by the judge at any pre-trial conference, the judge may make such order against the defaulting party as meets the ends of justice.

With effect from 13 August 2010, all judges of the High Court, its Deputy Registrars and all Judges of the Sessions Court and Magistrates and Registrars may, at the pre-trial case management stage, give directions that parties facilitate settlement of the matter by way of mediation [Practice Direction No.5 of 2010]. The main aim is to encourage the parties to settle amicably without going to trial. The types of cases suitable for mediation include personal injury and damages for road accidents, defamation, matrimonial disputes, contractual disputes, commercial disputes and intellectual property disputes. Mediation may be conducted by judges or private mediators. The Kuala Lumpur Court Mediation Centre provides free mediation services using judges as mediators. The High Court and Sessions Court in Kuala Lumpur may on its own motion or at the request of any party, make an order of referral to refer any civil action to the Mediation Centre. Referral may be at pre-trial case management stage or at any stage of the proceedings. All mediations are to be completed within 3 months from the date of referral.

There are several advantages of settlement via mediation. All proceedings are covered by confidentiality and are privileged communication and do not form part of court records. Even if there is no full settlement, the number of issues may be reduced and partial solutions may be reached. It saves time and preserves relationship. Parties can discuss wider issues and are not

restricted to what is legally relevant. There is also no formal rules of evidence or procedures. The settlement agreement which is an agreement between the parties becomes the judgement of the court. If there is no settlement agreement reached by way of mediation, the Court will give further directions on the case.

There are four ways of commencing an action in the High Court, i.e. by:

i) writ of summons;
ii) originating summons;
iii) originating motion; or
iv) petition.

It is important to use the appropriate mode because the Court has discretion under Order 10 rule 1 of the RC to set aside, in part, the proceedings commenced by the wrong mode. The writ applies where there is a factual dispute. It is the most common way of commencing a High Court action. The originating summons is used primarily for non-factual disputes, e.g. those involving construction of legislation or a written document (such as a deed, trust, or will). The originating motion and petition are used only where expressly provided for by statute, e.g. a petition has to be used in an application to wind up a company.

Parties are required to comply with the stated procedures for each action. There are statements to file and to serve on the other party within the stated time limits. A defendant who wishes to defend against the plaintiff's action must enter an appearance within the prescribed period. This is done by completing a memorandum of appearance and filing a copy of it at the High Court registry. The copy is then posted to the plaintiff to notify him that the defendant will defend or challenge the action. Exchange of pleadings takes place after the defendant enters an appearance. Such exchange applies only in actions commenced by writ of summons.

Pleadings are written documents containing concise statements of all material facts relied upon by the parties. Pleadings include the plaintiff's statement of claim, the defendant's statement of defence and counterclaim, if any, and the replies and responses of the parties. Pleadings serve two primary purposes:

a) to define the issues in dispute between the parties; and
b) to give the other party notice of the case to be answered so that there is no element of surprise at the trial.

For these reasons, parties are bound by their pleadings. At the trial, they may not raise issues which were not pleaded. Nor can the Court decide a case on an issue that was not pleaded. Nevertheless, amendment of pleadings is allowed in appropriate circumstances in accordance with Order 20 of the RC. Elaboration of a pleading may be necessary when its content is inadequate or lacks clarity. In such an event, "further and better particulars" may be obtained on request or by applying to the Court. Pleadings are deemed to be closed fourteen days after the service of the last pleading. Once pleadings are closed, discovery of documents begins.

Discovery is the process by which each party makes, and exchanges with the other party, a list of all relevant documents which are or have been in his or her possession, custody, or power relating to matters disputed by them in the action. The documents disclosed by one party may be inspected by the other party, and copies or extracts made. Such a process (known as general discovery) normally takes place voluntarily, i.e. without applying for a Court order. It may also be possible to obtain a Court order for the delivery up of specific documents where the general discovery does not yield all the relevant documents.

Besides discovery of documents, the parties may also request for admission of facts, and discovery of facts through interrogatories. Interrogatories are written questions posed by one party to the other party concerning matters in dispute between them, asking that other to answer such questions on oath before trial. The intention is to obtain evidence of material facts, which the interrogating party is unable to prove, and which is within the knowledge of the other party.

The rationale underlying discovery of documents and interrogatories is to provide the parties with the opportunity to assess the strength and weakness of their respective cases, and to encourage them either to compromise or settle their dispute without a trial. Indeed, a large proportion of cases are settled out-of-court at the discovery stage. If a settlement is not reached by the parties, the plaintiff has to proceed with the legal action.

Proceedings may be terminated or disposed of before the trial for various reasons.

1) **Default judgement** *(Order 13 rules 1 – 5 and Order 19 rule 7 of the RC)*

   The defendant's failure to enter appearance or to file a defence having entered appearance, within the prescribed period entitles the plaintiff to apply to the Court for default judgement.

2) **Summary judgement** *(Order 14 of the RC)*

   Where the defendant has entered appearance and filed a defence but it is obvious from the statement of defence that the defendant has no real defence to the plaintiff's claim, the plaintiff may apply to the Court for summary judgement. Applications for summary judgement must be filed within twenty-eight days after pleadings are deemed to be closed. To avoid summary judgement being entered, the defendant must show there is a "triable issue" (i.e. there is an issue which ought to be tried).

3) **Striking out** *(Order 18 rule 19 of the RC)*

   Just as the plaintiff may apply to the Court for summary judgement where it is obvious the defendant has no real defence, the defendant may likewise apply to strike out the plaintiff's statement of claim where it:

   - discloses no reasonable cause of action; or
   - is scandalous, frivolous, or vexatious; or
   - tends to prejudice, embarrass, or delay the fair trial of the action; or
   - is otherwise an abuse of the process of the Court.

4) **Withdrawal or discontinuance** *(Order 21 of the RC)*

A party may withdraw or discontinue his or her action or defence or counterclaim.

5) **Consent judgement**

Where both parties have reached a settlement agreement after mediation, the dispute is resolved. The settlement agreement is a legally binding contract and will become the consent judgement.

1.6.2 Trial

The trial process consists of the plaintiff's case and the defendant's case. The plaintiff bears the burden of proving his case, on the balance of probabilities. The plaintiff's counsel makes an opening speech which informs the judge about the facts of the case, the issues in dispute, the evidence that will be adduced to prove his case, the strengths in the plaintiff's case, and the weaknesses in the defendant's case. Counsel may also touch on any point of law involved in the case.

After the opening speech, witnesses for the plaintiff are called and take the oath. Each of the witnesses will be examined by the plaintiff's counsel, cross-examined by the defence counsel and re-examined by the plaintiff's counsel. Once the plaintiff's witnesses have given evidence, the plaintiff's counsel may close the plaintiff's case.

The defendant's counsel then opens the case for the defence and proceeds to call the defendant's witnesses, each of whom may be similarly examined, cross-examined and re-examined. After the defendant's witnesses have testified, the defendant's counsel makes a closing speech, followed by a closing speech by the plaintiff's counsel.

Closing speeches (referred to as "submissions" in Malaysia), like opening speeches, are of great importance. The facts are reviewed, submissions are made as to the weight to be attached to the evidence of witnesses, and reasons are given why their evidence should be accepted or rejected, and the points of law arising are fully argued, with citation of the relevant authorities. The Court then delivers its judgement. Judgement may be reserved if the Court needs time to consider the case, in which event judgement will be delivered subsequently after the parties are notified.

1.6.3 Post -trial

After judgement is delivered, the court will make an order as to the costs, i.e. how the costs are to be borne and the basis on which costs are to be assessed and paid. The party aggrieved by the said judgement may either file an appeal or in some circumstances, seek revision.

Appeals to the High Court

The party aggrieved may appeal from the whole or any part of a decision of a subordinate Court. The amount in dispute or the value of the subject-matter must be above RM10,000 except an appeal concerning maintenance of wives or children. Further, no monetary limit applies where the appeal is on a question of law. The procedure is set out in Order 55 of the RC. An appeal does not operate as a stay of execution of the decision appealed against except where the Court appealed from or the High Court so orders.

Appeals to the Court of Appeal

The procedure for lodging an appeal to the Court of Appeal is set out in the *Rules of the Court of Appeal (RCA) 1994*. Where the RCA does not provide for the procedure in a given situation, the RC applies with necessary changes. The civil jurisdiction of the Court of Appeal comprises hearing appeals from any judgement or order of the High Court whether made in the exercise of its original or appellate jurisdiction. An appellant may appeal from the whole or any part of the judgement or order of the High Court. In hearing the appeal, the Court of Appeal has the same powers as the High Court.

The hearing of an appeal by the Court of Appeal is by way of a "rehearing". This means that the Court re-hears the case on the documents, including the judge's notes of evidence. The Court of Appeal considers the materials which were before the judge below, additional materials (if any) and the judgement appealed against to decide whether that judgement was plainly wrong. An appeal to the Court of Appeal generally does not have the effect of staying execution of the judgement appealed against unless the Court of first instance or the Court of Appeal otherwise directs.

Appeals to the Federal Court

An appeal can only be brought to the Federal Court with leave from that Court and is governed by the *Rules of the Federal Court 1995*. The application for leave to appeal must be made within one month (or such further time as may be allowed by the Court) from the date on which the decision appealed against was given. On an application for leave, the Federal Court may fix the time within which an appeal must be brought once leave is granted.

For the purposes of the appeal, the Federal Court may exercise any of the powers of the Court from which the appeal lies, including the power to order a retrial. It may confirm, reverse, set aside, or vary the decision of the Court of first instance, or it may remit the matter with its opinion thereon to that Court or make such other order in the manner as it thinks fit. An appeal to the Federal Court does not operate as a stay of execution unless the Court of first instance or the Federal Court so orders.

1.7 The Difference between Civil and Criminal Law

The discussion above concerns elements in civil procedure. We will now have an overview of criminal law and criminal procedure. Criminal law can be defined as a body of rules prohibiting certain conduct on pain of punishment. When a person is alleged to have committed a crime, he may be prosecuted for it. For him to be charged in court for the said crime, the prosecution must have sufficient evidence (gathered by the police) to prove that the accused person had committed the crime. The burden of proof is that of 'beyond reasonable doubt', a higher burden than that in a civil matter, which is 'on the balance of probabilities. Upon the case being proven beyond reasonable doubt, the court may convict the accused and pass the sentence in accordance with law.

The *Criminal Procedure Code (Act 593)* (CPC) provides the general rules of criminal procedure. There are additional rules of criminal procedure governing specific situations, e.g.:

- *Dangerous Drugs Act 1952* (Act 234)
- *Child Act 2001* (Act 611)

The criminal process, like the civil process, may be looked at in three stages:

1) Pre-trial
2) Trial
3) Post-trial

1.7.1 Pre-trial

Investigation of Offences

Criminal investigations in Malaysia are conducted by a number of enforcement agencies. The largest and the most important is the Royal Malaysian Police (PDRM). Others include the Malaysian Anti-Corruption Commission (MACC), Royal Customs and Excise Department, and the Immigration Department.

The powers of the police to investigate are found in the CPC, *Police Act 1967 (Act 344)* and relevant Acts. These include the power to arrest, search, seize, gather and preserve evidence, interview potential witnesses and recording of statements. Once the investigation is completed, the case is forwarded to the Deputy Public Prosecutor who then decides on whether to charge the person in court.

The Charge

A charge must state the offence with which the accused is charged, the precise provision of law under which the person is being prosecuted, and the provision providing for the punishment, if the punishment is provided in a separate or different provision. The charge must also state the time, date, and place of the alleged offence. If the particulars described still do not give sufficient notice of the offence with which the accused is charged, then the prosecution is required to set out the particulars of the manner in which the alleged offence was committed.

The charge is a notice to the accused of the offence which he or she is accused of. For this reason, the charge must convey to the accused with clarity and certainty the case which the prosecution intends to prove against him or her, and which he or she will have to answer. The charge also serves as information to the Court which is to try the accused, of the matters that need to be proven.

Pre-trial Processes

Before the trial proper begins, there are several pre-trial processes. These include the pre-trial conference, case management, plea bargaining, and disposal of the case as agreed by the accused and the Public Prosecutor after the plea-bargaining process. These are governed respectively, under Sections 172A, 172B, 172C and 172D of the CPC.

1.7.2 Trial

Criminal trials before the Magistrates' Court are known as summary trials. The procedure is stated in Section 173 of the CPC. When the accused is brought before the Court, the charge is read and explained to the accused and he or she is asked whether he or she pleads guilty or claims trial. If the accused pleads guilty and that plea is accepted by the Court, he will be convicted and sentenced accordingly.

If the accused claims trial, remains silent or pleads not guilty, the trial commences. At the beginning of the trial, the prosecution will present its case by adducing evidence to prove, beyond reasonable doubt, each and every element of the crime. The prosecution calls the prosecution witnesses, each of whom is subjected to three stages of examination: the examination-in-chief by the prosecution, cross-examination by the defence and re-examination by the prosecution. The accused or his defence counsel shall be allowed to cross-examine all prosecution witnesses.

At the end of prosecution's case, the Court determines whether the prosecution has made out a *prima facie* case against the accused. The Courts have interpreted the phrase '*prima facie* case' to mean '*which if unrebutted or unexplained would warrant a conviction*'. If the Court finds that there is no *prima facie* case, the accused will be acquitted.

If there is a *prima facie* case, the Court will call upon the accused to enter his or her defence. The Court then informs and explains to the accused the three options available and their attendant consequences:

a) to give sworn evidence as a witness;
b) to give unsworn evidence from the dock; or
c) not to give evidence, i.e. to remain silent.

If the accused elects to give sworn evidence, he or she will precede all other defence witnesses and is examined by the defence counsel, cross-examined by the prosecution, and re-examined by defence counsel. An accused, who elects to give evidence, may also be cross-examined on behalf of any co-accused. Other defence witnesses will be similarly examined, cross-examined and re-examined. At the conclusion of the defence case, the defence makes its closing submissions. The prosecution then exercises the right to reply on the whole case.

The Court must then decide whether on the evidence adduced, the accused is guilty. If the Court finds that the prosecution has not proved the guilt of the accused beyond reasonable doubt or a proper defence was established or there is a reasonable doubt in the prosecution's case, the Court will find the accused not guilty and acquit the accused. If the prosecution succeeds in proving the guilt of the accused beyond reasonable doubt, the Court will find the accused guilty and may convict and sentence him or her accordingly. Both the parties will be given the opportunity to submit prior to sentencing. This allows both the prosecution and defence to submit on the aggravating and mitigating factors respectively.

The procedures for High Court trials are substantially similar to that in the subordinate Courts, as set out in Sections 178–183 of the CPC.

1.7.3 Post -trial

A party aggrieved by the decision of a Court in a criminal case may either:

a) file an appeal to a higher Court, or
b) proceed by way of revision.

There are two levels of appeal. If the matter originates from the subordinate Court, i.e. Magistrates' Court or Sessions Court, the first level of appeal is to the High Court and the second and final appeal is to the Court of Appeal. If it originates from the High Court, the appeal goes to the Court of Appeal and then the Federal Court.

The revisionary powers of the High Court Judge are discretionary. It is for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order of a subordinate Court. A revision is initiated by the Judge himself, either by calling for the record of proceeding himself or if the matter otherwise comes to his knowledge. Unlike an appeal, no party has any right to be heard in a revision. Nevertheless, the Judge may hear any party if he thinks it fit to do so.

Appeals to the High Court (Criminal Cases)

Appeals against the judgement, sentence, or order of the Magistrates' and Sessions Courts may be made to the High Court. "Judgement" refers to the final order in a trial terminating in the conviction or acquittal of the accused, while "order" must be a final order in the sense that it is final in effect as in the case of a judgement or sentence. Appeals may be made on the grounds of error of fact, law or mixed fact and law, or excessive severity or inadequacy of sentence.

The statutory right to appeal from the judgement, sentence, or order of the magistrates or judges of the Sessions Courts is qualified when or where:

1) There is no appeal in the case of an offence punishable with a fine only not exceeding RM25; or
2) A person convicted after a proper plea of guilty cannot appeal against his or her conviction; he or she can appeal only as to the extent or legality of the sentence; or
3) A person has been acquitted by a magistrate or a Sessions Courts judge, there shall be no appeal except by, or with the written sanction of, the public prosecutor.

An appeal does not automatically operate as a stay of execution. The trial or appellate Court has the discretion to stay execution on any judgement, sentence, or order pending appeal on such terms as security for the payment of any money, or the performance or non-performance of any act, or the suffering of any punishment ordered, as to the Court may seem reasonable.

At the hearing of the appeal, where all the parties are present, the submissions will be made by the parties in the following order:

a) the appellant;
b) the public prosecutor or respondent, and
c) a reply by the appellant.

The powers of the High Court when exercising its appellate jurisdiction are set out in Section 316 of the CPC. The judge may either dismiss the appeal, direct further inquiry, order a retrial, substitute an acquittal with a conviction and proceed to sentence the accused according to law, quash the conviction and set aside the sentence, acquit or discharge the accused or vary the sentence or order accordingly.

Appeals to the Court of Appeal (Criminal Cases)

Appeals to the Court of Appeal may be made against decisions of the High Court:

1) in the exercise of its original jurisdiction,
2) in the exercise of its appellate or revisionary jurisdiction concerning matters originating in the Sessions Court, and
3) in the exercise of its appellate or revisionary jurisdiction concerning matters originating in the Magistrates' Court.

In categories (1) and (2), the appeal may lie on questions of fact or law or mixed fact and law whereas appeals falling under category (3) are confined to only questions of law, which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the outcome of the appeal or revision, and can be pursued only with the leave of the Court of Appeal.

An appeal does not automatically operate as a stay of execution. The only exceptions are where the appellant has been sentenced to whipping or death by the High Court. In these two cases, the sentence will not be carried out until the deadline for filing a notice of appeal has expired or, where a notice of appeal has been filed, until the appeal has been determined. In all other cases, the High Court or Court of Appeal has the discretion to stay execution on any judgement, order, conviction, or sentence pending appeal on such terms as may seem reasonable to the Court.

Where an appeal is against an acquittal, the Court of Appeal may direct that the accused be arrested and brought before it. In such a case, the Court of Appeal may remand the accused to prison pending the disposal of the appeal or grant the accused bail, if applicable. At the hearing of the appeal, the parties will make their submissions in the following order:

a) the appellant;
b) the respondent; and
c) a reply by the appellant.

The powers of the Court of Appeal are set out in Section 60 of the CJA 1964. It may, among other things, confirm, reverse, or vary the decision of the High Court, or even order a retrial. The *proviso* to subSection (1) of Section 60 of the CJA 1964 is important. It allows the Court of Appeal to dismiss the appeal if the Court considers that no substantial miscarriage of justice has occurred even though it is of the opinion that the point raised in the appeal might be decided in favour of the appellant.

Appeals to the Federal Court (Criminal Cases)

Pursuant to Section 87(1) CJA 1964, the appellate jurisdiction of the Federal Court in criminal cases is confined to hearing and determining *"any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction*". This, in essence, means that the Federal Court can only hear and determine appeals in criminal cases which are heard by the High Court in the first instance.

Such appeals may be on questions of fact or law or mixed fact and law. The procedure for appeals to the Federal Court is substantially the same as that for appeals to the Court of Appeal. Likewise, the powers of the Federal Court, in the exercise of its appellate jurisdiction in criminal matters, are the same as those conferred upon the Court of Appeal and the High Court.

Punishment

A crime is an offence against the state. If the accused is found guilty, depending on the seriousness of the crime, they will be punished by the death penalty, whipping, imprisonment or some lesser penalty such as a fine. There are four theories of punishment which explain the function of punishment. They are:

1) retribution;
2) deterrence;
3) incapacitation; and
4) rehabilitation.

Retribution indicates vengeance; that is, an offender deserves punishment. Under a general theory of political obligation, all persons owe duties to others not to infringe their rights. Justice and fairness insist that all persons must equally bear the sacrifice of obeying the law. By committing a crime, the offender has gained an unfair advantage over all the others who have obeyed the law and restrained themselves from committing a crime. Social equilibrium in society must be restored. The offender deserves and must receive punishment to destroy his unfair advantage.

The aim of *deterrence* is that the threat of punishment will deter people from committing a crime. Individual deterrence is where the individual offender is discouraged from committing a further crime as a result of his unpleasant punishment. In the case of general deterrence, the punishment of an offender serves as an example and a threat to others of what will happen to them if they commit crimes.

Incapacitation is based on the idea that society needs protection from "dangerous criminals"; that is, those criminals are likely to commit the offence again. Accordingly, society is justified in taking whatever steps are necessary to protect itself from the danger.

The purpose of *rehabilitative* sentencing is to try to reform the offender so that, being rehabilitated, he can resume a normal and useful role in society. Sometimes there may be an overlap between criminal acts and civil wrongs. The commission of a crime will generally involve some type of

offence against an individual and/or their property and will also attract civil liability generally in the form of a tort.

1.7.4 Main Differences between Criminal and Civil law

The main differences between Criminal and Civil law can be summarised as follows:

1) In Criminal law, the State (not the victim) brings the action as crimes are considered to have been committed against the community; whilst in Civil law, the individual (victim) brings the action as the individual suffers a personal loss.
2) In Criminal law, the State enforces judgement of the Court whilst in Civil law, the individual enforces judgement of the Court.
3) The standard of proof under Criminal law is beyond reasonable doubt whilst under Civil law it is on the balance of probabilities.
4) Guilty mind (*mens rea*) is required under Criminal law but not required under Civil law.
5) The onus of proof under Criminal law is on the prosecution to prove its case beyond reasonable doubt as the accused is presumed innocent until proven guilty; whilst under Civil law the plaintiff (person bringing the action) must establish their case on the balance of probabilities.
6) The punishment under Criminal law includes death, imprisonment, fines, whipping, and loss of licence, etc.; whereas under Civil law the remedies include damages (money compensation), injunction, and specific performance.

What is the terminology used to refer to the two parties in a Court case?

In civil cases, the two parties are the plaintiff (or claimant) and the defendant. In criminal cases, they are referred to as the prosecution and the accused.

Summary

When we speak of the law, we usually imply the whole of the law, however it may have been formed. Much of the Malaysian law has been created out of the English jurisprudence initially, but a great part of the law now has been the result of statutory invention namely statutes, i.e. Act of Parliament.

Generally speaking, Law can be categorised into three main areas.

1) Public Law
2) Private Law
3) International Law

Public law regulates the relationship between the citizen (an individual or group of people) and the State.

Private law deals with the relation between one citizen and another citizen. It is also known as "Civil law". It includes contract, Family law, Tort, Land law, and Commercial law in general. Legal action may be commenced or initiated by individuals seeking for damages or compensation.

Public international law deals with relationship between states, e.g. Border, territorial waters etc.

Private International law is concerned with the application of various national laws of the facts of a particular case involving two or more countries.

The main sources of law in Malaysia can be categorised as follows:

i) the Federal Constitution
ii) the 13 Constitution of the States comprising the Federation
iii) Federal law made by Parliament
iv) State laws made by State Legislative Assemblies
v) Federal and State Subsidiary Legislation
vi) Principles of English Law
vii) Judicial Precedent
viii) Islamic Law

The Federal Constitution is the supreme law of the land. Generally, any law which is inconsistent with the Federal Constitution is invalid. The Malaysian Parliament functions under a written constitution and is governed by it. Its law-making power is limited by the provisions in the Constitution. However, our Parliament as a legislative body has the capacity to amend, repeal and make new constitution by way of a two-third majority vote of both houses of Parliament (*Dewan Negara* and *Dewan Rakyat*). The Federal Constitution also establishes a constitutional Monarchy and a Federal System of Government.

The 13 States of Malaysia have individual constitutions, which provide for a single chamber Legislative Assembly in each state. A *Menteri Besar* or a Chief Minister heads the State government.

Legislation refers to laws made by a person or body, which has power to make laws. In Malaysia, Parliament and Legislative Assemblies have powers to enact laws in their respective areas. Laws made by Parliament may extend to the whole country. However, laws enacted by a State Assembly only apply to that particular state.

The applicability of English law remains in Malaysia even after independence. The English law is adopted so far as they were suitable to local conditions. Many of the local laws especially those affecting trade, commerce and banking were patterned on English models.

Common law refers to law laid down by judges sitting in the Superior Courts as distinct from statute law enacted by the legislature.

Syariah law applies only to Muslims and comes under the jurisdiction of the *Syariah* Court. It covers matters such as marriage, divorce, adoption, wills and other offences under the Islamic law.

Further Reading

- Wu, M. *An Introduction to the Malaysian Legal System.* 2nd ed., Heinemann Educational Books (Asia), 1975.
- *The Malaysian Legal System*. Dewan Bahasa dan Pustaka, 1987.
- Hickling, R., & Wu, M. *Conflict of laws in Malaysia*. Butterworth. 1995

Review Questions

1. What is the highest court in Malaysia?
- a) High Court
- b) Court of Appeal
- c) Federal Court
- d) Sessions Court

2. Who appoints the Attorney General in Malaysia?
- a) Prime Minister
- b) Yang di-Pertuan Agong
- c) Chief Justice
- d) Parliament

3. Which type of law governs relationships between individuals and the state?
- a) Private Law
- b) Public Law
- c) International Law
- d) Customary Law

4. What is the primary role of the Syariah Courts in Malaysia?
- a) Handling criminal cases for all citizens
- b) Managing cases related to land disputes
- c) Overseeing personal and family law matters for Muslims
- d) Handling appeals from the Federal Court

5. A plaintiff wishes to recover a debt of RM150,000. Which court should they file their suit in?
- a) Magistrates' Court
- b) Sessions Court
- c) High Court
- d) Court of Appeal

6. Scenario-based: Sarah was fined RM200 for a minor traffic offense. If she wants to challenge the fine, which court should she appeal to?
- a) High Court
- b) Sessions Court
- c) Magistrates' Court
- d) Federal Court

7. Which of the following are components of the Malaysian legal system? (Choose all that apply)
I. Federal Constitution
II. Civil Law Act 1956
III. Common Law
IV. International Treaties
a) I and II only
b) I, II, and III only
c) I, II, III, and IV
d) I and III only

8. Scenario-based: Lisa is involved in a contractual dispute worth RM1.5 million. Which court has the jurisdiction to hear her case?
a) Magistrates' Court
b) Sessions Court
c) High Court
d) Court of Appeal

9. Which of the following principles apply to the doctrine of judicial precedent in Malaysia? (Choose all that apply)
I. Decisions of higher courts bind lower courts
II. Decisions of courts of the same level are persuasive but not binding
III. Decisions of foreign courts are binding
IV. Decisions can be overturned by the same court that made them
a) I and II only
b) I, II, and III only
c) I and III only
d) I, II, and IV only

10. Scenario-based: Michael was sentenced to 5 years in prison by the Sessions Court. He believes the trial was unfair and wants to appeal. Which court should he appeal to?
a) High Court
b) Court of Appeal
c) Federal Court
d) Magistrates' Court

You will find the answers at the back of the book.

2

The Law of Tort

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Learning Outcomes

After completing this topic, you should be able to:

- *State the various types of tort*
- *Explain what negligence is and its related concepts*
- *Explain what trespass is and its various forms*
- *Describe what conversion is*
- *Explain what detinue is*
- *Discuss defamation; its meaning, forms such as slander and libel, its elements and defences to an action for defamation*
- *Describe what constitutes nuisance and its types – public nuisance and private nuisance.*
- *Understand what vicarious liability is and the scope of liability*
- *Recognise what occupier's liability is and the duties of an occupier*
- *Describe what bailment is*

Why this Topic is Important

This topic is important because knowledge of the basic principles of the law of tort is fundamental to understanding the legal impact and consequences, which attach themselves to our daily conduct in relation to others. The duties and responsibilities recognised by the law of tort are imposed by law, whether we agree to it or not. It is largely based on our moral duty to others who may be affected by our conduct even though we may not have intended to affect them.

It is especially important to the insurance industry because damage to insured property is likely to lead to insurance claims. As a result, an appreciation of the principles underlying the liabilities of tort is important for insurers, intermediaries and policyholders alike. This would involve a good understanding of the basis of a claim, the defences available and the remedies sought. For example, in tort law cases, liability insurance is vital for the defendant. Liability insurance is a means for individuals or businesses to protect themselves in cases where they are potentially liable for some wrongdoing that caused harm to another.

Introduction

Tort is based on an obligation imposed by law. A "tort" is a civil wrong. It is the breach of a general duty, which is imposed by the law (and not agreed upon between the parties). Any person whose legal right is infringed may sue that wrongdoer. The essential elements of a tort are that there must be an act or omission done intentionally or negligently, and there must be damage caused by such act or omission, which is not remote.

2.1 The Nature and Classification of Torts

A tort may consist of either a wrongful act or omission, which is not authorised by law. A tort has the effect of encroaching upon another's interest, whether this encroachment results in actual damage or not, which entitles the other party to a remedy from which he or she will hopefully be restored to his or her previous position.

Generally, the features of a tort are:

1) there must be a wrongful or unauthorised act or omission; and
2) that wrongful or unauthorised act or omission affects the interests or rights of others; and
3) the injured party or victim has a right to a claim for damages.

There is no accurate definition that readily explains the width or the scope of the law of torts. Even though a tort is a "wrong", this does not mean that all "wrongs" come within the purview of the law of torts. Not all wrongful acts or omissions are legal wrongs.

Example

All wrongs are not torts

If *B* was drowning and he called out to *A* for help, and *A* failed to rescue *B*, then *A* would not have committed any tort towards *B*. *A's* behaviour may be morally wrong, but it is not a tort, that is, not a legal wrong.

The scope of tort is wide and continues to expand. Well established torts include wrongs against the person such as:

- trespass to person (assault, battery, and false imprisonment),
- interference to goods (trespass to goods, conversion, detinue),
- trespass to land,
- negligence,
- defamation,
- nuisance, and
- strict liability.

The scope of "tortious liability" has slowly expanded in recent years to include among others, "interference with trade", "passing-off" and "product liability". The scope of the law of torts will continue to expand in parallel to the need to protect new rights and interests of both individuals and the community as a whole.

There are three main sources of the law of torts in Malaysia, namely, English common law, local judicial decisions and common law principles, which have been codified into local statutes. The only branch of Malaysian tort law that has been codified into statute is contained in the *Defamation Act 1957* (Act 286).

The *tort of negligence* is the most significant and central tort, arguably the tort which defines the law of torts. It is generally true that damage suffered as a result of another person's careless action or inaction may give rise to the tort of negligence. However, the tort of negligence requires proof of specific elements before the tort is established, despite carelessness on the part of the defendant, and injury or damage sustained by the plaintiff.

Case Law *Tort of negligence – definition*

CASE 2-1 *Blyth -v- Birmingham Waterworks Co* [1856]11 Ex 781

In the English case of *Blyth -v- Birmingham Waterworks Co*, Alderson B stated at page 784 that:

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."*

Case Law *Tort of negligence – definition*

CASE 2-2 *Lochgelly Iron and Coal Co -v- McMullan* [1934] AC 1 at page 25

In the English House of Lords case of *Lochgelly Iron and Coal Co -v- McMullan,* **Lord Wright** defined negligence as:

> *"…Negligence means more than needless or careless conduct…it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing…".*

In short, negligence is established when three elements are fulfilled, namely:

1) that there is a duty of care owed by the defendant towards the plaintiff; and
2) this duty is breached by the defendant; and
3) loss or injury is suffered by the plaintiff; and
4) the loss or injury was caused by the said breach of the duty of care.

2.2 The Law of Negligence

2.2.1 Duty of care

"Duty of care", in the tort of negligence means duty as imposed by the law, or legal duty. The breach of this duty gives rise to liability in negligence.

ACTIVITY

Research the term "neighbour principle". How does it relate to the law of negligence and the duty of care?

Example

Legal duty

A, a customer at a supermarket notices a banana skin on the floor of the supermarket but he chooses to walk past it, and *B*, who is in a hurry, slips on the banana skin and injures himself. *A* does not owe a *legal duty* to warn *B* or to dispose of the banana skin. *A* only has a *social* or *moral* duty, which is not enforceable by the law. There is generally no duty to rescue a stranger from danger.

However, the proprietor of the supermarket would not be in the same position as *A*, for the law imposes a duty of care on the occupier of premises to ensure the safety of the premises to invitees and will be liable for breach of duty should anyone be injured due to his act or omission to render a safe premises for its users.

Case Law *Duty of care*

CASE 2-3 *Taj Hospital Sdn Bhd -v- Ketua Pengarah Kesihatan Malaysia & Anor* [2008] 2 CLJ 423

The Malaysian High Court in the case of *Taj Hospital Sdn Bhd -v- Ketua Pengarah Kesihatan Malaysia & Anor* held that the Director of Health, under the relevant Ministry owes a common law duty of care to ensure that any application to renew a private hospital licence must be attended to promptly and failure to do so for almost a year, without any reasonable cause, constitute a breach of that duty to that hospital.

The primary test or principle used in determining the existence of a duty of care is the well-known "neighbour principle". This principle was laid down in the landmark case of *Donoghue -v- Stevenson.*

Case Law *Neighbour principle*

CASE 2-4 *Donoghue -v- Stevenson* [1932] AC 562

The facts of the case are that the defendant, a ginger-beer manufacturer, had sold ginger-beer to a retailer. The ginger-beer bottles were opaque. *A* bought a bottle and entertained her friend, the plaintiff who drank the ginger-beer. It was alleged that when *A* refilled the glass, along with the ginger-beer came the decomposed remains of a snail. The plaintiff suffered shock and was severely ill as a consequence.

The plaintiff sued the manufacturer and claimed that the manufacturer had a duty in the course of his business, to prevent snails from entering into his ginger-beer bottles and further that he had a duty to ensure that all empty bottles were carefully inspected before they were filled with ginger-beer.

The issue in this case was whether the defendant owed such a duty to the plaintiff.

The House of Lords held that the test to determine the existence or otherwise, of such a duty, was whether the plaintiff was the neighbour of the defendant. **Lord Atkin** at page 580, held that A's neighbour are persons who are so closely and directly affected by A's act that A ought reasonably to have them in A's contemplation as being so affected by the said act. The rule is you must not injure your neighbour.

Applying this neighbour principle, the Court held the defendant liable. The decision in this case is important for two reasons:

1) it created a new category of duty, owed by the manufacturer to the consumer; and
2) the Court had taken into account new technology, which was mass production, in the imposition of liability for negligence.

Prior to *Donoghue -v- Stevenson,* the Courts would insist on a pre-existing contractual relationship between the parties before a duty of care could arise.

The neighbour principle is an objective test in the sense that the Court will ask the hypothetical question, would a reasonable man, who is in the same circumstances as the defendant, foresee that his conduct will adversely affect the plaintiff? If the answer is "no", the plaintiff is not a neighbour of the defendant and no duty of care arises. Conversely, if the answer is "yes", this means that the plaintiff is a neighbour of the defendant and the latter owes the former a duty of care.

Lord Atkin's neighbour principle was approved by a subsequent House of Lords case of *Home Office -v- Dorset Yacht Co Ltd*.

Case Law *Neighbour principle*

CASE 2-5 *Home Office -v- Dorset Yacht Co Ltd* [1970] AC 1004

In this case, seven boys who were borstal trainees, had escaped from an island due to the negligence of some borstal officers. The boys caused damage to a yacht and its owner sued the Home Office.

The issue was whether the Home Office or its officers owed any duty of care to the owner of the yacht. The Queen's Bench held that the Home Office owed a duty of care to the plaintiffs, which was capable of giving rise to liability in damages. The appeal by the Home Office was dismissed.

In short, a duty of care exists when the following factors are fulfilled:

1) the damage is reasonably foreseeable; and
2) there is a close and direct relationship of proximity between the plaintiff and the defendant; and
3) the circumstances as a whole must be such that it is fair, just and reasonable for the imposition of a duty of care.

The Malaysian Court of Appeal in the case of *Kris Angsana Sdn Bhd -v- Eu Sim Chuan & Anor,* had to consider the issue of foreseeability in negligence.

Case Law *Foreseeability in negligence*

CASE 2-6 *Kris Angsana Sdn Bhd -v- Eu Sim Chuan & Anor* [2007] 4 CLJ 293

The defendant was conducting piling activities and excavation works on their land in order to build two 20-storey condominiums. It did not take any precautionary or preventive measures prior to construction to ensure that the plaintiff's neighbouring bungalow was not affected. Movement and settlement of the underground soil caused structural damage to the bungalow and cracks appeared on its floors, walls, columns and beams.

Suriyadi Halim Omar JCA in delivering the judgement of the Malaysian Court of Appeal, held the defendant/appellant liable due to its negligence in omitting to take preventive measures before commencing the construction works which any reasonable man in that situation would have done to avoid the plaintiff/respondent's loss.

It should be noted that foreseeability or proximity does not always necessarily mean physical nearness. The fact that the plaintiff must be a foreseeable victim does not mean that the plaintiff himself must be identifiable by the defendant. It is enough for the plaintiff to be a member of a class of persons to whom damage is foreseeable.

There may be situations in which the Court may not impose a duty of care on grounds of public policy even though damage to the plaintiff is foreseeable. An example of a public policy argument is that to impose a duty of care on a certain party may open the 'floodgates' of litigation.

2.2.2 Breach of Duty

"Negligence" is the omission to do something which a reasonable man would do, or doing something which a reasonable man would not do. A "breach of duty" is determined through the "reasonable man's test". The question to be asked is:

> *"Would a reasonable man in the same circumstances as the defendant have acted as the defendant has done?"*

It is very much up to the judge to determine based on the facts of each individual case as to what a reasonable man would have done in the circumstances as well as to decide on what should have been foreseen by the defendant.

Case Law *Standard of care requirement*

CASE 2-7 *Nettleship -v- Weston* [1971] 2 QB 691

In *Nettleship -v- Weston,* the English High Court held that the defendant, a learner-driver was not liable for the injury she caused to the plaintiff as she had tried to control the car to the best of her ability.

On appeal, the English Court of Appeal held that the standard of care required of a learner-driver was the same as other experienced drivers. The defendant's lack of experience was irrelevant and as the way in which she drove fell below the required standard of care, she was liable. The English Court of Appeal further stated that it would indeed be difficult if Courts had to take into account the different levels of experience of each defendant.

Case Law *Standard of care requirement*

CASE 2-8 *Chen Soon Lee -v- Chong Voon Pin & Ors* [1966] 2 MLJ 264

In the Malaysian High Court case of *Chen Soon Lee -v- Chong Voon Pin & Ors*, a schoolgirl drowned at sea during a picnic organised by the school. It was proven that no one was aware that the particular area of the beach where the child was playing was dangerous.

In an action by the father against the school, the Malaysian High Court found that the school had taken all the reasonably necessary steps to safeguard the safety of the children and Thus, the school was not liable.

Quite often, what is regarded as reasonable behaviour varies according to the circumstances of the case.

Case Law *Reasonable behaviour*

CASE 2-9 *Government of Malaysia & Ors -v- Jumat bin Mahmud & Anor* [1977] 2 MLJ 103

In the Malaysian case of *Government of Malaysia & Ors -v- Jumat bin Mahmud & Anor,* a pupil who was sitting behind the plaintiff, pricked the plaintiff's thigh with a pin. The plaintiff turned around and his eye came into contact with the sharp end of a pencil which the pupil was holding. The eye was badly injured and had to be removed.

The Malaysian High Court held the form mistress liable in negligence. On appeal, the Malaysian Federal Court held that in considering whether or not the defendants were in breach of their duty of care, it was necessary to consider whether the risks of injury to the plaintiff were reasonably foreseeable. Assuming it was, the next question was whether the defendants had taken reasonable steps to protect the plaintiff against those risks.

In this case, the Malaysian Federal Court found that the particular form mistress did not expose the plaintiff to injury that was reasonably foreseeable. Further, constant vigilance in the classroom would not have prevented the injury sustained by the plaintiff. The defendants' appeal was accordingly allowed.

Case Law *Reasonable behaviour*

CASE 2-10 *Mohamed Raihan bin lbrahim & Anor -v- Government of Malaysia & Ors* [1981] 2 MLJ 27

In the Malaysian case of *Mohamed Raihan bin lbrahim & Anor -v- Government of Malaysia & Ors*, the plaintiff was injured by a hoe wielded by a fellow pupil during a practical gardening class. The plaintiff alleged that the defendants had failed to give adequate supervision and instructions with regard to the use of gardening tools.

The Malaysian Federal Court distinguished this case from the *Government of Malaysia & Ors -v- Jumat bin Mahmud & Anor* case and held the defendants negligent as they had failed to take reasonable steps to prevent injury to the plaintiff who was under their care. The teacher had failed to examine the tools. She should have appreciated that the boys were handling dangerous instruments and she ought to have given sufficient warning as to the use of the tools. Further, she ought to have taken steps to see that the pupils were positioned within such distance between them so as to avoid injuries from being inflicted. Accordingly, the school had failed to provide a safe system and environment of gardening techniques.

The essence of an 'objective test' in the tort of negligence is this:

The reasonable man is not expected to be a perfect man. The defendant's actions must conform to the criteria expected of a person of normal intelligence and skill. It is no good if the defendant has done his "best", if his "best" is below that of the reasonable man. Similarly, if the defendant is of higher intelligence than the reasonable man, he will not be expected to reach that personal higher level of intelligence to a given situation. The standard against which his conduct is measured remains that of the reasonable man.

When a person professes to have a special skill or expertise in a particular field, he will be judged as against other people. Replace it who possess the same skills. If a person represents himself as having the skill and experience which he in fact does not have, the Courts will expect him to demonstrate the standard of care which he claims to have.

Case Law *Standard of care – special skills*

CASE 2-11 *Chaudhry -v- Prabhaker* [1988] 3 All ER 718

In the English High Court case of *Chaudhry -v- Prabhaker,* the plaintiff relied on her friend, the defendant, to find a suitable second-hand car for her to buy. She had stipulated that the car should not have been involved in an accident. The defendant found a car which he recommended the plaintiff to buy, and which she did. It was subsequently discovered that the car had been involved in a serious accident, had been poorly repaired and was in fact unroadworthy.

The English High Court allowed the plaintiff's claim on the basis that the defendant had chosen to be the agent of the plaintiff and since he had elected to take on the particular task, even though he was not an expert or a professional in the matter, he was expected to have a sufficient degree of knowledge to complete the task competently.

Case Law *Standard of care – special skills*

CASE 2-12 *Ang Tiong Seng -v- Goh Huan Chir* [1970] 2 MLJ 271

In the Malaysian High Court case of *Ang Tiong Seng -v- Goh Huan Chir,* the plaintiff injured his hand due to the negligence of *D1* and *D2*. They brought the plaintiff to see *D3*, a *sinseh*. *D3* bandaged the plaintiff's hand together with three sticks of bamboo. On the second day, the plaintiff experienced some pain and went to see *D3*, who gave some ointment to the plaintiff and told him that the pain would get worse on the third day, which was true. The plaintiff went back to *D3* as he was in great pain, and the latter brought the plaintiff to a hospital. Gangrene had set in, and the hand had to be amputated.

The issue, in this case, was the standard of care required of a sinseh. The Malaysian High Court held that even though the standard of care required of *D3* was not the same as the standard of care required of a doctor, he was nevertheless held liable as he was careless in his treatment of the plaintiff.

Where a person is registered under the *Medical Act 1971*, it has been held that the standard of care and skill required of him is at par with that of a medical practitioner.

Case Law *Standard of care required of a person registered under the Medical Act 1971*

CASE 2-13 *Wilsher -v- Essex Area Health Authority* [1987] QB 730

In the English Court of Appeal case of *Wilsher -v- Essex Area Health Authority,* a premature baby was given excess oxygen due to an error in monitoring its oxygen supply. A junior doctor inserted a catheter into a vein instead of an artery and this caused an inaccurate reading of the oxygen level. The doctor administered more oxygen to the baby with the consequence that the baby became blind. In a claim for negligence, the doctor raised the fact that he was a junior and inexperienced doctor and so the standard of care applicable to him ought to be the standard of care of another doctor with the same level of limited experience.

In a majority judgement, the English Court of Appeal held that the standard of care should be related to the "post" of the defendant and not his individual level of experience or competency and in this case it was a person who filled the post of a skilled and competent doctor.

In any case, the standard of care of a defendant with special skills is to be assessed on the basis of what a reasonably skilled competent man undertaking that activity would do or would not do in order to avoid harm to his neighbour. Bankers, doctors, accountants, lawyers, architects, engineers and all who specialise in particular skills are professionals who are bound to exercise the care and skill of ordinary competent practitioners in their respective professions. The standard of care required of these professionals is that of a reasonable professional. Thus, someone who professes to have a special skill will not be judged in the same category as an ordinary person. The standard of care required of a professional is naturally of a higher level than that required of the ordinary man on the street. The defendant's personal characteristics are not taken into account in assessing whether he has acted reasonably or otherwise in the particular circumstances.

Case Law *Standard of care required of a professional*

CASE 2-14 *Bolam -v- Friern Hospital Management Committee* [1957] 2 All ER 118

The test in determining the standard of care of a professional defendant was laid down in the English High Court case of *Bolam -v- Friern Hospital Management Committee.* In this case the plaintiff's pelvis was broken during an electro-convulsive treatment (ECT) and the plaintiff alleged negligence on three grounds: firstly because the defendant did not warn the plaintiff of the risks involved in an ECT; secondly because the defendant did not give the plaintiff any relaxant before the shocks were given to him, and thirdly because the defendant did not hold down the plaintiff's body whilst the treatment was being administered.

McNair J, in his direction to the jury stated that a man need not possess the highest expert skill...it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. The defendant was found not liable as he had conformed to the standard of reasonable doctors.

Bolam has long been the criterion in Malaysia in assessing a doctor's level of competency.

Case Law *Standard of care – doctors*

CASE 2-15 *Kow Nan Seng -v- Nagamah & Ors* [1982] 1 MLJ 128

In the Malaysian Federal Court case of *Kow Nan Seng -v- Nagamah & Ors*, the plaintiff was involved in an accident and his left leg had to be plastered. The plaster was tight and the plaintiff complained of pain. The doctors did not act on the complaints immediately. When they eventually did, the plaintiff's leg had turned gangrenous and consequently had to be amputated.

The Malaysian Federal Court held that the duty of a doctor towards his patient was that he must adhere to the reasonable standard of care and expertise. If there were differences in opinion in terms of the types of plasters that may be used, the defendant would not be liable in negligence as long as he opted for a treatment that was generally accepted within the profession. The Malaysian Federal Court applied the *Bolam* test and held that in this case, the defendant was liable as all doctors were aware of the fact that if plaster was applied blood circulation would be affected. The doctor was also negligent in merely prescribing painkillers when the plaintiff complained of pain. The fact that all the doctors were busy on that day as it was "surgery-day", was not accepted as a valid defence.

The *Bolam* test is also applicable in other professions, notably in cases involving the negligence of engineers and architects.

Case Law *Standard of care – application of the Bolam test to professionals*

CASE 2-16 *Greaves & Co -v- Baynham Meikle* [1975] 1 WLR 1095

In the English High Court case of *Greaves & Co -v- Baynham Meikle,* it was held that a professional man – be it a medical man, a lawyer, an accountant, an architect or an engineer must use reasonable care and skill in the course of his employment. Reasonable care and skill are to be determined through the Bolam test, where the defendant professional's conduct will be compared with that of reasonably competent men exercising the particular art.

Case Law *Standard of care – departure from the Bolam test*

CASE 2-17 *Kamalam a/p Raman & Ors -v- Eastern Plantation Agency (Johore) Sdn Bhd & Anor* [1996] 4 MLJ 674

In the Malaysian High Court case of *Kamalam a/p Raman & Ors -v- Eastern Plantation Agency (Johore) Sdn Bhd & Anor,* the Malaysian High Court introduced a different test to determine breach of duty.

The facts are these: One Mr *D* (the deceased) was employed by *D1* at the time of his death and was staying on the estate owned by *D1*. Mr *D* was taken to the estate clinic one day due to giddiness and having fainted at work. The attending doctor, having examined Mr *D*, prescribed medication and discharged him. On two subsequent occasions thereafter Mr *D* was attended to by *D2*. Eight days after the first visit to the clinic, as a result of giddiness and fits, Mr *D* was taken to a hospital for emergency treatment and was subsequently transferred to another hospital. He died the next day, the cause of death being a stroke which was not but could and should have been diagnosed much earlier.

The Malaysian High Court found *D1* and *D2* liable for their failure to provide an efficient ambulance service at the material time and for failure to admit Mr *D* into hospital earlier, respectively.

Although the same decision might have been reached applying the *Bolam* test, the Court chose to distinguish *Bolam* and was of the view that the standard of care of a skilled person cannot be determined solely by reference to the practice supported by a responsible body of opinion in the relevant profession or trade. The ultimate question is whether it conforms to the standard of reasonable care demanded by the law, which is a question to be decided by the Court and not delegated to any profession or group in the community.

Case Law *Standard of care – departure from the Bolam test*

CASE 2-18 *Hong Chuan Lay -v- Dr Eddie Soo Fook Mun* [1998] 7 MLJ 481

This departure from the *Bolam* test was reiterated in the Malaysian High Court case of *Hong Chuan Lay -v- Dr Eddie Soo Fook Mun,* where it was held that although the standard of care required in matters pertaining to diagnosis and treatment was still subject to the *Bolam* test, in respect of the provision of advice and information, it is the Court rather than a body of medical opinion that will determine whether the doctor has breached his duty. Medical opinions are however still required to assist the Court in its deliberations.

Case Law *Standard of care – departure from the Bolam test*

CASE 2-19 *Foo Fio Na -v- Dr Soo Fook Mun* [2007] 1 CLJ 229

In the Malaysian Federal Court case of *Foo Fio Na -v- Dr Soo Fook Mun*, the plaintiff was injured when the car she was travelling in was involved in a collision. She was taken to the nearest hospital, the *Assunta Hospital.* The plaintiff had dislocated her cervical vertebrae which caused much pain in her neck. A cervical collar was placed around it to prevent unnecessary movement. After conservative treatment for a few days, the defendant surgeon performed the first of two surgeries. After the first surgery, the plaintiff was paralysed and when medication failed to improve her condition, the defendant performed the second surgery. There was a slight improvement afterwards but the plaintiff's paralysis was permanent when she was discharged from the hospital some nine months later.

The plaintiff's claim was that her paralysis was caused by the first surgery and not the motor accident, that the defendant had been negligent in the surgical procedure adopted during the surgery which caused a compression on her spinal cord leading to the paralysis, and that the defendant was negligent in his failure to rectify the situation immediately after the first surgery. The plaintiff further claimed that the defendant failed to explain the risk of paralysis arising from the first surgery, and instead informed her that it was a minor procedure, on the basis of which she gave her consent. The second surgery was performed without her consent being obtained. The plaintiff stated that had she been warned of the risk of paralysis she would not have readily agreed to proceed with the first surgery.

The Malaysian Federal Court held that the applicable test in determining the standard of care of a medical practitioner in relation to disclosure of information and risks is not the *Bolam* test. Instead, the medical practitioner has a duty to warn a mentally competent patient of the risks of a proposed procedure so as to enable the patient to decide whether to proceed or decline it accordingly. Professional opinion serves as a guidance to Courts as to what constitutes acceptable professional practice, but its reasonableness may be questioned by the Courts.

In *Foo Fio Na v Dr Soo Fook Mun*, the Federal Court has distinguished between the standard of care of in providing medical advice as opposed to the standard of care provided in respect of either medical diagnosis or treatment. The Federal Court ruled that it is the courts which will decide on the standard of care, and not the medical fraternity as in *Bolam's* case, whether a patient has been properly advised of the risks associated with a proposed treatment, because such 'advised risks' are related to self-determination by the patient.

The required standard of care of a professional is judged according to the practice and knowledge available at the time of the alleged breach.

Case Law *Standard of care – practice and knowledge available at the time of the alleged breach*

CASE 2-20 *Roe -v- Minister of Health* [1954] 2 QB 66

In the English Court of Appeal case of *Roe -v- Minister of Health,* the plaintiff was paralysed from the waist down after an operation because the solution which was used for the required injection was mixed with phenol, another solution that was placed around the container containing the injection solution. Evidence showed that the container containing the injection solution was cracked, but that it could not have been detected according to the state of knowledge at that time.

The English Court of Appeal found that the doctor knew of the consequences of a phenol injection, and he had examined the injection solution before giving the injection. The doctor was not aware of the possibility of undetectable cracks on the container. Had he been aware of the fact, he would have added another chemical to the phenol to detect any contamination.

Lord Denning held the doctor was not negligent in not testing the phenol as the possibility of cracks occurring in such a situation was only discovered in the medical field in 1951, whereas this incident took place in 1947. The standard of care must therefore be based on current medical knowledge at the time of the alleged breach, and not at the time of the trial.

Case Law *Standard of care – practice and knowledge available at the time of the alleged breach*

CASE 2-21 *Dr Chin Yoon Hiap -v- Ng Eu Khoon & Ors* [1998] 1 MLJ 57

In the Malaysian Court of Appeal case of *Dr Chin Yoon Hiap -v- Ng Eu Khoon & Ors*, the plaintiff became blind as a result of excessive oxygen being administered to him. The Malaysian High Court initially found that the paediatrician was negligent for failing to inform the plaintiff's parents of the possibility of loss of vision through the administration of excess oxygen.

At the Malaysian Court of Appeal it was found that in late 1975 or early 1976 during which time the plaintiff received treatment, there was no preventive or curative treatment available for the plaintiff's condition. This being the case, the doctor's failure to alert the plaintiff's parents would not have made a difference and it was not a breach of duty. The doctor's appeal was Thus, allowed.

The standard of care is a measure that is imposed by the law but its determination is largely dependent on the facts of the case. If damage is not reasonably foreseeable, the defendant is not required to take steps to prevent injury, as one is only required to take precautionary measures against foreseeable and probable damage or injury.

The Court, having considered the facts and all the circumstances of a case, will pose the question: *"Is it reasonably foreseeable that the defendant's conduct will cause damage to the plaintiff?"* If the answer is "yes", then the defendant will be required to exercise a proportionate degree of care to avoid the harm from materialising.

General and Approved Practice

The general rule is that if a defendant does as a reasonable man would do in the same situation, then the defendant will have acted reasonably. It follows that a defendant, who has acted in accordance with the common practice of those similarly engaged in the activity, will have strong evidence to suggest that he has not been negligent.

Case Law *Assessing risk – general and approved practice*

CASE 2-22 *General Cleaning Contractors -v- Christmas* [1953] AC 180

In the English House of Lords case of *General Cleaning Contractors -v- Christmas*, the plaintiff window cleaner was cleaning a window twenty-seven feet above the ground. The plaintiff fell from the ledge on the window which was six and a quarter inch in width and injured himself.

The House of Lords held that even though standing on the window ledge was a common practice for window cleaners, this was a dangerous practice and the defendant as the employer was liable for not providing a safer system of work.

The principle which emerges is that even if an act is a general and common practice, liability will still be imposed if the act is dangerous and gives rise to a considerable degree of risk of injury.

Case Law *Assessing risk – general and approved practice*

CASE 2-23 *Aik Bee Sawmill -v- Mun Kum Chow* [1971] 1 MLJ 81

In the Malaysian Court of Appeal case of *Aik Bee Sawmill -v- Mun Kum Chow*, the plaintiff did not use a crossbar to lift planks onto a lorry with the result that the planks fell onto him. The general practice was that a crossbar would normally be used to lift the planks.

The Malaysian Court of Appeal held that since the plaintiff was never taught how to use the crossbar, the defendant was liable.

The factors that the Court needs and might take into account in determining whether the defendant has reached the required standard of care are varied. Although the standard of care is a question of law, a judge's reasons for finding that the defendant has met or not met that standard are matters of fact.

2.2.3 Rules Concerning Damages

The third element of negligence that the plaintiff needs to prove is that damage was caused by the defendant's breach of duty. Two issues need to be addressed in determining whether the damage suffered by the plaintiff is the consequence of the defendant's breach of duty. The first issue is *causation in fact* and the second, *causation in law*. Causation is relevant in all torts; the plaintiff must prove that the defendant has caused his loss.

Causation in Fact

The question that arises is whether the defendant's conduct has in fact caused the damage suffered by the plaintiff. The test used is the "but-for" test: *"But-for the defendant's breach of duty, would the plaintiff have suffered the injury or damage?"* If the answer is "yes", then it may be concluded the defendant's breach caused the plaintiff's injury and vice versa.

Case Law *Causation in fact – the 'but for' test*

CASE 2-24 *Barnett -v- Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428

This test was laid down in the English Court of Appeal case of *Barnett -v- Chelsea & Kensington Hospital Management Committee.*

Three security guards went to the defendant's hospital when they started vomiting after drinking some tea in the early morning. One of the security guards was the plaintiff's husband. The nurse on duty telephoned the doctor who instructed the nurse to tell the three men to go home and to call their own doctors. Later that afternoon, the plaintiff's husband died of arsenic poisoning, and the plaintiff sued the hospital for negligence for its failure to treat her husband.

The English Court of Appeal held that the doctor had breached his duty of care by not treating the patient. It was however found that the breach did not cause the plaintiff's husband's death as evidence showed that the patient would still have died even if the doctor had treated him. The defendant was accordingly held not liable.

Case Law *Causation in fact – the 'but for' test*

CASE 2-25 *Swamy -v- Matthews & Anor* [1968] 1 MLJ 138

In the Malaysian Federal Court case of *Swamy -v- Matthews & Anor*, the plaintiff went to see *D1*, a doctor who was in the employment of *D2*, for an itch on his hands and legs. He was given an injection of 5 cc acetylarsan, which was alleged to have caused paralysis of the hands and legs.

The High Court dismissed the plaintiff's claim for negligence on the basis that the plaintiff failed to establish that the injection caused his paralysis. On appeal, the Malaysian Federal Court upheld the earlier decision on the same grounds: that the paralysis was not caused by the injection and *D1* was not negligent in giving the injection.

Case Law *Causation in fact – material contribution*

CASE 2-26 *McGhee -v- National Coal Board* [1972] 3 All ER 1008

In the English Court of Appeal case of *McGhee -v- National Coal Board*, the plaintiff contracted dermatitis as a result of exposure to brick dust. Due to inadequate washing facilities at the defendant's factory, this meant the plaintiff was still in contact with the dust whilst he was cycling home.

The defendant was not guilty of exposing the plaintiff to the dust during working hours but they were held liable for the prolonged exposure due to the inadequate washing facilities at their factory.

The plaintiff, in this case, could not prove through the "but-for" test that he would not have contracted dermatitis if he had been able to shower after work but it was established that his disease was due to the brick dust. It was sufficient for the plaintiff to prove that the defendant's breach had materially increased the risk of injury to him.

The *burden of proof* lies with the plaintiff throughout and the plaintiff must prove, at the very least, that the defendant's breach of duty is a "material contribution" to his damage, and there should be no distinction between "material contribution" to injury and "material increase in risk" of injury. Therefore, in the absence of conclusive evidence that it is in fact the defendant's breach which causes the plaintiff's damage, and there is uncertainty with regard to the actual and specific cause of the damage, the "material contribution" factor will be taken into account. It follows that if the degree or level of the defendant's contribution is known then he will only be liable to the extent of his contribution and no more.

Case Law *Causation in fact – material contribution*

CASE 2-27 *Hotson -v- East Berkshire Area Health Authority* [1987] 2 All ER 909

In the House of Lords case of *Hotson -v- East Berkshire Area Health Authority,* the plaintiff injured his hip in a fall and went to a hospital run by the defendant's health authority. The injury was incorrectly diagnosed and the plaintiff was sent home. After five days of severe pain, the plaintiff went back to the hospital where the nature and extent of his injuries were then discovered and he was given an emergency treatment. The nature of the hip injury caused the plaintiff permanent deformity of the hip joint, restricted mobility and general disability.

In an action against the defendant, it was admitted that the delay in diagnosis when the plaintiff was first examined amounted to a breach of duty, but they denied that the resulting delay had caused the plaintiff the disabilities that he was suffering from.

At the House of Lords, it was concluded that the crucial question of fact was whether the plaintiff's injury was caused by the fall or the defendant's negligence in making an incorrect diagnosis and delaying treatment. If the fall had caused the injury, then the defendant's negligence was not a cause of the injury: and this question had to be decided on a balance of probabilities.

The trial judge found that even with prompt and correct diagnosis and treatment when the plaintiff first arrived at the hospital, there was a 75% chance that his condition would have developed and therefore the delay by the defendants caused only 25% of his illness. Thus, the defendant's damages were assessed at 25% of the compensation which would have been payable if they were 100% liable.

The House of Lords quashed this decision. As it was the accident itself rather than the defendant's delay which was more likely to have caused the plaintiff's illness, the defendant was not liable.

Case Law *Causation in fact – burden of proof*

CASE 2-28 *Wilsher -v- Essex Area Health Authority* [1988] 1 All ER 871

In the House of Lords case of *Wilsher -v- Essex Area Health Authority,* where the plaintiff's blindness could have been caused either by the negligent administration of excess oxygen by the doctor or by any one of five other conditions which afflicted the plaintiff at the time, the English House of Lords held that where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach and the plaintiff's injury did not give rise to the presumption that the defendant had caused the injury.

The burden of proof remained on the plaintiff to prove that the defendant's breach of duty caused his injury. In this case, since the plaintiff's blindness could have been caused by any one of a number of different agents and it was not proved that the blindness was caused by the failure to prevent excess oxygen from being given to him, the plaintiff had failed to discharge the burden of proof required of him.

It is clear that the plaintiff must prove, either that the defendant did in fact cause the damage suffered by the plaintiff (where there is a single cause), or that the defendant's conduct materially increased the risk of damage to the plaintiff (where there are many potential causes).

In Malaysia, it seems that the requirement of material contribution is applicable, as opposed to the defendant's breach of duty merely being a contributory factor to the plaintiff's loss.

Case Law *Causation in fact – material contribution*

CASE 2-29 *Dr KS Sivananthan -v- The Government of Malaysia & Anor* [2000] 4 AMR 3767

In the Malaysian Court of Appeal case of *Dr KS Sivananthan -v- The Government of Malaysia & Anor,* the plaintiff was injured in a road accident and sought treatment first at Hospital A and then at Hospital *B*. At Hospital *A*, a plaster of Paris (POP) was applied to his wounded leg. Dissatisfied with the care he received there, he discharged himself and sought treatment at Hospital *B*. The attending doctor split the POP and performed an operative procedure on the leg. A week later, the plaintiff received further treatment by way of an internal fixator from the same doctor. Nine months later, the leg had to be amputated due to ischaemia.

The Malaysian Court of Appeal held that since the plaintiff's leg was at a severe level of ischaemia when he was admitted into Hospital *B*, the attending doctor could not be said to be negligent in delaying treatment at that stage. Although the doctor could have opted to treat the plaintiff by a number of alternative treatments rather than the internal fixator, this method of treatment was acceptable as a recognised choice of treatment in the circumstances (Thus, satisfying the required standard of care). Thus, the doctor at Hospital *B* could not be concluded as being the causative factor of the plaintiff's final injury.

Where a plaintiff's injury was attributable to a number of possible causes, one of which included the defendant's breach of duty, this in itself does not give rise to the presumption that the defendant had caused the injury. The plaintiff must prove that the defendant's negligent conduct has more probably than not caused the plaintiff's injury.

Where two or more tortious acts result in the final damage, and any one of the acts could have produced the same damage, the party responsible for each act will be held liable for the whole damage. This is because each act is a substantial cause of the final damage. The same applies where the plaintiff suffers damage as a consequence of two independent negligent acts. Where there are concurrent causes, all parties will be liable if and only if it can be established that his act has caused the final damage.

In simple terms, what does the 'but for' test in negligence attempt to establish?

The "but for" test, is a simple means of establishing factual causation, that is, did the act or omission cause the harm to the claimant?

Causation in Law/Remoteness of Damage

A defendant will only be liable if it is reasonably foreseeable that his conduct will result in some damage to the plaintiff.

Case Law *Causation in law*

CASE 2-30 *The Wagon Mound* [1961] AC 388

In the Privy Council case of *The Wagon Mound,* the defendant chartered the ship, *The Wagon Mound*, which was anchored at *C* Oil Co for refuelling. Due to the negligence of the defendant's stevedores, some oil had spilled onto the water and the oil spread to the plaintiff's wharf which was about 500 feet away. Two ships were anchored at the plaintiff's wharf for welding works. The manager at the plaintiff's wharf, upon seeing the oil, ordered the welding work to be stopped. He enquired with *C* Oil Co whether it was safe to continue the welding works. *C* Oil Co advised that it was safe to do so. The manager himself believed that the oil on the surface of the water was not dangerous and accordingly instructed the repair works to be continued. He however reminded the workers to be careful not to drop any flammable material into the water. Two days later, the oil caught fire and the plaintiff's jetty was extensively damaged.

Two important findings of fact arose at the trial: firstly, expert evidence was tendered that it was unforeseeable that fuel oil on the surface of the water would catch fire. Secondly, it was foreseeable and indeed had materialised, that damage by way of oil seeping into various parts of the plaintiff's jetty and affecting usage of those same parts would occur.

Thus, it was contended that although damage was foreseeable, the type of damage which had in fact materialised was not foreseeable.

However, since damage was foreseeable, the trial judge and the Court of Appeal held the defendant had breached their duty of care and was Thus, liable for all the direct consequences of that breach of duty.

On appeal to the Privy Council, it was held that the test should be *whether a reasonable man in the defendant's position would foresee the damage that has occurred.*

In this case since it was not foreseeable that the defendant's breach of duty would cause a fire, the defendant was held not liable.

The "reasonable foresight" test involves two principles; firstly, damage must be foreseeable as a consequence of the defendant's conduct, and secondly, the type of damage must be foreseeable. It follows that if the damage that occurs is of a different nature than what is foreseeable, the defendant will not be liable.

Case Law *Causation in law – foreseeability of damage*

CASE 2-31 *Jaswant Singh -v- Central Electricity Board & Anor* [1967] 1 MLJ 272

In the Malaysian Court of Appeal case of *Jaswant Singh -v- Central Electricity Board & Anor,* five buffaloes and a dog which belonged to the plaintiff died as a result of being electrocuted by a telephone wire belonging to *D2*, the Government of Malaysia. The wire had snapped three days prior to the accident and was lying on the ground and resting on top of the aerial electricity lines belonging to *D1*.

In a claim for negligence against both defendants and their servants, the Malaysian Court of Appeal held that the defendants owed a duty of care to the plaintiff as the plaintiff was a "neighbour" of the defendant. It was further held that when electricity was carried overhead by wires or cables great care must be taken in addition to any precautions required by statute, to ensure that it was not likely to become a source of danger.

The defendants had breached their duty in allowing the wire to remain resting on the electric cables for a long time, and the damage was not too remote for if the danger of the telephone wire becoming live with electricity was reasonably foreseeable, then death or serious injury to any person or animal coming in contact with it was also reasonably foreseeable.

Foreseeability of damage is subject to certain factors and these are:

1) The general principle is that the damage must be of the same type, kind or class as what is foreseeable. If the damage that materialises is of a different type than what is reasonably anticipated, then it is regarded as too remote and the defendant will not be liable. The problem lies in determining the type of damage that ought to have been foreseen.

Case Law *Causation in law – type of foreseeable damage*

CASE 2-32 *Bradford -v- Robinson Rentals Ltd* [1967] 1 All ER 267

In the English Court of Appeal case of *Bradford -v- Robinson Rentals Ltd*, the defendant had asked his employee, the plaintiff to run an errand. The van which the plaintiff was driving did not have a heater with the consequence that the plaintiff suffered frostbite.

In a claim against the defendant, the English Court of Appeal held that frostbite was a type of illness that was foreseeable as a consequence of exposure to cold weather and as such the defendant was liable.

2) The extent of damage is irrelevant as long as the type of damage is foreseeable in the circumstances.

Case Law *Causation in law – extent of foreseeable damage*

CASE 2-33 *Vacwell Engineering Co Ltd -v- BDH Chemicals Ltd* [1971] 1 QB 88

In the English Court of Appeal case of *Vacwell Engineering Co Ltd -v- BDH Chemicals Ltd*, the defendant had sold a chemical to the plaintiff without informing him that it might explode if it came into contact with water, but what was foreseeable was a small explosion. The plaintiff placed several test-tubes containing the chemical in a sink and while washing the test-tubes, one of them fell and broke. A huge explosion ensued, killing the plaintiff.

The defendant was held liable, even though the damage was far more serious than what was initially foreseeable, as the type of damage, which was damage through an explosion, was foreseeable.

3) The general rule is that once the type of damage is foreseeable, the way or method by which the damage occurs and its severity are not important.

Case Law *Causation in law – way in which damage occurs*

CASE 2-34 *Hughes -v- Lord Advocate* [1963] AC 837

The leading case is the English House of Lords case of *Hughes -v- Lord Advocate,* where due to the negligence of some post office workers, a manhole was left uncovered. A tent was erected over the manhole and kerosene lamps were placed around the tent to serve as a warning to passers-by. Two boys played with the lamps. While they were doing so, one boy stumbled over one of the lamps. It fell into the manhole and caused a loud explosion and the boy was seriously burned. The explosion was caused by the vaporisation of the kerosene, which the flame from the lamp ignited.

The House of Lords held that it was not foreseeable that an explosion would occur in these circumstances, although injury as a result of a fire was foreseeable. Since the type of injury was foreseeable, the defendant was held liable.

Furthermore, leaving the manhole uncovered constituted a breach of duty on their part. They should have foreseen that children might bring the lamps into the hole and if the lamps were to fall and break, someone would be injured. The lamp was a dangerous object even though the way in which the damage occurred was not foreseeable.

Therefore, the precise sequence of events need not be anticipated for the harm to be foreseeable. The actual harm or damage itself may not be foreseeable, it is sufficient if the harm or damage is of a kind within the general range of what is reasonably foreseeable.

There are instances where, after an event occurred due to the breach of duty by the defendant, another "event" takes place and this "other event" which is not caused by the defendant is referred to as an intervening act. An intervening act may break the chain of causation and the final damage is said to be attributable to the intervening act and not as a result of the defendant's breach.

There are three different types of intervening acts, namely intervention by natural causes, intervention by a third party and intervention by the plaintiff.

a) Intervention through a natural event that is independent of human conduct will absolve the defendant of liability if the breach of duty does not increase the probability of risk of damage to the plaintiff.

Case Law *Causation in law – intervention by natural causes*

CASE 2-35 *Carslogie Steamship Co Ltd -v- Royal Norwegian Government* [1952] AC 292

In the House of Lords case of *Carslogie Steamship Co Ltd -v- Royal Norwegian Government,* the defendant was not liable for the damage to the plaintiff's ship caused by bad weather as this damage was not a consequence of the first collision. The second damage was a natural intervening event and thus, the defendant was not liable.

For the act of nature to break the chain of causation, it must be overwhelming and unpredictable and in no way linked to the defendant's negligence.

b) The defendant will be liable if his breach of duty causes a third party to act, which act subsequently causes the final damage. If however, the defendant's breach of duty gives an opportunity to the third party to act which he does on his own accord and independently, this constitutes a *novus actus interveniens* and the defendant will not be held liable for the third party's conduct.

Case Law *Causation in law – intervening acts*

CASE 2-36 *The Oropesa* [1943] 1 All ER 211

In the English Court of Appeal case of *The Oropesa,* there was a collision between *The Oropesa* and *The Manchester Regiment.* Both ships were at fault but the damage to the latter was more severe. The captain of *The Manchester Regiment*, together with nine of his crew took a boat to cross over to meet the captain of *The Oropesa* to discuss the incident. Unfortunately, the boat capsized before it reached *The Oropesa* and the plaintiff's son who was on the boat, died. At the trial, the question was whether his death was caused by *The Oropesa*, or whether the captain's act of bringing his crew on board the boat constituted a *novus actus interveniens.*

The English Court of Appeal held that the death could not be seen as an isolated incident, independent of the collision. It was stated that in order to break the chain of causation, it must be proven that the second incident was an independent and separate act that was not a normal consequence of the initial breach, something that was unreasonable. There was no intervening act in this case.

Case Law *Causation in law – intervening acts*

CASE 2-37 *Billion Origin Sdn Bhd -v- Newbridge Networks Sdn Bhd* [2006] 6 MLJ 768

In the Malaysian Court of Appeal case of *Billion Origin Sdn Bhd -v- Newbridge Networks Sdn Bhd*, a sprinkler in a room occupied by the first defendant was activated when a fire broke out on the premises. There was no one in the premises at the time and the personnel of the management of the building, the second defendant, did not turn off the sprinkler. This resulted in a flood which in turn flooded the plaintiff's premises below the first defendant's premises.

In an action against the defendants, the first defendant argued that even though it might have been at fault for leaving a fan on its premises switched on for a continuous period of six days, Thus, causing a fire which in turn activated the sprinkler, the failure of the second defendant's employees to conduct a thorough check and to turn off the sprinkler constituted a *novus actus interveniens* to his liability.

The Malaysian Court of Appeal rejected the first defendant's argument and held that there had been no break in the chain of causation. Leaving a fan on unattended for six days would run the risk of fire.

c) If the plaintiff's act or omission, together with the breach by the defendant causes the final damage, the plaintiff is usually said to be contributorily negligent. If the plaintiff's act or omission causes the damage, then that act or omission constitutes a *novus actus interveniens*. The act or omission in this instance must essentially be unreasonable.

Case Law *Causation in law – plaintiff's act or omission*

CASE 2-38 *McKew -v- Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621

In the House of Lords case of *McKew -v- Holland & Hannen & Cubitts (Scotland) Ltd*, due to the defendant's negligence, the plaintiff sustained some injuries on his leg, as a result of which he sometimes lost control and fell. A few days after the accident, the plaintiff went to a block of flats where the staircase had no handrail beside it. As he was descending these steps, he suddenly lost control and in order to avoid from falling, he jumped down, and fractured a bone.

The House of Lords held that to jump in an emergency situation did not necessarily break the chain of causation, but in this case the plaintiff had broken the chain of causation as he had placed himself in that emergency situation. His conduct though foreseeable, was unreasonable.

In conclusion, the general guideline in determining whether there has been a *novus actus interveniens* is to consider whether the resulting or subsequent act or omission to the first breach is unreasonable or foreseeable. If the intervention is reasonably foreseeable, then *novus actus interveniens* would not be established and *vice versa*.

2.2.4 Proof of Negligence

The judge will conclude, from the evidence tendered in Court, whether negligence has been proven.

The burden of proof lies on the party making the claim, the plaintiff. Section 101 of the *Evidence Act 1950* (Act 56) places the burden of proof on the plaintiff. The standard of proof is on a balance of probabilities.

Case Law *Proof of negligence*

CASE 2-39 *Neo Chan Eng -v- Koh Yong Hoe* [1960] MLJ 291

In the Malaysian High Court case of *Neo Chan Eng -v- Koh Yong Hoe*, the plaintiff was hit by a lorry driven by the defendant.

The evidence of the plaintiff and defendant was contradictory and the learned judge disbelieved both parties. He stated that he could guess what actually happened but that he had no right to do that and concluded that the party asserting his case must prove his case as the burden of proof lies on that party. If no evidence can be given in his favour, then the defendant will not be liable.

In certain circumstances, the Court will be prepared to draw an inference of negligence even though there is no outright evidence as to the defendant's act or omission. This inference may be made when the plaintiff invokes the maxim *res ipsa loquitur*, a phrase in Latin which means "the thing speaks for itself".

Res ipsa loquitur

Usually applied in bodily injury cases, the maxim of *res ipsa loquitur* operates as an evidentiary rule that allows plaintiffs to establish a rebuttable presumption of negligence on the part of the defendant through the use of circumstantial evidence.

When the plaintiff pleads *res ipsa loquitor,* the damage or injury which has occurred must give rise to an inference that the defendant has been negligent. This maxim requires three elements to succeed.

Case Law *Proof of negligence – res ipsa loquitur*

CASE 2-40 *Scott -v- London and St Katherine Docks Co* [1865] 3 H & C 596

In the English Court of Appeal case of *Scott -v- London and St Katherine Docks Co*, the plaintiff who was standing near the door of the defendant's warehouse was injured when several sugar bags fell on him.

The defendant was held liable as the facts were sufficient to give rise to the inference that the defendant was negligent.

The three elements are:

1) the thing that causes the damage must be under the control of the defendant or his servants, and

2) the damage is something that will not ordinarily happen if the defendant takes adequate precaution, and
3) the cause of the accident is not known.

Case Law *Proof of negligence – requirements of res ipsa loquitur*

CASE 2-41 *Teoh Guat Looi -v- Ng Hong Guan* [1998] 4 AMR 3815

In the Malaysian Court of Appeal case of *Teoh Guat Looi -v- Ng Hong Guan*, the plaintiff/appellant's husband was killed when the defendant/respondent reversed his car into the rear of another car, near which the deceased was standing. A single eyewitness who was standing near the driver's side of the car reversed into claimed that although he did not see the actual collision, he heard a crashing sound. He then turned and saw that the defendant's car was backed into a car and the deceased was lying on the ground in between the two cars. The plaintiff relied on *res ipsa loquitur* in her claim for damages in negligence against the defendant.

NH Chan JCA, in delivering the judgement of the Malaysian Court of Appeal, held *res ipsa loquitur* to be applicable. The circumstances of an accident may raise the presumption of negligence under the maxim, and one such circumstance is where the defendant's car is in a position where in the ordinary course of things, it has no right to be. This would include circumstances where a car had mounted the pavement.

However, once the cause of the loss or injury is known and may be explained, the thing ceases to "speak for itself" and the maxim becomes inapplicable.

The effect of the maxim is that it shifts the onus to the defendant to rebut the inference. He may do so by giving evidence or explanation as to how the accident occurred and that the accident was in fact not caused by his action or omission. If the defendant is able to give evidence that explains how the accident could have occurred without negligence or gives a reasonable explanation which is equally consistent with the accident happening without his negligence, the onus shifts back to the plaintiff who then has to prove negligence in the usual way.

2.2.5 Liability for Economic Loss and Psychiatric Injury

Pure Economic Loss

"Economic loss" means pecuniary or financial loss. Economic loss incurred as a result of physical injuries or damage to property is usually recoverable. Where the economic loss is not followed by physical injuries or damage to property i.e., "Pure Economic Loss", the Courts have adopted a restrictive approach. Policy reasoning plays a large role in this approach and as a general rule, the Courts would only allow pure economic loss claims where there exists a special relationship between the parties concerned.

Case Law *Pure economic loss*

CASE 2-42 *Majlis Perbandaran Ampang Jaya -v- Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1

Within the Malaysian context, the Malaysian Federal Court case of *Majlis Perbandaran Ampang Jaya -v- Steven Phoa Cheng Loon & Ors*, is the current authority.

The plaintiffs were apartment owners of Blocks 2 and 3 of Highland Towers, which consisted of three blocks of apartments. They had to evacuate their apartments for fear of the instability of the buildings when Apartment Block 1 collapsed in which 48 people died.

The Malaysian Federal Court had to decide on the issue of recoverability of pure economic loss.

The recovery for pure economic loss was denied in this case due to policy reasons which applied specifically to local authorities. The court expressed concerns that local councils may go bust if required to pay for such economic loss. Nevertheless, the principle that was laid down is that pure economic loss is recoverable if it is a foreseeable result of the defendant's breach.

Psychiatric Injury

The Courts have been cautious in holding that a duty of care exists in cases where the type of damage suffered by the plaintiff is one of nervous shock, though the preferred expression now is "psychiatric injury or illness". Psychiatric illness may occur either as a result of a deliberate act which is intentional in nature, or from negligence.

Psychiatric illness includes all forms of mental illness, neurosis and personality change that are medically recognised. This must be differentiated from normal human responses to events that happened such as fear or emotional distress, grief or sorrow, which by themselves, do not give rise to liability except, when it has resulted in a distinct medical condition such as hypertension, heart attack or a positive psychiatric illness like Post-traumatic Stress Disorder (PSTD), anxiety neurosis or reactive depression etc.

Even though psychiatric illness is in principle recoverable, the Courts have always been reluctant and cautious in awarding compensation. There are several reasons for this, namely:

a) the difficulty in assessing such injury or medical condition in monetary value;
b) the difficulty in determining the truth of the plaintiff's allegation;
c) to avoid undue difficulty on the defendant's behalf, for if claims of this nature are not limited, every plaintiff who suffers any kind of emotional disturbance would institute a claim and therefore open the *"floodgates"*; and
d) the difficulty in proving that it is indeed the defendant's act or omission which caused the psychiatric illness suffered by the plaintiff.

Case Law *Psychiatric injury*

CASE 2-43 *Alcock -v- Chief Constable of South Yorkshire Police* [1992] 1 AC 310

The current law on liability for psychiatric illness must now be seen through the decision of the House of Lords in *Alcock -v- Chief Constable of South Yorkshire Police.*

The defendant was sued in a tragedy where part of a stadium collapsed, due to their negligence in allowing too many spectators to enter a confined area of the stadium. Ninety -five people died and more than four hundred people were injured by crushing. This accident was televised live and thereafter reported in the news broadcasts. Sixteen people claimed for nervous shock, of whom four were at the stadium at the time of the accident, although they were not in the area where the disaster occurred, and the rest saw the bodies of their relatives at the mortuary. One plaintiff was the fiancée of one of the victims. There were no claims made by parents or spouses.

The defendant admitted liability for negligence towards those who were killed and injured but denied that they owed a duty of care towards the plaintiffs. The plaintiffs argued that a duty was owed to them if damage in the form of psychiatric illness was reasonably foreseeable.

The House of Lords held that a claim for nervous shock may succeed if firstly, it is reasonably foreseeable that the plaintiff will sustain psychiatric illness due to his close relationship of love and affection with the primary victim, and there is physical proximity between the plaintiff and the victim in terms of time and space. The nature of the relationship between the plaintiff and the victim is also an important factor.

In the present case, the Court held that one of the plaintiffs had failed to prove that he did enjoy a close emotional tie with his two deceased brothers, and his claim was therefore denied. The Court also held that the shock must be caused by actual sight or sound of the accident or its immediate aftermath. The plaintiffs in this case failed the immediate aftermath test as they only saw the bodies some nine hours after the tragedy.

What is the difference between primary victims and secondary victims?

Primary victims suffer shock,due to fear for their own personal safety, whereas secondary victims suffer shock,due to fear for the safety of others.

Case Law *Psychiatric injury*

CASE 2-44 *Thiruvannamali Alagirisami Pillai -v- Diners Club (Malaysia) Sdn Bhd* [2006] 8 CLJ 671

The Malaysian High Court had to consider the issue whether mental anguish must be of a kind which is medically recognised in the case of *Thiruvannamali Alagirisami Pillai -v- Diners Club (Malaysia) Sdn Bhd*. In this case, the plaintiff, a medical doctor, was a member of the Diners Club credit card. Due to a mistake on the part of the defendant, a condolence letter was sent to the plaintiff's wife informing her of his death. The plaintiff subsequently sued the defendant for shock, fear and mental anguish.

The High Court denied his claim even though it acknowledged the plaintiff's discomfort and even anger at the misinformation about his death. It would seem that ordinary emotions of anxiety are not recoverable.

2.2.6 Defences

Even where the plaintiff is able to satisfy the Court that all the requirements of a particular tort exist, the plaintiff's claim might still fail, for the defendant may raise a defence. If the defence is accepted by the Court, the defendant will escape liability, as a valid defence negates the tort.

Defences that are usually raised in a negligence suit are *volenti non fit injuria*, contributory negligence, mechanical defect and inevitable accident. Another defence that may be used but is rarely used is that of a valid exclusion clause.

Volenti Non Fit Injuria

This maxim is a Latin phrase which means "the plaintiff has consented to or voluntarily assumed the risk" of injury. This is a complete defence for the defendant.

The defence has three requirements, namely:

1) The plaintiff has an agreement with the defendant that the latter will not be liable if the plaintiff is injured or suffers loss.
2) The plaintiff's consent must be given freely and voluntarily.
3) The plaintiff had full knowledge of the nature and extent of the risk of injury and of the circumstances prior to making the choice of voluntarily assume the risk.

Contributory Negligence

"Contributory negligence" essentially means that the plaintiff was partially responsible for the injury he suffered or that he contributed to the injury suffered. This defence serves to reduce the amount of compensation payable to the plaintiff in proportion to his own contribution.

In Malaysia, the current law is contained in s 12(1) of the *Civil Law Act 1956* (Act 67). Section 12(1) reads as follows:

> *…Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Courts think just and equitable having regard to the claimant's share in the responsibility for the damage…*

Section 12(1) (b) further provides that in the case where there is a contract between the parties or where there is written law which limits liability, then the amount of damages recoverable by the claimant cannot exceed the agreed upon or stipulated maximum limit.

Mechanical Defect and Inevitable Accident

The defence of "mechanical defect" has been held to be related to the issue of inspection and maintenance of vehicles, and it will only avail a defendant who can prove through his record of service that the vehicle is free from defect. The defence of an inevitable accident requires a defendant to prove the cause of the accident and that the result of the cause is inevitable.

Case Law *Negligence- defence of mechanical defect*

CASE 2-45 *Che Jah binte Mohamed Ariff -v- CC Scott* [1952] MLJ 69

In the Malaysian High Court case of *Che Jah binte Mohamed Ariff -v- CC Scott*, the plaintiff was a passenger in the defendant's car which crashed into a stationary car causing injuries to the plaintiff. The defendant gave evidence that ten days previously, due to brake failure he had sent the car to a competent motor repair firm for repair and general overhaul with particular attention to the brakes. On the day before the accident, the plaintiff and the defendant had gone to fetch the car where the foreman of the firm tested the brakes again and found them in order. On the day of the accident but before the accident occurred the defendant had used his brakes several times and they were functioning well.

The Malaysian High Court held that the defects in the brakes were a latent defect and as the defendant had employed skilled labour; no negligence can be attributed to him.

This case illustrates that if by reason of a latent defect in a vehicle which a defendant is not aware of and which cannot be discovered by reasonable examination an accident is caused, the defence of an inevitable accident may be raised to exclude liability.

Exclusion Clause

An alternative defence that is available in a claim in negligence is that of a valid "exclusion clause". An exclusion clause, which is construed to be clear and unambiguous, may effectively deny what would otherwise be a good claim in negligence. It is trite law that clauses which exclude liability must be clear and unambiguous.

Case Law *Negligence- defence of exclusion clause*

CASE 2-46 *Chin Hooi Nan -v- Comprehensive Auto Restoration Service Sdn Bhd* [1995] 2 MLJ 103

In the Malaysian High Court case of *Chin Hooi Nan -v- Comprehensive Auto Restoration Service Sdn Bhd*, where the plaintiff paid some money to the defendants to have his car waxed and polished by the latter. The car was damaged whilst one of the defendants' employees drove the car down to the basement of the building. In a claim for negligence against the defendants, the latter argued that the exemption clause which was printed on the back of the receipt which was given to the plaintiff exonerated them from liability. The clause was worded as follows:

> *"The company is not liable for any loss or damage whatsoever of or to the vehicle, its accessories or contents. Vehicles and goods are left at owner's risk."*

The Malaysian High Court held that the exemption clause did not exclude the defendants from the burden of proving that the damage to the car was not due to their negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car, and since the defendant had failed to do this, they were held liable to compensate the plaintiff for the costs of repair, of hiring another car during the repair period and of engaging an independent adjuster.

Akmal is injured in a car crash caused by Andrew's negligent driving. Doctors have opined that Akmal's injuries would have been less serious if he had been wearing a seatbelt, which he was not. What defence can Andrew use to counter Akmal's claim against him for personal injury?

Contributory negligence.

2.3 General Characteristics of Other Torts

There are several important concepts in the law of torts.

2.3.1 Tortious Liability

Liability in tort arises when a person does something that is not allowed, or does not do something that is required, by the law. It arises from the breach of duty that has been sanctioned by the law. This duty is owed towards the public generally, the breach of which may be redressed by an action for compensation in the form of unliquidated damages.

2.3.2 Intention

"Intention" is a state of mind and may be deduced from a person's conduct in two ways:

1) Firstly, where a person knows the consequences of his actions, and wishes for those consequences to befall the plaintiff, or where a person realises that there is a risk that his act or acts will result in some harm, but that the occurrence of the harm is only a possibility and undesired by him.
2) Secondly, a man is presumed to have intended the natural and probable consequences of his act. So a defendant whose conduct is foreseeable to give rise to some infringement of the plaintiff's interest is said to have the intention to commit the act in question.

Intention remains relevant in all intentional torts, namely trespass to person including false imprisonment, trespass to land, interference with goods (conversion or detinue) or defamation. However, intention is not required in the tort of negligence, which utilises the objective test based on the duty of care in determining liability.

2.3.3 Motive and Malice

In general, the law of tort is not concerned with a person's *motive*, be it good or bad, altruistic or selfish. This means that motive is usually irrelevant in determining the defendant's liability.

Improper or evil motive, spite or ill-will, otherwise known as "malice", may however, be relevant in certain torts. Malice is relevant in the torts of nuisance and conspiracy. Malice also defeats the defences of fair comment and qualified privilege in the tort of defamation.

2.3.4 Damage (The Harm Caused)

Torts such as negligence, nuisance, strict liability and defamation require proof of damage or harm before the defendant is held liable. "Damage" or harm may be one or more of four kinds, namely damage in the form of physical injuries, damage to property, damage to reputation or economic loss. Economic loss without accompanying bodily injury or property damage is known as "pure economic loss" because such loss is solely pecuniary in nature.

2.3.5 Damages (The Compensation)

"Damages" means the monetary compensation that the defendant is ordered to pay to the plaintiff. Damages fall into two broad categories, namely unliquidated damages and liquidated damages. Unliquidated damages refer to unquantifiable damage which includes general damages for pain and suffering. "Liquidated damages" refers to specific damage that the plaintiff has suffered, for instance loss of earnings and medical bills.

2.4 Other Types of Torts

Besides the tort of negligence, there are various types of torts. These include trespass, nuisance, defamation and bailment.

2.4.1 Trespass

Intentional torts include "trespass to person", "trespass to land" and "interference with goods". One common link in all these torts is the mental state of the defendant, in that the defendant does the act that is purported to be tortious, intentionally.

The general elements of trespass are:

1) a positive act, as opposed to an omission; and
2) a direct act of the defendant (to the plaintiff, his land or goods); and
3) the tort of trespass is actionable *per se.* The plaintiff need not prove that he has suffered any injury or loss.

Trespass to Person

Trespass to person comprises several torts, namely the torts of *assault*, *battery* and *false imprisonment.*

Assault

"Assault" may be defined as an intentional and direct act of the defendant which causes the plaintiff reasonable apprehension of the immediate infliction of a force onto his person. The tort of assault

is concerned with the protection of person's mental well-being against the unlawful act of another. There is no direct physical contact yet.

Assault is established when four elements are fulfilled, namely:

1) The defendant must have the intention to do his act.
2) The plaintiff must feel *reasonable apprehension* that a force will be inflicted upon him. Reasonable apprehension is determined by an objective test, that is, *"Would a reasonable man, faced with the same situation that the plaintiff was in, feel apprehension that a force would be inflicted upon him?"* Only when the answer is "yes" will this element be fulfilled. "Force" means some form of physical contact that would put a reasonable man to be in a state of fear of such attack.
3) The defendant must have the capability to carry out the threat. This requirement is measured through the eyes of the reasonable plaintiff. The test is an objective one, namely, *"Would a reasonable man, who is in the plaintiff's position, feel reasonable fear that there is a threat of immediate force upon himself?"*
4) Even though assault involves no physical contact, it is often said that some bodily movement is necessary. Bodily movement means a positive act in the circumstances, indicating that the defendant will carry out his threat.

Battery

"Battery" may be defined as the intentional and direct application of force to another person without that person's consent. This touching need not necessarily involve violence. The tort of battery protects an individual from any interference onto his person, Thus, it preserves a person's dignity as well as his reputation. One cannot touch another person without his consent or without lawful justification.

Battery is established when the following elements are fulfilled:

1) The defendant must have applied the force with intention.
2) The defendant's act must be done voluntarily.
3) There is contact or application of force on the plaintiff's body or clothing. The word "force" here is equivalent to "unwanted". No violence is necessary. Generally, any physical contact with the body of the plaintiff or his clothing would be sufficient to constitute "force". The contact must give rise to an insult or indignity arising from the touching, however trivial that touching might be.

The act of detaining someone and then applying physical force amounting to torture onto him in order to extract information would clearly indicate an intention to apply unreasonable force. Where the act of torture is committed as a group, intention would be evident.

The differences between assault and battery may be summarised thus,:

Assault	Battery
The issue of consent does not arise.	The defendant's act is done without the plaintiff's consent.
The plaintiff experiences reasonable apprehension of an immediate infliction of force upon his person.	There is physical contact or direct transmission of force between the defendant and the plaintiff.
The tort protects one from the threat of any physical violence, as well as to maintain a person's mental well-being.	The tort protects one from physical contact, violent or otherwise, as long as it is an unnecessary and an unauthorised contact.

■ **Table 2-1** *Difference between assault and battery*

False imprisonment

"False imprisonment" is defined as the unlawful restriction of a person's liberty and freedom of movement. The person so restrained is "imprisoned" so long as he cannot move to another place in accordance with his wishes. Thus, false imprisonment is the infliction of bodily restraint which causes the confinement of the plaintiff within an area determined by the defendant, which is not expressly or impliedly authorised by law. The interests protected are the personal liberty and freedom of movement of an individual which are guaranteed constitutional rights.

Three main elements must be fulfilled before false imprisonment is established and these are:

1) The defendant must have committed the restraint intentionally.
2) The restriction is unlawful.
3) The restraint must be complete.

Trespass to Land

"Trespass to land" may be defined as the unreasonable interference with another's possession of land. The tort may be committed only against a person who has possession of the land on which the acts complained of are committed. The tort of trespass to land is actionable *per se* i.e., without any proof of damage or actual loss. Liability is therefore strict. Trespass to land is therefore completed once a person wrongfully enters onto land in the possession of another even though no damage has been done.

Section 5 of the *National Land Code 1965* (Act 56) defines "land" as:

> *(a) the surface of the earth and all substances forming that surface;*
>
> *(b) the earth below the surface, and all substances therein;*
>
> *(c) all vegetation and other natural products whether or not requiring the periodical application of labour to their production, and whether on or below the surface;*

> *(d) all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface; and*
>
> *(e) land covered by water.*

The interest that is protected under this tort is that of ensuring that a person who has possession of land would be free from any physical interference in respect of that possession. Section 44(1) of the *National Land Code 1965* (Act 56) provides that:

> *…a person has the right to the exclusive use and enjoyment of so much of the column of airspace above the surface of the land and so much of the land below that surface as is reasonably necessary to the lawful use and enjoyment of the said land…*

Case Law *Trespass to land*

CASE 2-47 *Hj Jaafar Hj Hashim & Ors -v- Rohani Ab Latip* [2006] 8 CLJ 213

In the Malaysian High Court case of *Hj Jaafar Hj Hashim & Ors -v- Rohani Ab Latip,* the plaintiff was the registered owner of a piece of land which was occupied by the eighth defendant. The eighth defendant and his family lived in an old house which the plaintiff had built for them.

Subsequently, seven other defendants who were members of the village Development and Security Committee, without the consent and permission of the plaintiff, entered the plaintiff's land (but with the permission and consent of the eighth defendant) and demolished the old house to replace it with another house under the Poor Citizens Housing Project.

Low Hop Bing J, held that the demolition of the dilapidated house without the plaintiff's consent constitutes trespass in law, giving rise to the remedy of damages to the plaintiff.

The plaintiff must prove two elements before trespass to land is established and these elements are:

1) The defendant must intend to do the act alleged to be a trespass. All that is required to establish intention is that the defendant had voluntarily intended to enter the land belonging to another. It is not necessary to prove that the defendant knew that he was trespassing. Intention is also established when the defendant ought to have foreseen it as trespass.

Case Law *Trespass to land – intention*

CASE 2-48 *League Against Cruel Sports Ltd v Scott* [1985] 2 All ER 489

In the English case of *League Against Cruel Sports Ltd v Scott,* the plaintiffs owned lands which they maintained as deer sanctuaries. Hunting was naturally prohibited on the grounds. The defendants were members of a local hunt and hunted deer for the purpose of sport.

The plaintiff alleged that the hunt by the defendants' servants or agents and by their hounds had trespassed onto their lands. They sought a permanent injunction to restrain the defendants or their servants or hounds from entering or crossing any of their lands. They argued that trespass was established without any fault on the part of the master of the hound, and that the only question to consider was whether the intrusion was voluntary or involuntary and where it can be foreseen that there is a real risk of any pack of hounds entering or crossing lands belonging to another, liability would be established.

The English Court found that a master of hounds may be held liable for trespass if he either intended that the hounds should enter the land or by negligence, he failed to prevent them from doing so.

Knowledge that there is a real risk that hounds may enter or cross prohibited land or a failure to exercise proper control over them which causes them to enter prohibited land is tantamount to having intention. Here the master knew there was a real risk that the hounds might enter the plaintiff's land and entry was in fact made. No effective precautions were taken to prevent entry, such as hunting on grounds away from the plaintiff's lands.

This indifference to the risk of trespass amounted to an intention that the hounds should trespass on the land.

2) The entry upon the land in possession of another was unlawful.

Entering land which is in the plaintiff's possession

Case Law *Entering land which is in the plaintiff's possession*

CASE 2-49 *Kerajaan Negeri Selangor & Ors -v- Sagong Tasi & Ors* [2005] 4 CLJ 169

In the Malaysian Court of Appeal case of *Kerajaan Negeri Selangor & Ors -v- Sagong Tasi & Ors*, the act of a construction company together with the Malaysian Highway Authority in forcibly demolishing the plaintiffs' houses and public building was held to be an actionable trespass which deserved exemplary damages.

Gopal Sri Ram JCA, in delivering the judgement of the Malaysian Court of Appeal, observed at page 197 paragraphs c – d, page 199 paragraph h and page 200 paragraphs a – c that this was a case of deliberate trespass with the sole purpose of gaining the plaintiffs' land without paying them the full compensation due to them.

Remaining on the plaintiff's land

Remaining on land that is trespassed upon is by itself a trespass, and more commonly referred to as "continuing trespass". A licensee whose licence has been revoked or terminated also becomes a trespasser and would be liable for damages if he continues to stay on the land. A tenant at will becomes a trespasser if he remains on the premises after a notice demanding possession has been served on him. A continuing trespass therefore gives rise to a new cause of action from day to day as long as it lasts.

Continuing trespass applies only to the failure to remove things (or people if the defendant remains in person) that have been wrongfully left on the land.

Case Law *Continuing trespass*

CASE 2-50 *Cheah Kim Tong & Anor -v- Taro Kaur* [1989] 1 CLJ (Rep) 378

In the Malaysian High Court case of *Cheah Kim Tong & Anor -v- Taro Kaur,* the defendant's house encroached onto the plaintiff's land. The defendant relied on estoppel and consent on the grounds that the previous owner, before the plaintiff, had never complained. The defendant further contended that the plaintiff did not suffer any damage.

The Malaysian High Court held that this was a case of continuing trespass and therefore a fresh cause of action arose from day to day. The plaintiff need not prove damage as the cause of action was actionable *per se*. **Peh Swee Chin J**, in delivering the judgement of the Malaysian High Court, held at page 380 paragraphs d – g:

> *"In a continuing trespass a fresh cause of action arises from day to day and that any trespass, was even actionable per se i.e. without any necessity to prove an actual damage."*

Entering or placing an object on the plaintiff's land

It is a trespass, if someone throws things onto your land or allows his cats to wander onto and remain on your land. The Courts have held the following acts to constitute trespass: placing a ladder against another's wall, driving nails into another's wall, firing a gun into the plaintiff's soil, removing doors and windows belonging to another, fixing a surveillance device on somebody's house, dumping soil onto the plaintiff's land and inserting ground anchors in another's land.

Case Law *Entering or placing an object on the plaintiff's land*

CASE 2-51 *Pelantar Agresif (M) Sdn Bhd -v- Projek Lebuhraya Usahasama Bhd & Anor* [2013] 6 CLJ 620

In the Malaysian High Court case of *Pelantar Agresif (M) Sdn Bhd -v- Projek Lebuhraya Usahasama Bhd & Anor,* the defendant had constructed a part of a motorcycle lane and concrete divider on the plaintiff's land. The plaintiff claimed that the defendant had trespassed onto and continued to trespass on the said land; had generated income arising from such trespass and had unjustly erected and profited themselves at the plaintiff's expense and consequently, the plaintiff was entitled to damages arising out of the acts of trespass committed by the defendant.

Lau Bee Lan J, in delivering the judgement of the Malaysian High Court, acknowledged that there was trespass by the defendant.

The slightest crossing of the boundary is sufficient to constitute an unjustifiable intrusion upon the land in possession of another. For example, it is clearly a trespass to construct an access road over another's land, unless there is easement, in which case the landowner is obliged under the law to provide for an access road.

Case Law *Unjustifiable intrusion*

CASE 2-52 *Karuppannan Chellapan -v- Balakrishnan Subban* [1994] 3 AMR 2279

In the Malaysian Federal Court case of *Karuppannan Chellapan -v- Balakrishnan Subban*, the plaintiff landowner prayed for an interlocutory mandatory injunction against the defendant, who was the landowner of an adjacent land, to remove protrusions and all other encroachments encroaching upon his land. These protrusions were to the side-windows of the building owned by the defendant and were built by the defendant's predecessor-in-title.

The Malaysian Federal Court affirmed the High Court decision and held that in the case of trespass to land and airspace committed by the owner of an adjacent property, the aggrieved owner of the land upon which the trespass is committed is entitled to an interlocutory mandatory injunction to have the trespass removed notwithstanding that the source of trespass had already been in existence before the new owner came to own the land and whether he knew or had notice of it or not.

Interference with Goods

Interference with goods may be divided into three separate torts namely:

1) trespass to goods,
2) conversion, and
3) detinue.

Trespass to goods

"Trespass to goods" may be defined as a wrongful and direct interference with goods that are in the possession of another. The interests that are protected by this tort are the plaintiff's interest to continue to have possession of his property, to the physical condition of his property as well as to maintain and protect his right to the non-interference of his property in all aspects.

There are two elements that have to be satisfied of the tort, namely:

1) As with all intentional torts, the defendant must be proven to have had the intention to deal with the goods; and
2) Interference must be through the direct act of the defendant which causes immediate contact with the plaintiff's property or goods. In other words, the interference must be physical in nature. This interference must also be voluntary, as involuntariness may negate intention. The interference must be wrongful or unlawful for it to constitute trespass.

Case Law *Trespass to goods*

CASE 2-53 *Haji Awalludin bin Anidin -v- Majlis Perbandaran Kuantan* [1996] 1 CLJ 9

In the Malaysian Supreme Court case of *Haji Awalludin bin Anidin -v- Majlis Perbandaran Kuantan,* the defendant, pursuant to powers under a statute required one Chua who was owner on record of the plaintiff's premises, to pay up arrears of assessment due within a stipulated time. When no payment was received, the defendant went to the plaintiff's premises – the plaintiff having bought it from Chua; and removed a cassette recorder and a television set belonging to the plaintiff. The goods were subsequently returned to the plaintiff when Chua paid the defendants the arrears due. The plaintiff sued in trespass.

The Malaysian Supreme Court held that since the defendants had complied with the provisions of the particular statute which empowered them to seize goods in the circumstances of the case, the seizure was lawful and accordingly no trespass was committed.

A plaintiff who sues in trespass to goods need not prove damage as it is not necessary in establishing a tort which is actionable *per se*.

The right to claim lies in the hands of the person who has possession. Generally, this would mean the person who has physical control over the goods who is deemed to have possession in fact. As such, an owner who is not in possession at the date of the alleged trespass, cannot sue for trespass (although he might be able to sue for conversion).

There are persons who do not have possession in fact, but who may nonetheless bring a claim in trespass. These are:

a) a trustee, acting on behalf of a beneficiary;
b) an executor or administrator can take action for trespasses committed to the goods of the deceased after his death but before probate is granted to the executor or before the administrator takes out letters of administration; and
c) a person with a franchise or a person who has the right to take a wreck or treasure trove.

Conversion

"Conversion" may be defined as dealing with goods in a manner inconsistent with the rights of the true owner or person entitled to possession. It involves interference with the property of another, coupled with the intention of exercising dominion or control over it. There must be an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.

Although a precise definition is impossible, the basic features of the tort are threefold, namely:

a) First, the defendant's conduct must be inconsistent with the rights of the owner or another who is entitled to possession.
b) Secondly, the conduct is deliberate and not accidental.

c) Thirdly, the conduct constitutes an extensive encroachment on the rights of the owner such that he is excluded from the use and possession of the goods.

There are three elements that must be satisfied for the tort of conversion, namely:

1) The defendant's act must be voluntary and therefore done deliberately and intentionally. It does not matter that the person who has dealt voluntarily with the goods (and so usurped the owner or the possessor's right) did not know, or could not reasonably have known, of the other party's interest in the goods. The duty to refrain from dealing with another's goods is absolute.

   Any person who (however innocently) obtains possession of the goods of another, who in turn has been fraudulently deprived of them, and subsequently disposes of them, whether for his benefit or otherwise, is guilty of a conversion.

Case Law *Conversion*

CASE 2-54 *Hollins -v- Fowler* [1875] LR 7 HL 757

This principle is derived from a House of Lords case of *Hollins -v- Fowler,* where the plaintiff owned some bundles of cotton. *F* tricked the plaintiff and obtained possession of some bundles of cotton. The defendant, a cotton broker, bought some cotton from *F* and sold it to a third party.

The House of Lords held the defendant liable in conversion as he had the intention to deal with the bundles of cotton. The principle that arises is that if the defendant himself was directly involved in the business negotiation, and he then disposes of the goods to a third party, as in the instant case, he will be liable. If on the other hand, someone else had been directly involved in the business transaction and the defendant is merely an agent or representative who delivers the goods in question, he has not committed any conversion.

Thus, a bona fide purchaser cannot be sued for conversion.

Case Law *Conversion*

CASE 2-55 *Che Din Mohamed Hashim -v- Teoh Ong Thor and Chew Chan Seng* [1950] MLJ 238

In the Malaysian case of *Che Din Mohamed Hashim -v- Teoh Ong Thor and Chew Chan Seng*, the purchaser did not acquire a good title as he and the seller knew at the time of the sale that the seller had no right to sell the goods. This is in accordance with the principle that a purchaser acquires no better title than what the seller has.

2) Interference or dealing that is inconsistent with the owner's rights.

Case Law *Interference*

CASE 2-56 *Rimba Muda Timber Trading -v- Lim Kuoh Wee* [2006] 3 CLJ 93

In the Malaysian Federal Court case of *Rimba Muda Timber Trading -v- Lim Kuoh Wee*, a timber concession was given to *A* by the state government of Pahang to fell and extract timber from a concession area. *A* then appointed *D* as the principal contractor to fell and extract timber from the concession area. *D* was entitled to sell the felled timber. *D* in turn appointed *P* to fell and extract timber. *P* later found out that *D* had been extracting timber and selling them to *RMTT*. *P* claimed in conversion and trespass against *D* and *RMTT*. *D* settled out-of-court. The Malaysian Federal Court in affirming the Court of Appeal's decision that *RMTT* was liable held that the property rights in the logs passed to *P* when he was issued a licence to extract timber. He did not need to take possession of the logs before the property right in the logs could pass to him. It did not matter even if the contract between *D* and *P* was illegal. The law will protect the property rights of the true owner.

Arifin Zakaria FCJ, in delivering the judgement of the Malaysian Federal Court, observed at page 100 paragraph 14, page 102 paragraphs 17 & 18 and page 104 paragraph 23: it is immaterial that the defendant acted with complete innocence or in good faith as it would not afford a defence to a claim in conversion by the true owner of the goods or chattel. This is because the common law has always leaned in favour of the true owner

The denial must be absolute in order for conversion to occur. "Denying" or "depriving" the owner of possession does not mean that the wrongdoer must himself take the goods from the possession of the owner. Although this will often be the case, it is not always so. An owner is said to be denied or deprived of possession when he is excluded from possession, when possession is withheld from him.

Case Law *Conversion – denial must be absolute*

CASE 2-57 *Lord -v- Price* [1874] LR 9 Ex 54

In the English High Court case of *Lord -v- Price,* the plaintiff bought two bales of cotton where cash payment was one of the conditions of purchase. The plaintiff paid for one bale and left a deposit for the other. When he came back to collect the second bale of cotton, the defendant had already bought it by mistake.

The English High Court held that there was no conversion, as the plaintiff had neither title nor possession, as he had not paid for the goods. The possession over the goods remained with the vendor. The plaintiff also did not have the right to immediate possession and therefore his claim failed.

Damages for conversion

Damages for conversion are normally in the form of monetary compensation, and in this, the law in Malaysia subscribes to the common law principles. The amount of damages will be the full market value of the goods at the time the conversion occurs, not the value on the date of judgement.

Detinue

Another type of interference with goods is detinue. "Detinue" may be defined as the illegal possession of goods. The possession becomes illegal due to the withdrawal of consent by the owner of the goods, who initially may have consented to the defendant having possession of the same goods. In legal terms, detinue is the wrongful detention of goods which the plaintiff has an immediate right to possess. The plaintiff will have a good cause of action against the defendant if the refusal is due to the goods being lost.

Detinue often arises in situations where the defendant initially has possession over the goods but subsequently refuses to return them to the rightful owner without any reasonable excuse or justifiable reasons. Reasonableness is a question of fact and may depend on the time of the demand, the expense and inconvenience of immediate compliance and whether the defendant has sufficiently explained to the plaintiff the reasons for his temporary refusal.

Two elements must be satisfied before the tort detinue may be established, namely:

1) The plaintiff must prove that the defendant kept the property after the plaintiff had requested for its return. There must be a demand for the goods, and a subsequent refusal on the defendant's part. The defendant may stipulate reasonable conditions before the goods are returned by him. If these conditions are not met and he refuses to return the goods, no action for detinue will lie.

Case Law *Detinue*

CASE 2-58 *Nambiar -v- Chin Kim Fong* [1963] MLJ 60

In the Malaysian case of *Nambiar -v- Chin Kim Fong*, the plaintiff's insurance company instructed for the plaintiff's car to be sent to the defendant's workshop for repairs. On July 27, 1961, the defendant informed the plaintiff that the repairs were completed and the car was ready for delivery. On August 12, the plaintiff went to collect the car but the defendant refused to release the car unless the plaintiff signed a certain document which the plaintiff was under no duty to sign. At a later date, the plaintiff again demanded for the car and again the defendant refused to release it for the same reason.

The Court held that since the plaintiff was asked to sign what amounted to a release to his insurance company and the defendant against any bad work, and added to that the repairs did not entirely satisfy the plaintiff, the defendant's request was unreasonable and constituted a detinue.

Conversion	Detinue
There must be an intentional dealing.	Negligence is sufficient.
Only one wrongful act arises.	It is a continuous tort. The tort arises at the point where the defendant refuses to return the goods until such time when the goods are returned or when judgement is given.
The person who sues must have either the right to immediate possession, or actual possession.	The person suing must have the right to immediate possession.
The act involves the denial of the plaintiff's right over the goods.	There must be a wrongful detention i.e. there must have been a demand and a refusal.
The amount of damages is the value of the goods at the time the conversion occurs together with any consequential damage flowing from the conversion which is not too remote.	The amount of damages is the value of the goods at the date of judgement and any damages in respect of the wrongful detention between the date of the refusal and the date of the actual return or the date of payment of the value of the goods.

■ **Table 2-2** *Difference between conversion and detinue*

2) The plaintiff must have an immediate right to possess the goods. In order to succeed in detinue, it is essential for the plaintiff to show that he has the right to immediate possession at the time of commencing the action.

Thus, having the immediate right to possess entitles one to claim for any wrongful detention of goods.

Defences in trespass

There are several defences available against an action in trespass. These include self-defence, defence of another, defence of property, contributory negligence, necessity, consent and lawful arrest.

2.4.2 Nuisance

The law of "nuisance" aims to provide protection from the unlawful interference in the use and enjoyment of land to persons who have proprietary interests in land; and to members of society generally, through the unlawful obstruction of highways and public access by any person. It is concerned with the balancing of competing interests.

A cause of action in nuisance may be maintained in cases of consequential harm.

Case Law *Nuisance in cases of consequential harm*

CASE 2-59 *Government of Malaysia & Anor -v- Akasah b Ahad* [1986] 1 MLJ 396

In the Malaysian Federal Court case of *Government of Malaysia & Anor -v- Akasah b Ahad,* the plaintiff operated a petrol station. The defendant built a federal highway which was on higher ground than the petrol station, and the road to the station had to be closed. The defendant offered to build a road to the petrol station through another route but the plaintiff refused.

In an action for nuisance against the defendant, the Malaysian Federal Court found that the plaintiff had failed to prove nuisance. With regard to the differences between nuisance and trespass, the Court stated that nuisance is of a bigger class than trespass. Whether an act is a nuisance or a trespass depends on whether there is a direct physical interference. Trespass means a direct entry onto the land belonging to another and is actionable *per se* without any proof of special damage, whereas nuisance is interference to the plaintiff's interest over his property and does not necessarily require entry by the defendant. To succeed, the plaintiff is generally required to prove special damage.

Lee Hun Hoe CJ (Borneo) in delivering the judgement of the Malaysian Federal Court observed *that the difference between the two tortious wrongs is only on the consequence.*

Another difference is that trespass is interference with *possession* of land, whereas nuisance is interference with the *use* of land.

Case Law *Nuisance and negligence*

CASE 2-60 *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393

In the Malaysian Supreme Court case of *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan*, the defendant was engaged in some construction work in a building beside the plaintiff's clinic. The work included piling and excavation works. As a consequence of these activities, the plaintiff's wall cracked and tilted. The defendant contended that he had taken all reasonable precautions. The Court allowed the plaintiff's claim and granted him damages. The defendant appealed and argued that the main issue in the case was one of negligence and since nuisance was not specifically pleaded, his appeal should be allowed.

The Malaysian Supreme Court held that negligence is not a requirement in nuisance actions and therefore a plaintiff need not prove any negligence in a nuisance case. All that is necessary is proof of special damage which is damage to his property due to the activities of the defendant on the adjoining land. The cause of action in this case was founded on the natural right of support, and the Court held that it was equivalent to a claim based on nuisance. The defendant's appeal was dismissed.

The harm or damage that usually occurs in nuisance cases are of two types, namely damage to property, which is easily identifiable, and/or interference to personal comfort, which is specific to the tort of nuisance. The remedy usually sought in a claim for nuisance is an injunction, which function is to prevent the nuisance from continuing; or monetary compensation, which is usually granted for damage to property.

Damage must be proved in an action for nuisance. The damage must be of a kind that is reasonably foreseeable to arise from the defendant's wrongful conduct. Actual damage however, need not be established if the nuisance is caused by smell. It has been held that injury to health is not a necessary ingredient in the cause of action for nuisance by smell as the interference here is something that substantially affects the senses or the nerves.

The reasonableness or otherwise of the defendant's activity or act is central in nuisance cases because only when the interference is deemed unreasonable will nuisance be established.

In the tort of nuisance, reasonableness is measured by balancing the rights and interests of both parties, which is a process of compromise. The Court needs to take into account the fact that in the first place, the defendant has a right to the use and enjoyment of his land. Although the defendant may be shown to have taken all precautions to prevent any harm to the plaintiff – this does not mean that the defendant has acted reasonably for the purposes of nuisance. The plaintiff who nonetheless suffers damage as a result of the defendant's activity needs to be compensated as he too is entitled to the (safe) use and enjoyment of his land. The damage suffered by the plaintiff is a relevant factor in determining the reasonableness of the interference.

Case Law *Nuisance and reasonableness*

CASE 2-61 *Syarikat Perniagaan Selangor Sdn Bhd v Fahro Rozi Mohdi & Ors.* [1981] 2 MLJ 16

In the Malaysian Federal Court case of *Syarikat Perniagaan Selangor Sdn Bhd v Fahro Rozi Mohdi & Ors.*, **Chang Min Tat FJ** stated at page 17 that almost every one of us has to tolerate a certain amount of interference from our neighbours and we in turn have a right to make a certain amount of noise in the enjoyment of our property. A person may use his property in a reasonable way but no one has the right to create intense noise just as no one should be asked to put up with such a volume which by any reasonable standard becomes a nuisance. The ordinary use of a residential property is not capable of creating actionable nuisance.

It follows that reasonableness cannot be determined with accuracy. Whether an activity amounts to actionable nuisance or not depends on other factors, such as the purpose of the defendant's conduct, location, time, extent of damage, the way in which the interference occurs, motive and malice, the effect of the interference, and whether it is continuous or in stages or intermittent.

Nuisance is divided into two main categories:

1) public nuisance, which is a crime as well as a tort, and
2) private nuisance, which is a tort.

It is quite possible for the same conduct to amount to both public and private nuisance if the plaintiff is able to satisfy the necessary requirements.

Public Nuisance

"Public nuisance" arises when there is an interference with public rights such as the obstruction of public highways, the selling of contaminated food or where a person's right of free passage or part of it is interfered with. A set of facts giving rise to a claim in public nuisance may also give rise to an action for negligence and a defendant may be sued for both torts in the alternative; an example being cases of obstruction on public highways.

Case Law *Public nuisance – definition*

CASE 2-62 *Majlis Perbandaran Pulau Pinang -v- Boey Siew Than & Ors.* [1978] 2 MLJ 156 at page 158

Public nuisance is an act or omission which inflicts damage, injury or inconvenience on subjects of the State or on members of a class who come within the sphere or neighbourhood of its operation, and it might affect some members to a greater extent than others. This definition was adopted in the Malaysian High Court case of *Majlis Perbandaran Pulau Pinang -v- Boey Siew Than & Ors.* where it was stated by **Gunn Chit Tuan J** that a nuisance is a public nuisance if it materially affects the reasonable comfort and convenience of a class the subjects of the State.

A public nuisance is a crime as well as a tort. A person who is found guilty of public nuisance may be subject to a criminal sanction. For instance, the pollution of streams with any filth and trade refuse within a local authority area constitutes a public nuisance as well as a criminal act.

Public nuisance is not necessarily an interference with the plaintiff's use and enjoyment of his own land. As such, the plaintiff who wishes to sue for public nuisance need not have an interest in land in order to be entitled to claim. However, only a person who has suffered special damage can claim for damages for public nuisance. The plaintiff therefore has to prove that he has suffered damage and injury over and above the ordinary inconvenience suffered by the public at large. The damage must be a direct consequence of the public nuisance and is substantial. This is to prevent a multiplicity of actions.

Private Nuisance

"Private nuisance" may be defined as an unlawful, substantial and unreasonable interference with a person's use, comfort, enjoyment and any interest that a person may have over his land. Three kinds of interests are therefore protected: the plaintiff's interest over his land per se, the use of land, and the enjoyment of land. These interests need not be exclusive of one another and may be interfered with at one time – an example would be in a case where an activity causing flooding to a neighbour's land, the flooding interferes with the land, use of land as well as enjoyment of land.

Interference becomes unlawful and constitutes a nuisance when it unreasonably interferes with the plaintiff's enjoyment of his land.

Case Law *Difference between public and private nuisance*

CASE 2-63 *MPPP v Boey Siew Than* [1978] 2 MLJ 156 at page 158

The difference between public and private nuisance was laid down in the Malaysian High Court case of *MPPP v Boey Siew Than* where it was stated by **Gunn Chit Tuan J** that the difference between a public and a private nuisance is that, in regard to the former, rights which are common to all subjects are infringed whereas for private nuisance, the plaintiff must prove interference with the enjoyment of his land. A claim based on public nuisance does not require the plaintiff to have any interest over land compared to a plaintiff in a private nuisance who must have an interest in land to be able to sue in private nuisance.

People who have an interest over land are a landowner, a tenant and a licensee who has been granted a licence to use the land for a particular purpose.

A plaintiff in a private nuisance action need not prove special or particular damage. The elements required to establish private nuisance are substantial and unreasonable interference.

Substantial interference

Nuisance is not a tort which is actionable *per se*. The tort protects a person from three types of damage or interference – interference with the use of land, interference with the comfort or enjoyment of land and physical damage to the land. Whichever type of damage has occurred, the plaintiff must prove that there has been substantial interference.

What constitutes substantial interference depends on the facts and circumstances in each case. A trivial interference does not give rise to nuisance. There is no formula upon which a situation may conclusively be said to amount to substantial interference or otherwise. Decisions have to be made on a case-by-case basis, and the Courts do have to take into account whether the plaintiff's complaint is reasonably justified in the context of the surrounding circumstances.

Case Law *Nuisance and substantial interference*

CASE 2-64 *Dato' Dr Harnam Singh v Renal Link (KL) Sdn Bhd* [1996] 1 AMR 1157

In the Malaysian High Court case of *Dato' Dr Harnam Singh v Renal Link (KL) Sdn Bhd*, the plaintiff had for eighteen years operated a clinic and hospital for the treatment of ear, nose and throat ailments. The defendant operated a renal clinic at which patients receive hemodialysis on the floor above the plaintiff's clinic.

The defendant was found liable for emitting from their clinic obnoxious fumes which escaped downwards into the plaintiff's clinic. The plaintiff, his staff and patients were found to have suffered substantial damage ranging from skin diseases, red and swollen eyes, headaches, lethargy and breathing difficulties.

Unreasonableness

The unreasonableness of the defendant's activity is the second requirement in establishing nuisance. It is important to realise that the two elements of nuisance are interconnected and interdependent. The general principle is that the more serious the interference, the more likely the Court will regard it as unreasonable.

The fact that there is no clear-cut definition as to what constitutes unreasonable interference may be seen in the English House of Lords' decision in *Hunter v Canary Wharf Ltd*.

Case Law *Nuisance and unreasonableness*

CASE 2-65 *Hunter v Canary Wharf Ltd* [1997] AC 655

The plaintiffs claimed damages in respect of interference with their television reception, for a period of two years, caused by the defendants' nearby building which was 250 metres high.

The English House of Lords held that in the absence of an easement, the mere presence of a neighbouring building did not give rise to an actionable nuisance. Something more than just the presence of the building preventing something from reaching the plaintiff's land is required to make it an actionable nuisance.

Generally, for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it has to arise from something emanating from the defendant's land, examples being – noise, dirt, fumes, a noxious smell, vibrations,and the like.

If the object of the defendant's conduct benefits the society generally, it is more likely that the conduct will not be deemed unreasonable. For example, if a claim in nuisance is initiated against the building of a school or a government hospital causing interference in the form of noise and dust to nearby residents, the court may take the view that the utility derived from the construction of such a facility would outweigh the discomfort of nearby residents, and dismiss the action in nuisance.

However, even if the defendant's activity gives rise to public benefit, this does not automatically mean that his activity is not actionable. An example is the English High Court case of *Adams -v- Ursell.*

Case Law *Nuisance and unreasonableness*

CASE 2-66 *Adams -v- Ursell* [1913] 1 Ch 269

The defendant was in the trade of selling fried fish. The shop was located in the residential part of a street. Faced with a claim for an injunction, he argued that his business benefited the public, especially the poor and therefore the smell produced by his trade was justified.

The Court rejected the defence as the plaintiff's comfort and convenience also had to be considered.

The law of nuisance is not sympathetic to a plaintiff who is extra sensitive, whether the sensitivity is related to the plaintiff himself or to his property. If the only reason why a plaintiff complains of dust is because he has an unusually sensitive skin, his claim will probably fail. Sensitivity cannot be used as a basis for claiming that the defendant's conduct constitutes an unreasonable and substantial interference, but once unreasonable and substantial interference is established, sensitivity will not deprive the plaintiff from obtaining a remedy.

Three categories of persons are potentially liable in private nuisance. They are "creators" of the interference, "occupiers" and "landlords".

Creator

The source or creator of the interference, whether or not he occupies the land from which the interference emanates, will be liable for the nuisance. For instance, if an employee rears animals on a piece of land for his employer-licensee and the latter does not ensure that the waste of the animals are properly channelled out of that land, he will be liable even though it is the employee and not the licensee himself, who is in occupation of the land. This is because the licensee will be deemed to have been invested with the management and control of the premises. The question is who authorises the activity and whether interference is foreseeable from that activity. There is no requirement that the defendant creator must have an interest over the land or that the land belongs to him.

Case Law *Interference by creators*

CASE 2-67 *Marcic v Thames Water Utilities Ltd.* [2002] 2 All ER 55

In the English Court of Appeal case of *Marcic v Thames Water Utilities Ltd.*, the defendant company was a statutory sewerage undertaker. It was responsible for the removal of sewage in the area where the claimant lived. Over time, the sewers became inadequate for removing surface and foul water which had on occasion been discharged into the claimant's front and back garden. His house was also damaged.

The English Court of Appeal held that as owners and those in control of the sewers, the defendant company had a duty to do whatever was reasonable in the circumstances to prevent such hazards from damaging property belonging to others. The Court found that the company had or should have had knowledge of the hazard and it was within their capabilities to abate the nuisance.

Occupier

An occupier must have knowledge of the state of affairs on his premises (and that it could give rise to an interference) to be liable in nuisance. In private nuisance suits, it is usually the case that the defendant is the occupier of the land from which the interference emanates. He will be liable for all positive acts of interference, including omissions which give rise to a nuisance. The occupier may also be liable for the acts and omissions of third parties.

Landowner or landlord

As a general principle, a landowner who has surrendered possession and control of a certain premises will not be held liable for any nuisance that occurs on those premises. There are however, three situations where the landlord may be held liable.

1) Where the landlord authorises the nuisance either expressly or impliedly, he will be held liable.
2) Knowledge of the existence of the nuisance before the premises is let will make the landlord liable. This is based on the principle that the creator of the nuisance is liable even though he does not occupy the land himself. The tenant himself may be liable for "accepting" or "continuing" the nuisance and on the basis of his occupation.

The landowner or landlord is also liable if he ought to have known of the nuisance at the time the tenancy commenced. This rule does not apply if it is not reasonable for him to have known of the situation giving rise to an actionable nuisance. The test is therefore objective.

3) Generally, if the nuisance occurs after the tenant has occupied the premises, liability of the landlord depends on the degree of control that he has over the premises. If there is an agreement that the landlord will conduct repair works, then he will be liable for any interference that arises as a result of any disrepair. The duty is owed to anyone who is reasonably expected to be adversely affected by the defects in the state of the premises.

Example

Interference by landlord

A developer of condominiums may be liable in nuisance to resident-owners of apartments if he has covenanted to repair any defect on the premises and has reserved the right to enter the premises to conduct the said repairs. If the agreement is that the tenant or lessee should conduct repair works, liability depends on the following two factors: firstly, if the landlord knows of any existing defect or possibility of nuisance at the time the tenancy commences, he will still be held liable.

Secondly, if the nuisance occurs after the tenancy has commenced, the issue revolves around the degree of control that the defendant as landlord, retains. If he does not have the right to enter the rented premises to conduct any examination as to the state of the premises, then he will not be held liable. If the landlord reserves his right to enter the premises for repair purposes, this is considered as sufficient control to make him liable even though he is not aware of the damage or nuisance that has arisen. Even if the landlord has undertaken to repair or has the right to enter the premises to conduct repair, the tenant can also be liable as the occupier.

Defences in Nuisance

The defendant may raise a valid defence of easement or statutory authority against an action in nuisance. If the defence is accepted by the Court, the defendant will escape liability, as a valid defence negates the tort.

Easement

In Malaysia, an easement is defined under s 282(1) of the *National Land Code 1965* (Act 56 of 1965) as any right granted by one proprietor to another for the beneficial enjoyment of his land.

Section 284(1) of the *National Land Code 1965* (Act 56 of 1965) further provides:

> *…No right in the nature of an easement shall be capable of being acquired by prescription that is to say, by any presumption of a grant from long and uninterrupted user…*

The grant of an easement is a formal process in Malaysia and an easement of say, a particular installation which belongs to the defendant on the plaintiff's land will stipulate the length of time the easement is granted for. The plaintiff may only release the easement with the consent of the defendant and cancellation of the easement is subject to the easement impeding the reasonable use of the plaintiff's land. Within this *'limited'* rights of the plaintiff in releasing and cancelling a validly created easement, it is submitted that an easement generally provides a good defence in Malaysia.

Statutory authority

If a statute confers power to the defendant to conduct a particular activity, the defendant will usually escape liability notwithstanding that the activity gives rise to an interference. The defendant must however prove that the interference cannot be avoided even though reasonable precautionary measures have been taken.

Nevertheless, statutory authority is generally not a good defence if the work causes substantial damage to neighbouring property. The defence might succeed if the interference is an inevitable consequence of the defendant's operations, having regard to all reasonable precautions that have been taken by the defendant. In this situation, the plaintiff will be without redress due to overriding public interest. In practice however, compensation is provided for under the relevant statutes.

Example

Nuisance – defence of statutory authority

The *Local Government Act 1976 (Act 171)* provides that a local authority has the power to make new public places and enlarge such public places and the owners and occupiers of any land, houses or buildings which are required for such purpose or which are injuriously affected will be compensated in accordance with the provisions of any written law. It is further provided that if the amount of compensation is in dispute, the parties may refer the matter to a Court of competent jurisdiction.

Therefore, damage caused to a plaintiff's property arising from nuisance created by a local authority in pursuance of its statutory power will be compensated in the form of damages.

2.4.3 Bailment

"Bailment" is a common type of business arrangement. In its simplest form, it is an arrangement between a person (a bailor) who owns or lawfully possesses goods and another person (a bailee) who is given possession of the goods for a specific purpose. The essence of bailment is possession. Many business activities involve the transfer of possession of goods. For example, the storage of goods or equipment in a warehouse by a business,shipment of goods by a common carrier, goods left with repair services, such as motor vehicle repair garages, jewellery shops, and appliance repair facilities.

"Bailment" came from the French word "bailler", which means "to deliver", says Blackstone,[6] Thus, Bailment *"is a delivery of goods in trust, upon a contract express or implied, that the trust shall be faithfully executed on the part of the bailee".*

According to *Halsbury's Laws of England*[7] *in order "to constitute a bailment, the actual or constructive possession of a specific chattel must be transferred by its owner or possessor (the bailor), to another person (the bailee) in order that the latter may keep the same or perform some act in connection therewith, for which such actual or constructive possession of the chattel is necessary, thereafter returning the identical subject matter in its original or an altered form".*

In Malaysia, Section 101 of the *Contracts Act 1950* (Act 136) defines bailment as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

The duties and liabilities of the parties to each other and the remedies available are governed by the relevant provisions in the *Contracts Act 1950* (Act 136). Bailees are required to take reasonable care of goods in their possessions and will be liable for the loss or destruction of such goods unless they can disprove fault. It should be noted that in general, Malaysian bailment cases are generally covered within tort and contract law. Hence, the common law position is generally applicable. The English *Torts (Interference with Goods) Act 1977* introduces common remedies for all forms of *"wrongful interferences with goods"*.

Section 102 of the *Contracts Act 1950* (Act 136) provides that the delivery of the goods to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

Example

Deliver of goods to bailee

If you are going out of your house and you ask your servant to look after your personal belongings in your absence, would that give rise to a bailment? It is clearly not a bailment because you have not delivered the personal belongings to the servant.

In bailment, there has to be delivery of goods by a bailor to the bailee. Goods should go into the possession of the bailee. The delivery can be of two types, namely actual and constructive. Actual delivery is a delivery in which the possession is actually going from bailor to the bailee and the constructive delivery means the delivery when there is no change of physical possession but some

6 *2 Blackstone's Commentaries* (13th ed., p. 451). (1800).
7 Marylebone, Q. (n.d.). Paragraph 1501. In *Halsbury's Laws of England* (4th ed.).

act on the part of the bailor has the effect of putting the goods into the possession of the bailee, for example, by handing over the keys to an apartment to the estate agent for the premises to be listed. Another essential requirement of bailment is that the delivery should be on the basis of some agreement.

Types of Bailment

Bailments can be divided into two categories according to whether it is a gratuitous or non-gratuitous bailment.

Gratuitous bailments are bailments without any charge or reward, namely there are no hire charges paid by the bailor and no custody charges are paid by the bailee.

Non-gratuitous bailments are bailments for some charges or reward, namely there are hire charges paid by the bailor and custody charges paid by the bailee.

Termination of Bailment

A contract of bailment shall terminate in the following circumstances:

1) On expiry of stipulated period.
2) On fulfilment of the specified purpose.
3) By notice:
   a) Where the bailee acts in a manner which is inconsistent with the terms of the bailment, the bailor can terminate the contract of bailment by giving a notice to the bailee.
   b) A gratuitous bailment can be terminated by the bailor at any time by giving a notice to the bailee.
4) By death: A gratuitous bailment terminates upon the death of either the bailor or the bailee.

2.4.4 Defamation

The law of defamation in Malaysia is primarily based on the English common law principles except insofar as it has been modified by the Malaysian *Defamation Act 1957* (Act 286). The *Defamation Act 1957* is in *pari materia* with the English *Defamation Act 1952*.

The interest that is protected by this tort is a person's good name and reputation. Mere feelings of hurt however, are insufficient for the award of damages under the tort of defamation. Words that are spoken in jest and are understood by those who hear them to be so, are not defamatory as the words should not affect the plaintiff's reputation. The circumstances and context in which the words appear are important considerations. The tort of defamation arises when there is a publication which has a tendency to lower the person's reputation or to cause him to be shunned or avoided by reasonable people in society, thereby adversely affecting his reputation. Only the person defamed may bring an action in defamation. A person's reputation is said to die with him on his death, therefore a next-of-kin cannot institute proceedings on behalf of the deceased.

Case Law *Only person defamed may bring action in defamation*

CASE 2-68 *Atip bin Ali -v- Josephine Doris Nunis & Anor* [1987] 1 MLJ 82

In the Malaysian High Court case of *Atip bin Ali -v- Josephine Doris Nunis & Anor,* the defendant claimed for breach of promise to marry against Datuk Rahim Thamby Chik.

The defendant subsequently did not pursue her claim after the writ had been filed. However, the newspapers found out about the writ and published the matter. The plaintiff and all UMNO members of Alai, Melaka claimed that as a result of the publication, the members of both PAS and Wanita UMNO avoided them on the basis that they (the plaintiffs) supported an adulterer.

The Malaysian High Court held that the word *'UMNO'* did not appear on the writ. If any party was defamed, it was Datuk Rahim Thamby Chik himself and only he could have taken action but not the UMNO members.

The legal issues related to defamation also apply online.

In order to prove defamation, the plaintiff must establish the elements of this tort, which are:

a) the words are defamatory, and
b) the words refer to the plaintiff, and
c) that the words have been published.

Words are defamatory

The first requirement that must be established by a plaintiff in a defamation action is that the words are defamatory. As a general rule, this requirement is satisfied when the words have a tendency to lower the estimation of the plaintiff in the minds of right-thinking members of society generally, so that the plaintiff is exposed to hatred, or being shunned, avoided or ridiculed by others.

Case Law *Proving defamation – words are defamatory*

CASE 2-69 *DP Vijandran -v- Karpal Singh* [2000] 6 CLJ 433

In the Malaysian High Court case of *DP Vijandran -v- Karpal Singh,* in an allegation that the plaintiff, an advocate and solicitor had committed an offence of cheating under Section 420 of the Penal Code, the Malaysian High Court held that it is irrelevant that the public at large may not understand the implication of the allegation. It is sufficient that the plaintiff's fraternity including those of the judicial service know the meaning attributed to the said offence.

The Court only looks to the tendency of the response or reaction of the reasonable man, to the words. The Court does not concern itself with whether members of society would in actual fact avoid the plaintiff. This is a question of law for the Court to decide. Should the Court find that the words do indeed have a tendency to cause a reasonable man to look down upon the plaintiff, they are deemed to be defamatory. Words which may cause a reasonable man to "look down upon the

plaintiff" would include words which may expose him to hatred, contempt or ridicule, or those which would cause him to be shunned or avoided. It does not matter that no one believed the words to be true.

In a defamation suit, the intention of the publisher or maker of the statement is irrelevant. The words will be examined objectively, that is, its effect on a reasonable and ordinary reader or person who hears those words. Where the defamation is intentional, this may result in the plaintiff obtaining a higher award of damages.

The application of the reasonable man's test and what or whose opinion counts as "reasonable", may be seen in the Malaysian Court of Appeal case of *Lau Chee Kuan -v- Chow Soong Seong & Ors*.

Case Law *Proving defamation – application of the reasonable man test*

CASE 2-70 *Lau Chee Kuan -v- Chow Soong Seong & Ors* [1955] MLJ 21

An article in a Chinese newspaper described how the appellant, a midwife, was taken to a house at night where she delivered a child. She was paid $200. On leaving the house, she turned around to look at it and found that the house had disappeared and she was in a cemetery. On arriving at her house, she found the $200 in notes had turned into a heap of ashes of burnt *Hades* currency. The article explained that due to fright, ever since that fateful night she had been ill.

The trial judge dismissed the appellant's claim on the ground that in the eyes of the average thinking man, the article did not tend to lower the appellant's reputation or disparage her in the way of her profession. The article was therefore not defamatory.

On appeal, the Malaysian Court of Appeal disagreed and held the words in the article to be defamatory of the appellant. **Mathew CJ** stated at page 22 that the opinion of all other persons must be that here is a silly woman who believes in ghosts to such an extent that she makes herself ill and is unable to pursue her profession as a midwife.

Words may be defamatory in one of three ways; in its *natural and ordinary meaning*, or by way of *innuendo* or by *juxtaposition*.

a) The words complained of are defamatory in their *natural and ordinary meaning* if they impute that the plaintiff is dishonourable or of discreditable conduct or motive or lacks integrity. The words by themselves, as understood by ordinary men of ordinary intelligence must have the tendency to make them look down, shun or avoid the plaintiff. The natural and ordinary meaning of the words includes but is not restricted to the literal meaning of the words. Further, the words must be read in the context of the whole publication.

Case Law *Defamatory words – in their natural and ordinary meaning*

CASE 2-71 *Institute of Commercial Management United Kingdom -v- News Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408

In the Malaysian High Court case of *Institute of Commercial Management United Kingdom -v- News Straits Times Press (Malaysia) Bhd*, the plaintiff claimed damages against the defendant for libel in respect of words contained in an article published by the defendant entitled *"British diploma mills step up sales racket"*. The plaintiff alleged that the words in the article in their natural and ordinary meaning or by innuendo were understood to mean, *inter alia*, that the plaintiff was one of the *"diploma mills"* advertising actively in Malaysia, that the plaintiff was a bogus educational institution and that therefore the plaintiff was carrying out unlawful activities in Malaysia and other places. The plaintiff alleged that the words were calculated to injure and disparage the plaintiff in its trade as an educational establishment and examining body; that the plaintiff had in fact been injured in its credit and reputation as such.

The Malaysian High Court held that any ordinary reasonable person reading the article would link ICM with one of those organisations which operated the *"diploma mills"*. The words had a strong tendency to lower the plaintiff in the estimation of right-thinking members of society generally or the parents of potential students or the potential students themselves.

b) Sometimes the words by themselves are not defamatory but become so by virtue of either inferences or special facts or circumstances known by the recipient or reader of the words. In these circumstances, the words are said to be defamatory by *innuendo*. "Innuendo" may be divided into two types; *false innuendo* and *true* or *legal innuendo*.

Where the words are defamatory of the plaintiff due to inferences or implications arising from them, this is when the words are described as giving rise to a false innuendo. A false innuendo may arise from a combination of statements and pictures.

Case Law *Defamatory words – by way of innuendo*

CASE 2-72 *Syed Husin Ali -v- Sharikat Penchetakan Utusan Melayu Bhd* [1973] 2 MLJ 56

In the Malaysian High Court case of *Syed Husin Ali -v- Sharikat Penchetakan Utusan Melayu Bhd*, the defendant newspaper published among others, the following statements regarding the plaintiff: *"The Menteri Besar considers Syed Husin Ali as wanting to arouse the hatred of the Malaysian people against the Government and the British; the University lecturer was spreading subversive ideas in order to poison the thoughts of the Malays."*

The issue before the Malaysian High Court was whether the words were defamatory of the plaintiff.

It was held that by inference or implication, the words conveyed the meaning that the plaintiff was dishonest, disloyal to the Government, a subversive element and ungrateful. The plaintiff's claim was accordingly allowed.

Words are also capable of bearing a defamatory meaning by way of a true or legal innuendo which arises due to special facts which are known to the recipient of the publication. This special knowledge will cause the words to be defamatory of the plaintiff. Otherwise, the words are not defamatory in nature.

Case Law *Defamatory words – true or legal innuendo*

CASE 2-73 *Tolley -v- Fry & Sons Ltd* [1931] AC 333

In the English House of Lords case of *Tolley -v- Fry & Sons Ltd*, the plaintiff was an amateur golfer, and the defendant was a chocolate manufacturer. An advertisement in a newspaper showed a caricature of the plaintiff playing golf with a bar of the defendant's chocolate sticking out of his trouser pocket. In the picture, a caddy was seen pointing to the plaintiff indicating that the plaintiff's performance was as good as the quality of the defendant's chocolate. This advertisement was in fact an advertisement for the defendant's chocolate.

The plaintiff claimed for libel. The words and the picture were not defamatory on the face of it but the innuendo was that the plaintiff had received payment for the advertisement and therefore had prostituted his status as an amateur golfer.

The English House of Lords held the defendant liable as those who knew of the plaintiff's status may reasonably assume that the plaintiff had consented to and had been paid for the advertisement.

c) "Juxtaposition" usually involves a situation that employs visual effects, such as an effigy or placing the plaintiff's photograph in a pile of pictures of wanted criminals. Thus, defamatory imputations can arise from material other than written or spoken words.

Case Law *Defamatory words – by way of juxtaposition*

CASE 2-74 *Datuk Syed Kechik bin Syed Mohamed -v- Datuk Yeh Pao Tzu & Ors* [1977] 1 MLJ 56

In the High Court case of *Datuk Syed Kechik bin Syed Mohamed -v- Datuk Yeh Pao Tzu & Ors*, the plaintiff applied for interlocutory injunctions to restrain the defendants from further printing, publishing and circulating libels concerning him in their Chinese newspaper (OCDN). At the time, the plaintiff held various political and public offices in Sabah particularly. He was the director and chief executive of the *Sabah Foundation*. He was also a co-trustee of a trust known as *Amanah Tun Datu Haji Mustapha,* established by the Foundation, which trust was responsible for the distribution of cash benefits to its beneficiaries (comprising all adult citizens of the State of Sabah). Among the publications objected to by the plaintiff were caricatures of the plaintiff. The plaintiff contended that the first caricature clearly referred to him as director of the Foundation and imputed that he had become a stooge or errand-boy of the chairman and that the dollar-notes implied that he had unlawfully amassed fortune from holding his office. Similarly, the second caricature also referred to him and that the symbol "$" on his shoe and dollar-notes in the briefcase imputed that while he was holding office he had amassed a fortune.

The Malaysian High Court held that the publications disclosed a clear case of libel. The plaintiff's application was granted.

Words must refer to the plaintiff

The second element that must be proven by a plaintiff in a cause of action for defamation is that the words refer to him. Reference to the plaintiff is obviously established if the plaintiff's name is clearly stated. Otherwise, the description must be such that a person hearing or reading the alleged words would reasonably believe that the plaintiff is referred to. It is not necessary that the public at large or the whole world should understand the words to refer to the plaintiff. It is sufficient that those who know the plaintiff believe that he is the person referred to. The test in determining the issue of identity is an objective test.

Case Law *Proving defamation – words must refer to the plaintiff*

CASE 2-75 *Hulton & Co -v- Jones* [1910] AC 20

In the English House of Lords case of *Hulton & Co -v- Jones*, a fiction was written concerning an Artemis Jones in Peckham. There was in fact a real Artemis Jones, the plaintiff, a lawyer in that town. His friends thought the story concerned the plaintiff.

The House of Lords held that defamation was established as those who knew him understood the words as referring to him, although that was not intended to be so by the author and publisher.

The general principle is that the defendant will not be liable unless there is a specific reference to the plaintiff.

The words must be published

The fact that the words must be published is the third element of defamation. Publication means the dissemination of the defamatory words or material to a third party other than the plaintiff. Therefore, if the words or printed material are not heard or seen by third parties, and only the plaintiff hears or sees them, it cannot be considered a publication.

Case Law *Proving defamation – words must be published*

CASE 2-76 *Dr Jenni Ibrahim -v- S Pakianathan* [1988] 2 MLJ 173

In the Malaysian Supreme Court case of *Dr Jenni Ibrahim -v- S Pakianathan,* the plaintiff was a psychologist who was working on a voluntary basis at a Help Centre. The defendant who was the former managing director of the centre wrote two letters indicating that the plaintiff had committed a breach of trust amounting to about RM70,000. Copies of one of these letters were sent to all the directors of the Centre, to the Director of the Welfare Services of Perak and to the Registrar of Societies of Malaysia.

The Malaysian Supreme Court held that sending copies of the said letter to the other parties constituted publication.

The general rule is that if a document, which contains defamatory words, is expected to be published to a third party and a third party does in fact read the document, publication is established.

Defamation may be divided into two different types, namely *libel* and *slander*. In England, "libel" is a tort as well as a crime whereas "slander" is only a tort and not a crime. In Malaysia, libel and slander are both torts and crimes.

Libel

"Libel" is defamation in a permanent form and is usually visible to the eye, such as items in writing which include e-mail, pictures, statues or effigies. Section 3 of the *Defamation Act 1957* (Act 286) provides that the broadcasting of words by means of radio communication shall be treated as publication in a permanent form and therefore constitutes a libel. Section 3 of the *Defamation Act 1957* (Act 286) provides:

> *…Broadcast statements*
>
> *3. For the purpose of the law of libel and slander the broadcasting of words by means of radio communication shall be treated as publication in a permanent form…*

Libel is actionable *per se*, which means that a plaintiff need not prove any damage. This is because the law presumes that when a person's reputation is assailed, some damage must result. A bank commits the tort of defamation if it wrongfully prints the words "Account Closed" on a cheque that it is in fact bound to honour. A libel is made out through the publication of defamatory words.

Slander

"Slander" is defamation in a temporary or transient form usually made through spoken words or gestures. A slander is not actionable *per se*. The plaintiff therefore needs to prove actual or special damage in order to succeed in his action.

"Actual damage" refers to actual financial loss or any loss that may be measured in monetary terms. The loss of business or employment may be calculated in monetary terms and therefore constitute actual damage. The actual loss must be proved. The damage must also be the natural and reasonably foreseeable result of the defendant's words. The damage must further be a direct result of the defendant's words.

In an action for slander, the plaintiff must prove the actual words used.

Case Law *Slander – proof of actual words used*

CASE 2-77 *Rainy -v- Bravo* [1872] LR 4 PC 287

The logical reason for this procedural requirement was stated in the English Privy Council case of *Rainy -v- Bravo,* where **Sir Montague Smith** held that the words must be proved and not what the witness conceives to be the substance or the effect of them; for otherwise witnesses and not the Court or a jury, would be made the judges of what was a libel at page 295.

Case Law *Slander – remoteness of damage*

CASE 2-78 *Lynch -v- Knight* [1861] 9 HL Cas 577

In *Lynch -v- Knight,* the English House of Lords held that to make the words actionable by reason of special damage, that consequence must be such that it is fairly and reasonably anticipated to follow from the speaking of the words. This means that even if actual damage is proven, the damage must also have been foreseeable and not too remote. In this regard the ordinary principles on remoteness of damage are applicable.

The rule that a plaintiff must prove actual damage in an action for slander is a general proposition, subject to some exceptions. The exceptions in which slander becomes actionable *per se* are Sections 4 (Slander of women), 5 (Slander affecting official, professional or business reputation) and 6 (Slander of title, of goods or malicious falsehood) of the *Defamation Act 1957* (Act 286).

Defences

Many of the defences which are applicable to other torts are also applicable in an action for defamation, such as *consent* and *volenti non fit injuria*.

Consent and volenti non fit injuria

The plaintiff, who gives his *consent* for publication to be made, be it express or implied, cannot hold the defendant liable; for instance, if the plaintiff consents to being interviewed, knowing that the contents of the interview will be printed in a magazine. The defendant must prove such authorisation or consent in order for this defence to succeed.

Case Law *Defamation – defence of consent and volenti non fit injuria*

CASE 2-79 *Cookson -v- Harewood* [1932] 2 KB 478

In the English High Court case of *Cookson -v- Harewood*, the defendant published a true statement of the plaintiff not being allowed to ride the horses at his club. The plaintiff claimed that the innuendo was that he was corrupt and indulged in fraudulent practices.

The English High Court held that the plaintiff could not claim from the defendant as the statement was true and that permission was obtained to publish that statement.

Justification

The defence of "justification" or "truth" is an absolute defence. The burden lies on the defendant to prove its precise truth. The defendant is required to prove the truth of all his allegations which are defamatory and materially injurious.

Thus, a defendant may escape liability for his defamatory allegation if he can prove the truth of the facts within the allegation. If several allegations are made, the defendant is not required to prove the truth of all the allegations.

Section 8 of the *Defamation Act 1957* (Act 286) provides:

> *…Justification*
>
> *8. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges…*

Case Law *Defamation – defence of justification*

CASE 2-80 *Abdul Rahman Talib -v- Seenivasagam & Anor* [1965] 1 MLJ 42

In the Malaysian High Court case of *Abdul Rahman Talib -v- Seenivasagam & Anor*, the defendant alleged that the plaintiff, a government minister, had received money and favours to his personal advantage through his influence as minister. The defendant could prove the truth of the receipt of favours but could not do so with regard to the receipt of money.

The Malaysian High Court held that the unproven allegation did not materially injure the plaintiff's reputation having regard to the truth of the allegation concerning the receipt of favours and so the defence of justification was successfully raised against the plaintiff.

Fair comment

A comment which is *honestly* and *fairly* made may also absolve the defendant from liability. Section 9 of the *Defamation Act 1957* (Act 286) provides:

> *…Fair comment*
>
> *9. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved…*

In order to establish this defence, the defendant must show that:

1) the words must be in the form of comment and not a statement of fact (although it may consist or include inference of facts); and
2) the comment must be based on true facts; and
3) the comment is fair and not malicious; and
4) the comment concerns an issue of public interest or importance.

The defendant must prove the truth of the facts on which the comment is based. It is not essential that all the facts be proven; it is sufficient that the facts which form the basis of the comment are proven.

Case Law *Defamation – defence of fair comment*

CASE 2-81 *Telnikoff -v- Matusevitch* [1992] 2 AC 343

In the English House of Lords case of *Telnikoff -v- Matusevitch*, the plaintiff, a Russian emigrant was employed by the BBC Russian Service. He wrote an article concerning the Russian Service which was published by the Daily Telegraph. The defendant was a Russian Jew employed by Radio Liberty, London (a United States radio station), and he wrote a letter in reaction to the plaintiff's letter to the same newspaper imputing racialist opinions onto the plaintiff. The plaintiff's solicitors wrote to the defendant demanding an apology, which was not made. The plaintiff then sued the defendant for libel, stating that the words were defamatory in their natural and ordinary meaning. The defendant pleaded fair comment on a matter of public interest, to which the plaintiff replied that the defendant was actuated by express malice.

The English House of Lords held that if the contents of the letter were fair comment, then the plaintiff cannot complain notwithstanding that they were defamatory. An honest opinion on publications put before the public can be the subject of the defence of fair comment. The English House of Lords found for the defendant.

However, in order for the defence of fair comment to succeed it must be proven that there is a true statement of fact, which then becomes the subject of the comment.

Privilege

There are two types of privilege; "qualified" and "absolute". The defence of qualified privilege is provided for both, through statute and common law. Statutory qualified privilege is provided for in Section 12 of the *Defamation Act 1957* (Act 286).

The privilege conferred to reports listed under both Parts I and II of the Schedule is qualified. For reports of matters listed under Part I of the Schedule, the privilege is lost if the author and/or publisher is found to be malicious with regard to the publication. For reports of matters listed under Part II of the Schedule, the privilege is lost if the author and/or publisher:

i) has been requested by the plaintiff to publish either an explanation of or contradiction to the original publication, and the defendant has not done so either through refusal or neglect; or
ii) has been requested by the plaintiff to publish either an explanation of or contradiction to, the original publication, and the defendant has done so but the explanation or contradiction is inadequate or unreasonable in the circumstances; or
iii) is found to have acted maliciously.

Where there are several defendants and the plaintiff proves malice against one defendant, the defence does not fail as the malice of one defendant does not infect the other co-defendants.

Common law qualified privilege

Publications by a newspaper or broadcasting station or other agent and for purposes other than those listed in the Schedule to the *Defamation Act 1957* (Act 286) may still be privileged under *common law* principles of *qualified privilege*. There are occasions whereby on grounds of public policy and convenience, a person is allowed by law, to make defamatory remarks, even if untrue, without incurring legal liability. These occasions of qualified privilege are where the communication is made bona fide on a matter in which the party communicating it has an interest, or duty to do so and the recipient of the communication has a corresponding interest or duty to be informed of such matter. Without the privilege, the statement would be slanderous and actionable. This duty may be legal, moral or social in nature. The privilege is qualified because if the plaintiff can prove that at the time of the publication, the defendant was malicious or he had exceeded the boundaries of the privilege, the defence will not be available. It is important that the statement is made honestly and without any improper motive. In order to rebut this privilege, it is the plaintiff who must prove express or actual malice. It is not for the defendant to prove the absence of malice or is bona fide as that is presumed when the occasion is privileged.

Qualified privilege is only available to a person who falls within one or more of the four circumstances laid down below, though these circumstances are in no way conclusive:

i) statements made between parties who have a mutual interest over the subject matter of the communication.
ii) statements made to fulfil a legal, moral or social duty.
iii) statements made to relevant authorities in order to settle public nuisances or disputes.
iv) statements made in order to protect one's own interest or property.

Absolute privilege

There are instances where words which are harmful to a person's reputation are not actionable, as the publication of these words is protected by absolute privilege. The circumstances are usually connected to the administrative system within a particular government, whether the statement is made by legislative bodies, the executive or the judiciary. An advocate is protected by absolute privilege if he makes a defamatory statement while in the course of legal proceedings. This rule is however, restricted insofar as the defamatory words are relevant to the matter at hand, and spoken in good faith. Statements uttered outside the Courtroom are not afforded the privilege.

Absolute privilege is also extended to statements made during parliamentary debates and proceedings, which are not questionable in any Courts of law. Absolute privilege is also extended to any reports, papers, votes or other matters that Parliament orders or authorises to be published.

Therefore, any defamatory remark made by a Member of Parliament during parliamentary debates is not actionable, even if the remarks are made maliciously. This privilege does not extend to the repetition of the same remarks outside Parliament.

A fair and accurate report of judicial proceedings held in Malaysia enjoys absolute privilege by virtue of Section 11(1) of the *Defamation Act 1957* (Act 286) which provides:

> *…A fair and accurate and contemporaneous report of proceedings publicly heard before any Court lawfully exercising judicial authority within Malaysia and of the judgement, sentence or finding of any such Court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected, although such judgement, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this Section knew or ought to have known of such reversal, quashing or variation…*

The privilege under this provision is granted to any fair and accurate report of judicial proceedings held in an open Court. It should be noted that Section 11(2) of the *Defamation Act 1957* (Act 286) further provides that the absolute privilege is lost if the publication is blasphemous, seditious, indecent or prohibited by law.

Unintentional defamation

Where a defendant *unintentionally* and *innocently* publishes defamatory material of another person, he may raise the defence of unintentional defamation provided for under Section 7 of the *Defamation Act 1957* (Act 286). The defence may only be raised in the following circumstances.

Firstly, if the words are defamatory of the plaintiff in their natural and ordinary meaning, which includes a false innuendo. Innocent publication is proven when the publisher can show that:

a) he did not intend to publish them of and concerning the plaintiff; and
b) he did not know of circumstances in which the words might be understood to be referring to the plaintiff; and
c) he had exercised all reasonable care in relation to the publication.

Secondly, if the words are defamatory of the plaintiff due to certain external factors by way of true innuendo, innocent publication is proved when the publisher can show that:

a) he did not know of circumstances in which the words might be understood to be defamatory of the plaintiff; and
b) he had exercised all reasonable care in relation to the publication.

In both cases, any reference to the publisher includes his servant or agent who is involved with the contents of the publication.

If the defamatory article plainly refers to a given individual, the publication will not be an "innocent publication", even though he is not specifically named. Likewise, if the identity of the person referred to in the article may be easily discovered, the publisher cannot be said to have exercised all reasonable care in relation to the publication. For example, the US Justice Department's reference to 'MO1' or Malaysian official No. 1 during their press conference in 2016 on the forfeiture of foreign assets related to the 1MBD investment funds, would be defamatory as the identity of 'MO1' refers to a particular individual that is easily discovered, even though he is not specifically named in the press conference.

Case Law *Defamation – innocent publications*

CASE 2-82 *Sandison -v- Malayan Times Ltd & Ors* [1964] MLJ 332

In the Malaysian High Court case of *Sandison -v- Malayan Times Ltd & Ors*, the defendant's newspaper published an article indicating that a senior expatriate executive of the Rubber Replanting Board had been dismissed on November 13, 1962 for corruption.

The executive was not named but the Malaysian High Court found that the article clearly referred to the plaintiff as he was the only senior expatriate executive on the Board.

Innocent dissemination

A person who participates in the publication of a defamatory article is subject to suit. If he is a mere distributor or delivery boy, this rule would impose undue hardship on these people and the law in these special circumstances provides the defence of innocent dissemination.

Case Law *Defamation – innocent dissemination*

CASE 2-83 *Visetelly -v- Mudie's Select Library Ltd* [1900] 2 QB 170

In the English High Court case of *Visetelly -v- Mudie's Select Library Ltd,* it was held that the defence of innocent dissemination is available to a defendant who is not the author, printer or first or main publisher of the defamatory article. Additionally, he must also prove all of the following requirements:

a) that he was innocent of any knowledge that the publication in question contained a libel; and
b) there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose it contained a libel; and
c) when the article was disseminated by him it was not due to any negligence on his part and that he did not know that it contained a libel.

Apology

An apology may be an effective defence although the facts of the case may need to be scrutinised in order to determine the effectiveness of any purported apology by the defendant. A clear print of *"Mohon Maaf"* (we apologise), for instance, together with an explanation that an earlier article was withdrawn and the defendant regretted its publication and so apologised to the plaintiff and her family for any false notion or confusion arising from the publication; and this apology appearing in a subsequent issue of the magazine, was held to have met the criteria of a full and frank withdrawal of the alleged offending article.

2.4.5 The Rule of Strict Liability (*Rylands -v- Fletcher*)

"Strict liability" is a term used to describe liability which is imposed on the defendant without any proof of fault on his part. Unlike the defendant in a cause of action for intentional torts, the mental state of a defendant in a strict liability action is irrelevant. There is no requirement of fault on the part of the defendant. The landmark case in this branch of tort law is *Rylands -v- Fletcher.*

Case Law *Strict liability*

CASE 2-84 *Rylands -v- Fletcher* (1866) LR 1 Ex 265

In *Rylands -v- Fletcher,* the defendant mill owner employed some independent contractors to build a reservoir. Beneath this reservoir were some iron shafts that went through a mining area and which were connected to the plaintiff's mine. The defendant did not know of the existence of these shafts and the contractors were negligent in not blocking the shafts. The plaintiff's mine was flooded when the reservoir was filled with water.

The defendants themselves were not negligent and neither were they vicariously liable for the negligence of their independent contractors, but the English House of Lords held them liable to the plaintiff.

Blackburn J in the Court of Exchequer Chamber said at page 279 – 280 that that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

This statement is known as the rule in *Rylands -v- Fletcher*. The learned judge went on to say that the defendant may avoid liability if he can prove that the escape was due to the plaintiff's own fault or that it was caused by an act of God.

There are five elements required to establish liability under the rule in *Rylands -v- Fletcher,* and these are:

1) There must exist a dangerous "thing", and the word dangerous has its own meaning under this tort. What is dangerous is a question of fact. The rule applies to anything that may cause damage if it escapes. The object or "thing" therefore, need not be dangerous per se but are dangerous if they escape. This principle has been successfully applied to gas, noxious fumes,

explosives, fire, electricity, water and sewage. A less confusing phrase would perhaps be *"thing likely to cause damage if it escapes"*.

Case Law *Liability under the rule in Rylands -v- Fletcher – dangerous thing*

CASE 2-85 *Ang Hock Tai -v- Tan Sum Lee & Anor* [1957] MLJ 135

In the Malaysian case of *Ang Hock Tai -v- Tan Sum Lee & Anor,* the plaintiff rented a shophouse and lived on the first floor of the building. The ground floor was sublet to the defendant, who was in the business of repairing and distributing tyres. The defendant stored petrol for the purposes of his business. One morning, the defendant's premises caught fire. The fire spread to the first floor and the plaintiff's wife and child died in the tragedy.

The Court found the defendant liable under the rule in *Rylands -v- Fletcher* as petrol was a dangerous thing.

2) The rule only applies to an object or thing which the defendant purposely keeps and collects. The storing of the things must be for the defendant's own purposes. The rule is not applicable to anything that is naturally on the land.

Case Law *Liability under the rule in Rylands -v- Fletcher – thing which the defendant keeps*

CASE 2-86 *Giles -v- Walker* [1890] 24 QBD 656

In the English High Court case of *Giles -v- Walker* the defendant ploughed his land but thereafter left it unattended. Thistles grew on the land, which later escaped to the plaintiff's land and seeded.

The English High Court held that the thistles were the natural growth of the defendant's land and so he could not be found liable. In cases like this, liability may be sought under the tort of nuisance or negligence.

Case Law *Liability under the rule in Rylands -v- Fletcher – thing which the defendant keeps*

CASE 2-87 *Miles -v- Forest Rock Granite Co (Leicestershire) Ltd* [1918] 34 TLR 500

In the English High Court case of *Miles -v- Forest Rock Granite Co (Leicestershire) Ltd*, the defendant used some explosives to blast some rocks on his land. Some of the rocks fell onto the land below and injured the plaintiff.

The English High Court found that although the rocks were not purposely collected or kept on the land, the explosives were purposely collected and kept. The defendant was held liable for this deliberate accumulation which caused the escape of the rocks, and also because the way in which the injury was sustained, through rock-blasting, which was held to be a non-natural use of land.

It was the accumulation of explosives that gave rise to liability. The explosives, if they escaped would be likely to cause damage and therefore, were dangerous things. They were deliberately collected and stored by the defendant. There was an escape as the use of the explosives caused the rocks to fall away from the defendant's land; and damage was caused to the plaintiff. It did not matter that the final damage was in fact caused by another thing (the rocks, in this case). The Court held that the use of explosives on private land constituted a non-natural use of land.

3) The plaintiff must prove that there has been an escape. Escape means the thing that has escaped from a place over which the defendant has control and authority to a place over which the defendant has no control and authority. It is not necessary that the defendant has a proprietary interest in the land from which the escape occurs.

Case Law *Liability under the rule in Rylands -v- Fletcher – thing which the defendant keeps*

CASE 2-88 *Lee Kee -v- Gui See & Anor* [1972] 1 MLJ 33

In the Malaysian High Court case of *Lee Kee -v- Gui See & Anor*, the defendant was found liable when a third party whom he had hired to burn some rubbish on his land did so without taking any precautions, which resulted in the fire spreading onto the plaintiff's land, destroying the latter's rubber trees.

The Malaysian High Court held that in such a situation, he must take reasonable steps to prevent the fire from spreading. This duty is absolute and non-delegable.

In summary, liability is imposed for the spread of fire if the spread was due to the default of the defendant's servant, his guest and even his independent contractor.

4) The defendant will only be liable if in bringing or accumulating the thing onto his land, he makes a non-natural use of the land.

Case Law *Non-natural use of land*

CASE 2-89 *Rickards -v- Lothian* [1913] AC 263

The meaning of non-natural use of land was explained in the English Privy Council case of *Rickards -v- Lothian* where **Lord Moulton** stated at page 280 that it must be for some special use with increased danger to others and not merely the ordinary use of the land or use for the general benefit of the community.

Case Law *Non-natural use of land*

CASE 2-90 *Read -v- Lyons & Co Ltd* [1947] AC 156

Lord Porter, in the House of Lords case of *Read -v- Lyons & Co Ltd* said at page 169, that all factors such as time, location and the ordinary activities of mankind must be taken into consideration, so that what is dangerous or constitutes a non-natural use of land may differ in different circumstances.

For instance, in the seventeenth century, the building of skyscrapers was most probably a dangerous activity and constituted a non-natural use of land, but in the twenty-first century, this is regarded as usual and is arguably a natural use of land.

The perception of the Courts as to what constitutes a non-natural use of land will change in accordance with social and economic condition as well as the evolving needs of the public. For example, allowing multi-level shop lots in residential areas to be installed with telecommunication antennas can be viewed as a non-natural use of land, however, with the advent of 5G connectivity, such structures have become a modern necessity and therefore will not be considered as a non-natural use by the courts. No conclusive test may therefore be given as to what constitutes a non-natural use of land. It depends on the facts of each case but is often equated with extraordinary use.

Case Law *Liability under the rule in Rylands -v- Fletcher – non-natural use of land*

CASE 2-91 *Hoon Wee Thim -v- Pacific Tin Consolidated Corporation* [1967] 2 MLJ 35

In the Malaysian Federal Court case of *Hoon Wee Thim -v- Pacific Tin Consolidated Corporation,* the defendants had built a reservoir on their land which was above ground level. A heavy rainfall caused the water-bunds to collapse, as a result of which water escaped onto the adjacent land, and the deceased drowned. The administrator of the deceased's estate claimed for damages.

The Malaysian Federal Court held that using sand-bunds to separate ponds of water constituted a dangerous and non-natural use of land and any resulting damage would be caught under the rule in *Rylands -v- Fletcher.* As the reservoir was situated close to an area which was thickly populated, the defendants were using their land in a special way bringing with it increased danger to others.

The Malaysian Federal Court added that even if a landowner uses his property for a natural purpose, it does not mean that he may conduct hazardous activities causing adverse effects to his neighbours.

5) A defendant will not be liable for all consequential damage that results from an escape. For liability to arise under the rule in *Rylands -v- Fletcher,* the type of damage must be foreseeable.

Case Law *Liability under the rule in Rylands -v- Fletcher – foreseeable damage*

CASE 2-92 *Cambridge Water Co Ltd -v- Eastern Counties Leather plc* [1994] 1 All ER 53

In the House of Lords case of *Cambridge Water Co Ltd -v- Eastern Counties Leather plc*, the defendant who was a leather manufacturer used a chemical, PCE, in the process of manufacturing. The chemical had been spilled little by little on the concrete floor of their factory. PCE was not soluble in water and it had seeped through the factory floor until fifty metres below the ground. It had then spread at the rate of eight metres per day until it reached the area the plaintiff used to

pump water for the daily supply of the residents in that area. The distance between the defendant's factory and the plaintiff's borehole was 1.3 miles and it had taken nine months for the PCE spillage to reach the borehole. The plaintiff, a statutory water company had to spend about £1 million in order to find and operate another borehole.

In a claim for negligence, nuisance and strict liability under the rule of *Rylands -v- Fletcher,* the English High Court dismissed the claims for negligence and nuisance as it was unforeseeable that the spillage would accumulate underground or that it would spread and cause damage to the plaintiff. On the claim for strict liability, the English High Court held that the defendant's activity was not a non-natural use of land taking into account the public benefit in the form of employment that arose from the activity.

The English High Court further held that the rule in *Rylands -v- Fletcher* was inapplicable unless it could be foreseen that damage of a relevant type would occur as a result of an escape and the defendant does not take any steps to prevent the escape from occurring. If the damage that occurs is not known through any scientific knowledge at the time the escape occurred, no liability will be imposed.

The House of Lords affirmed the High Court's decision and held that in both the torts of nuisance and strict liability, foreseeability of the type of damage is a prerequisite to liability. The defendant's use of their land was not exactly a natural use of land but because the damage was not foreseeable, they therefore could not be held liable.

As a result of this case, it is now more difficult for the plaintiff to succeed in an action for strict liability. Although the plaintiff may be able to prove that there is a dangerous thing, that the thing has been actively accumulated and could reasonably be foreseen to escape, and escape in fact occurred, he must also prove that the defendant is using his land for a non-natural purpose, and further, that the type of damage incurred by the plaintiff is reasonably foreseeable.

Can you sum up the rule that has evolved from the case of *Rylands v Fletcher* (1866)?

If a person brings something onto his property for unnatural or unusual use which is likely to cause damage if it escapes, he is liable for the foreseeable consequences of that escape.

Defences

There are several defences available to the defendant in a strict liability action. These are:

a) consent of the plaintiff
b) common benefit
c) act of third party
d) act of God

Consent of the plaintiff

If the plaintiff either expressly or impliedly consents to the existence of the dangerous thing and the defendant is not negligent in any way, the defendant will not be liable for any escape and resulting damage.

Case Law *Negligence- defence of consent*

CASE 2-93 *Sheikh Amin bin Salleh -v- Chop Hup Seng* [1974] 2 MLJ 125

In the Malaysian High Court case of *Sheikh Amin bin Salleh -v- Chop Hup Seng* the plaintiff owned a piece of land on which eight terrace houses were built, four of which were rented by the defendants. The defendants used their rented premises for the purpose of a bakery, a fact known by the plaintiff. A fire caused by the defendants' negligence destroyed all eight houses.

The Malaysian High Court found on the evidence that the plaintiff assented to or acquiesced in the use of the defendants' premises as a bakery with an oven therein and therefore the defendants could not be liable under the rule in *Rylands -v- Fletcher*. The consent or acquiescence of the plaintiff to the defendants' activity negated the latter's liability under *Rylands*.

Common benefit

If the dangerous thing is allowed to exist for the common benefit of both the plaintiff and the defendant, the defendant will not be held liable if it escapes and causes damage. Indeed, common benefit is an important element in deciding whether the plaintiff has impliedly consented to the existence of the thing purported to be dangerous.

Case Law *Negligence- defence of common benefit*

CASE 2-94 *Carstairs -v- Taylor* [1871] LR 6 Ex 217

In the English High Court case of *Carstairs -v- Taylor*, the plaintiff rented the ground floor of a factory from the defendant, who occupied the floor above. Water from the roof was collected through gutters which were connected to a box, and from the box it flowed into some pipes and then into a drain. Rats had made holes in the box. Water dripped from it and damaged the plaintiff's property.

The defendant was in no way negligent and the English High Court found that even though the method in which water was disposed of was dangerous, the defendant was not liable as the act was done for the common benefit of both parties.

Act of a third party

Generally, trespassers and those who act on land that does not belong to the defendant are said to be third parties. The defendant's workers or employees as well as any independent contractors employed by him will not be regarded as third parties as they are within his control.

Case Law *Negligence- defence of act of third party*

CASE 2-95 *Rickards -v- Lothian* [1913] AC 263

In the House of Lords case of *Rickards -v- Lothian*, a third party deliberately blocked the waste-pipe of a lavatory basin in the defendant's premises and thereafter turned on the water tap. The water overflowed and damaged the plaintiff's property which was situated on the floor below.

The House of Lords held that the defendant was not liable for the damage.

Act of God

The use of this defence is very limited. The condition for its use is when the escape occurs through natural causes which are unforeseeable and occur without any human intervention.

2.4.6 Breach of Statutory Duty

A right of action in tort for breach of a statutory duty will arise if the statutory provision clearly provides for it. However, most statutes are usually silent with regard to a separate action in tort when there is a breach of statutory duty as the most common sanction is a criminal penalty.

Case Law *Breach of statutory duty*

CASE 2-96 *Parimala a/p MuThus, amy -v- Projek Lebuhraya Utara-Selatan* [1997] 5 MLJ 488

In *Parimala a/p MuThus, amy -v- Projek Lebuhraya Utara-Selatan*, a driver was killed when he hit a stray cow which had entered onto the highway through a hole in the fence surrounding the highway.

In a claim against the defendant highway authority which was statutorily responsible for the construction, maintenance, management and safety of the highway, the Malaysian High Court held that there had been a clear breach of the relevant statutory duty.

Section 11(1) of the *Highway Authority Malaysia (Incorporation) Act 1980* imposes and prescribes the statutory functions of the highway authority. The Highway Authority is also bound by the rules enacted under Section 88(k) of the *Road Transport Act 1987* (Act 333), that animals are prohibited from being left unattended on any road.

The duty was breached even though the carrying out of the statutory duties had been subcontracted out to an independent contractor.

The claim for damages in tort for breach of statutory duty may be denied when the public authority is statutorily protected.

In Malaysia, it is statutorily provided that the State Authority, local authority and any public officer or employee of the local authority cannot be subjected to any action, claim or liabilities which might

arise out of any building or other works which are carried out in accordance with the provisions of Section 95 of the *Street, Drainage and Building Act 1974 (Act 133)*.

Case Law *Breach of statutory duty – protection of local authority*

CASE 2-97 *Majlis Perbandaran Ampang Jaya -v- Steven Phoa Cheng Loon* [2006] 2 MLJ 389

In the landmark Malaysian Federal Court case of *Majlis Perbandaran Ampang Jaya -v- Steven Phoa Cheng Loon,* an apartment block in a three-block complex called the Highland Towers collapsed due to a landslide. The local authority of the area, MPAJ, thereafter prevented the occupiers of the other two blocks from entering their apartments as a safety precaution against possible instability of the whole area. The occupiers subsequently sued ten defendants including MPAJ for negligence, nuisance and strict liability as their acts/omissions had caused the landslide and collapse of the block which resulted in their evacuation. The landslide was caused by overflowing rainwater and a stream which MPAJ had ordered to be diverted.

The Malaysian Federal Court unanimously held in relation to the pre-collapse damage, that the creation of the danger in the diversion of the stream related to MPAJ's approval and inspection but *Section 95(2)* of *Act 133* protects the local authority from liability. As for post-collapse liability, the majority judgement was that MPAJ was not liable.

If the performance of the statutory duty requires the exercise of the authority's discretion, then no action may be brought for the authority's failure to perform that duty unless the refusal is actuated by malice.

An important case which laid down several principles relating to a cause of action based on breach of statutory duty is the Malaysian High Court case of *Hu Sepang -v- Keong On Eng & Ors*.

Case Law *Breach of statutory duty*

CASE 2-98 *Hu Sepang -v- Keong On Eng & Ors* [1991] 1 MLJ 440

The plaintiff was assaulted by four people in the presence of *D1*, a police inspector; and *D2* who was the Chief Police of Malacca at that time. The plaintiff subsequently brought an action for damages against *D1* and *D2* for failing to render assistance to him. He claimed they were in breach of their statutory duty under the *Police Act 1957* to prevent the assault. The Government of Malaysia was joined as *D3*.

The Malaysian High Court held that the Act was intended, among others, for the maintenance of law and order, the prevention and detection of crime and preservation of peace and security of the Federation, with the powers to effect these intentions being given to the police. Section 20(3) of the *Police Act 1967* imposes a duty on the police to apprehend a person whom the law authorises the police to apprehend, and to give assistance in the protection of life and property. Failure to carry out the duties subjects the police officers to disciplinary action. However, the Act is silent as regards a police officer being subject to civil or criminal liability for his failure to carry out his duties.

In dismissing the application of the defendants to strike out the statement of claim of the plaintiff and holding that the plaintiff had cause of action, the Malaysian High Court laid down the following principles:

1) Firstly, to establish civil liability for a breach of statutory duty, as the plaintiff must show that:
   a) the injury he has suffered is within the ambit of the statute,
   b) the statutory duty imposes a liability to civil action,
   c) the statutory duty is not fulfilled, and
   d) the breach of the statutory duty has caused his injury.
2) Secondly, if a statute imposes a duty towards persons generally, no question can arise as to whether the plaintiff is within the class protected.
3) Thirdly, where a statute confers a power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. By contrast, where a statute confers a power coupled with a discretion to exercise it, failure to exercise the power will not attract any liability. The plaintiff is however, still entitled to compensation if the refusal to exercise the discretionary power is made maliciously.
4) Fourthly, if a statute creates a duty but does not provide for any remedy, be it civil or criminal, upon its breach, the injured party has a right to a civil action for otherwise the statute would be meaningless.

Case Law *Does the statute give a right of action in tort?*

CASE 2-99 *X (minors) v Bedfordshire County Council* [1955] 3 All ER 353

The House of Lords in *X (minors) v Bedfordshire County Council,* held that a breach of statutory duty is not by itself sufficient to give rise to any private law cause of action. A private law cause of action would only arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. If this intention to confer a private law right of action is clearly stated, the plaintiff would have passed the first hurdle.

Some statutes clearly prohibit a separate right of action in tort, such as Section 59 of the *Occupational Safety and Health Act 1994* (Act 514), Section 31of the *Employees' Social Security Act 1969* (Act 4) and Section 95 of the *Street, Drainage and Building Act 1974* (Act 133).

(i) If the statute provides for a criminal penalty, the general rule is that there is no separate cause of action in tort.

Case Law *Breach of statutory duty*

CASE 2-100 *Tan Chye Choo & Ors -v- Chong Kew Moi* [1966] 2 MLJ 4

In the Malaysian High Court case of *Tan Chye Choo & Ors -v- Chong Kew Moi*, the relevant statute imposed a public duty on owners of motor vehicles to keep their vehicles free from danger to any person in the vehicle or on a road. The defendant's taxi collided into vehicle A, causing

the death of two occupants and serious injuries to the plaintiff who were all riding in vehicle A. The collision was caused by a brake failure in the taxi. The plaintiff alleged that the defendant was in breach of his statutory duty in permitting the taxi to be used in a condition in which it was a danger to persons on the road.

The Malaysian High Court held on the evidence adduced that the defendants had not been negligent in the maintenance and inspection of the taxi; and since the statute provided for a criminal penalty for its breach, it precluded the plaintiff from obtaining compensation in a civil action.

The Malaysian High Court further stated that the duty imposed by the statute was a public duty which was not enforceable by an individual.

(ii) The duty imposed may either be "absolute" or "so far as is reasonably practicable". In cases where the duty is absolute, the obligation or state of affairs must be actually fulfilled.

Case Law *Breach of statutory duty*

CASE 2-101 *Abdul Ghani bin Hamid -v- Abdul Nasir bin Abdul Jabbar & Anor*
[1995] 4 CLJ 317

In the Malaysian High Court case of *Abdul Ghani bin Hamid -v- Abdul Nasir bin Abdul Jabbar & Anor,* the defendants failed to display warning notices via *'danger signs'* at relevant places at an electric substation owned by them. They had also failed to switch off the switch cable prior to repair works, in contravention of certain regulations of the *Electricity Supply Regulations 1990.* As a result of noncompliance with the relevant regulations, the plaintiff suffered severe burns due to an explosion which occurred when he came into contact with the switch cable in order to effect repair works.

The Malaysian High Court held that the statutory duty under the regulations was absolute and once a plaintiff proves that such a duty has not been complied with, the breach is actionable without the plaintiff having to prove any lack of care or diligence on the part of the defendants.

The defendants, in this case, were liable for breach of their statutory duty as well as negligence under the common law for failure to ensure that the substation was safe.

A duty that is imposed "so far as is reasonably practicable" is not an absolute duty. It seems that where the duty is not absolute, liability for breach of that duty may be imposed if the defendant is "negligent" in the common law sense.

(iii) The plaintiff must prove that he is a member of the class of persons protected under the statute.

Case Law *Breach of statutory duty – class of persons protected*

CASE 2-102 *Lim Thong Eng -v- Sungei Choh Rubber Co Ltd* [1962] MLJ 15

In the Malaysian High Court case of *Lim Thong Eng -v- Sungei Choh Rubber Co Ltd*, the plaintiff's hand was crushed in a machine while he was working at the defendant's factory. The relevant statutory provision provided that the machine must be installed in a specific manner so as to prevent the hands of the operator being brought into dangerous proximity to the point of contact with the machine.

The Malaysian High Court held that the plaintiff clearly belonged to the class of persons for whose protection the provision was enacted and his claim for breach of statutory duty succeeded.

(iv) The plaintiff must prove that the breach has caused the damage or that it has materially contributed to the damage.

Case Law *Breach of statutory duty – the breach should cause the damage*

CASE 2-103 *Ginty -v- Belmont Building Supplies Ltd* [1959] 1 All ER 414

In the English High Court case of *Ginty -v- Belmont Building Supplies Ltd*, the relevant statute required that crawling boards should be used for work done on fragile roofs. This provision was binding on both the plaintiff employee and the defendant employer. The defendant supplied the boards but the plaintiff neglected to use them and he fell through a roof and suffered injuries. Both parties had been in breach of the relevant provision, the defendant for his failure to ensure the boards were used and the plaintiff, for failure to use the same boards.

The English High Court rejected the plaintiff's claim as the defendant's breach was co-extensive with the plaintiff's breach. The injury was caused by the plaintiff's own wrongdoing and he could not transfer responsibility to his employer who had complied with the statutory provision in supplying the boards.

(v) The plaintiff's action will fail if he suffers injury or damage different in kind from what the statute intends to prevent.

Case Law *Breach of statutory duty – kind of damage suffered*

CASE 2-104 *Gorris -v- Scott* [1874] LR 9 Exch 125

In the English High Court case of *Gorris -v- Scott*, the defendant shipowner was under a statutory duty to provide pens of a specified size for the carriage of animals on his ship. The defendant violated this order and the plaintiff's sheep were swept overboard as a consequence of the breach.

The plaintiff's action failed as the English High Court held that the statute was intended to prevent the spread of disease, and not to prevent animals from drowning at sea.

Defences to Breach of Statutory Duty

The general principle is that *volenti non fit injuria* and delegation are not good defences for breach of statutory duty.

Volenti non fit injuria

Case Law *Breach of statutory duty – defence of volenti non fit injuria*

CASE 2-105 *Mohamed Husin -v- Shum Yip Leong Rubber Works Ltd* [1972] 1 MLJ 17

In the Malaysian High Court case of *Mohamed Husin -v- Shum Yip Leong Rubber Works Ltd*, the plaintiff sustained serious injuries on his right hand when his co-worker negligently brought down the machinery which function was to cut rubber sheets into small pieces. The defendant had breached certain regulations of the *Machinery Regulations 1959*, which required them to provide or erect a guard to prevent an operator's fingers from reaching the danger zone.

In any event, they raised the defence of *volenti*, on the basis that the plaintiff was fully aware of the danger of operating the machine, and had by implication, voluntarily undertaken the risks.

It was held by the Malaysian High Court that the fundamental cause of the accident was a breach of the statutory duty by the employers. Thus, any supposed agreement by the workman to waive any breach of the law imposed on the employers and to consent to their contravening such statutory provisions were deemed highly undesirable, if not void, on grounds of public policy.

Delegation

Sometimes the defendant may delegate his statutory duty to the plaintiff who subsequently suffers injury through breach of the duty. The general principle is that delegation is not a good defence. Where a duty is imposed by law or statute on a person or body of persons, they do not release themselves from discharging their duty, or free themselves from liability, by delegating or handing over that duty to another person to perform it.

2.5 The Application of Tort and Liability in Law

"Vicarious liability" refers to a situation where *A* is liable to *C* for damage or injury suffered by *C* due to the negligence or other tort committed by *B*. *A* need not have done anything wrongful and *A* further need not owe a duty of care to *C*. The most important condition for imposing liability on *A* is the nature of the relationship between *A* and *B* and the tort committed by *B* is connected to the nature of this relationship.

2.5.1 Employers' Liability

Three requirements must be satisfied in order to impose vicarious liability; firstly, there must be a wrongful, or tortious act; secondly, there exists a special relationship that is recognised by

law between the person alleged to be vicariously liable and the tortfeasor, and thirdly, the tort is committed within the course of employment. Employers have been held vicariously liable for their employees' tortious acts in various circumstances. These include negligence, fraud and sexual harassment by their employees.

Wrongful or Tortious Act

The Court will first and foremost decide whether a tort has been committed. All the elements of the particular tort must be satisfied. Once a tort is established, the nature of the relationship between the defendant and the tortfeasor will be examined.

Special Relationship

There must be a special relationship between the defendant and the tortfeasor; and this special relationship is said to exist between an employer and his employee. Where a tort is committed by someone else on the defendant's premises but the tortfeasor is not an employee, the employer cannot be held vicariously liable for the tort. The special relationship referred to here is limited to the employer-employee relationship.

A person who is in a contract of service is an employee whereas one who is in a contract for service is an independent contractor. The general rule is that an employer is not liable for the torts of his independent contractors.

Case Law *Employers' liability – special relationship*

CASE 2-106 *Zedtee Sdn Bhd -v- Maduraya Sdn Bhd* [2004] 7 MLJ 461

In the Malaysian High Court case of *Zedtee Sdn Bhd -v- Maduraya Sdn Bhd*, the plaintiff was an independent contractor employed to extract timber from *Area 1*. The defendant obtained a license to extract timber from *Area 2* and it employed Bawan as an independent contractor to extract timber for it. Bawan, in the course of its felling and extracting timber from *Area 2*, had encroached into *Area 1* and had cut and felled over 600 pieces of timber logs. Bawan supplied and maintained all labour, tools, equipment, fuels, machinery and materials in discharging his obligations to the defendant.

On the issue of whether the defendant is liable for Bawan's acts, the Malaysian High Court held that determination of work and control over method of work indicates a servant or agent but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer; the latter is an independent contractor. Applying this test, Bawan was an independent contractor and so the defendant was not liable for his acts of trespass and conversion.

The liability of a hospital for the negligence of its health care professionals is dependent on whether the professional is engaged in his own business or that of the hospital, and only if the conduct of the medical officer is deemed to be part of the hospital's business will the hospital be found vicariously liable.

Case Law *Employers' liability – special relationship*

CASE 2-107 *Tan Eng Siew -v- Dr Jagjit Singh* [2006] 1 MLJ 57

In the Malaysian High Court case of *Tan Eng Siew -v- Dr Jagjit Singh*, the plaintiff, a 65 year old woman, was dissatisfied with the post-surgery care she received from the consultant who had conducted her two hip operations.

The Malaysian High Court held that a private consultant who has clients of his own and pays the hospital for using the hospital's facilities such as running a clinic and other operating facilities is not an employee but an independent contractor. It is irrelevant that the private practitioner is a shareholder of the hospital. Thus, the hospital cannot be vicariously liable for any negligent conduct on the part of the consultant.

The Tort must Occur within the Course of Employment

An employer is only vicariously liable for the torts of his employee which occur in the course of employment. Conduct is said to be within the course of employment if firstly, it is either expressly or impliedly allowed by the employer; or secondly, when the employee does something that is authorised but in an unauthorised manner or thirdly, the employee does something that is closely connected to what he is employed to do, in the course of doing the job.

Case Law *Employers' liability – within the course of employment*

CASE 2-108 *Century Insurance Co Ltd -v- Northern lreland Road Transport Board* [1942] AC 509

In the House of Lords case of *Century Insurance Co Ltd -v- Northern lreland Road Transport Board,* the defendant's worker, who was the driver of an oil tanker, had stopped at the plaintiff's petrol station to transfer petrol from the lorry to an underground tank at the garage. He lit up a cigarette and threw the burning match on the floor. An explosion ensued and the plaintiff's property was destroyed.

The House of Lords held the defendant liable for his worker's negligence as the act was done in the course of his employment, even though the actual act of smoking did not benefit the employer. Liability was also based on the fact that the driver did what he was employed to do (which was to deliver the petrol) albeit he performed his work in a negligent and unauthorised manner.

A person's act may still be considered as being within the course of employment even if the employer expressly prohibits it. The act must be related to his job and it is done for the benefit of the employer.

Case Law *Employers' liability – within the course of employment*

CASE 2-109 *Roshairee Abd Wahab -v- Mejar Mustafa Omar & Ors* [1997] 2 AMR 2044

In the Malaysian High Court case of *Roshairee Abd Wahab -v- Mejar Mustafa Omar & Ors*, the plaintiff was a participant in an orientation programme, having joined the Royal Malay Regiment. He was ragged and assaulted by both *D1* and *D2* which led to deafness in both ears. The government as the employer of the defendants claimed that the defendants' actions were unauthorised as ragging was prohibited under military regulations.

However, the Malaysian High Court held that although *D1's* acts were unauthorised, they were carried out during his normal course of duty. Therefore, the acts were so connected with his authorised acts that they constituted modes, albeit improper, of doing authorised acts. This was especially so as the plaintiff was directly under the charge, supervision and control of *D1*.

The Malaysian High Court reaffirmed the principle that a master is responsible not merely for what he authorises his servants to do, but also for the way in which they perform it.

A difficult question in the context of vicarious liability is in relation to sexual acts committed by an employee – can the employer be held vicariously liable? Yes, according to the English House of Lords case of *Lister -v- Hesley Hall Ltd*.

Case Law *Employers' liability – sexual acts committed by an employee*

CASE 2-110 *Lister -v- Hesley Hall Ltd* [2001] 2 All ER 769

In *Lister -v- Hesley Hall Ltd*, the employer school was found vicariously liable for their warden's acts of sexual abuse on boys in a residential school. The employer owned and managed a school and boarding annex for boys aged 12-15 years. These were children with emotional and behavioural difficulties who were sent to the school by the local authorities. The employer company employed Mr and Mrs *G* as warden and housekeeper to care for the boys. Unknown to the employer, the warden systematically sexually abused the boys at the home.

The English House of Lords unanimously found that the warden's acts were deemed to be closely connected with his employment and that it would be fair and just to hold the employers vicariously liable.

2.5.2 Liability for Dangerous or Defective Premises

In England, occupiers' liability is for the most part governed by two statutes. The *Occupiers' Liability Act 1957* (OLA 1957) regulates the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of premises or to things done or omitted to be done on those premises. The OLA 1957 replaced the rules of the common law. The *Occupiers' Liability Act 1984* regulates the duty owed by an occupier to persons who are non-visitors or trespassers. No corresponding statutes have been enacted in Malaysia and the law on occupiers' liability is based on common law principles.

ACTIVITY

Research the Occupiers' Liability Act 1957. How did it affect the law of torts?

Briefly, an occupiers' liability arises in a situation where the premises are not as safe as it should reasonably be and this defective state, which includes activities carried out on the premises; causes injury or damage to the plaintiff.

The definition of an "occupier" was laid down in the English House of Lords case of *Wheat -v- Lacon & Co Ltd*.

Case Law *Liability for dangerous premises – definition of "occupier"*

CASE 2-111 *Wheat -v- Lacon & Co Ltd* [1966] 1 All ER 582

In *Wheat -v- Lacon & Co Ltd*, the defendant owned a public house which was run by their manager. A licence was given to the manager and his wife to use the first floor of the building for their own personal use but the defendants had retained the right to conduct repair works. The manager and his wife received paying guests on the first floor with the permission of the defendants. The plaintiff, a patron had fallen down some steps from the first floor of the building and died as a consequence of his injuries.

The House of Lords held that the defendant had sufficient control over the private premises on the first floor together with the manager and Thus, both parties were occupiers and therefore jointly liable.

The test is occupational control over the premises, which is control associated with and arising from presence in and use of, or activity on the premises. Liability is not based on ownership. Control need not be absolute or exclusive.

An occupier is therefore someone who has immediate supervision and control and the power of permitting or prohibiting the entry of other persons into the premises. An owner who has let the premises to a tenant is generally no longer the occupier.

Case Law *Liability for dangerous premises – occupation, possession and overall responsibility*

CASE 2-112 *Chang Fah Lin -v- United Engineers (M) Sdn Bhd* [1978] 2 MLJ 259

In the Malaysian High Court case of *Chang Fah Lin -v- United Engineers (M) Sdn Bhd,* it was held that if a contractor is shown to have overall charge and control and possession of a construction site, then he may be deemed to have occupation as well as possession of the site, together with overall responsibility.

Actual possession is not required in determining the adequacy of sufficient control.

Case Law *Liability for dangerous premises – possession and control*

CASE 2-113 *Lembaga Kemajuan Tanah Persekutuan -v- Mariam* [1984] 1 MLJ 283

In the Malaysian Federal Court case of *Lembaga Kemajuan Tanah Persekutuan -v- Mariam,* the Malaysian Federal Court held that the defendant statutory authority, FELDA, remained as the occupier even when possession of a piece of land was given to a contractor, as the facts indicated that the statutory authority still retained control over the premises.

Here, the kongsi-house which collapsed on the deceased was built for the common benefit of the defendant, the contractor and labourers and the defendant did not cease to be in possession and continued to be the occupier of the site.

The significance of this decision lies in the acceptance in Malaysia that in order to impose a duty of care, the parties need not necessarily be in a pre-existing contractual relationship.

Case Law *Liability for dangerous premises – no pre-existing contractual relationship*

CASE 2-114 *Sri Inai (Pulau Pinang) Sdn Bhd -v- Yong Yit Swee* [2003] 1 MLJ 273

The Malaysian Court of Appeal, in *Sri Inai (Pulau Pinang) Sdn Bhd -v- Yong Yit Swee,* held that a landlord of premises stands in close proximity to the lawful visitors of his tenants. The duty may well be narrower than that owed by the occupier (such as the tenant) to the visitor, but it is nonetheless present. This duty is to ensure that the premises let out are indeed safe and suitable for the purposes for which they are let out. The scope of the duty includes dangerous defects which are known, or ought to be known, by the landlord.

Case Law *Liability for dangerous premises – duty of care*

CASE 2-115 *Sri Inai (Pulau Pinang) Sdn Bhd -v- Yong Yit Swee* [2003] 1 MLJ 273

In the Malaysian Court of Appeal case of *Sri Inai (Pulau Pinang) Sdn Bhd -v- Yong Yit Swee, D1*, a school, rented an old dwelling house from *D2*, a local authority, for a period of three years. *D1* used the premises as a hostel to accommodate its students. At the commencement and during the tenancy, *D2* did not make available a safety exit for occupants in the event of a fire. This was in fact a direct non-compliance with the *Uniform Building By-Laws 1986*. A fire broke out resulting in several deaths and serious injuries to many others.

The Malaysian Sessions Court judge found both *D1* and *D2* equally liable.

The Malaysian High Court found that as a matter of law, *D2* could not be liable whether as a landlord or a local authority, and so *D1* was found solely liable. *D1* appealed.

The Malaysian Court of Appeal set aside the order of the High Court and restored the order of the Sessions Court. *D2* was not a bare landlord. It had a duty to comply with the By-Laws which it did not. It was well aware that the premises would be used as a hostel for young children. It had exposed the plaintiffs to the risk of injury knowingly.

Therefore, once it is established that a person has sufficient control over the premises, he is deemed to be the occupier and may be sued for any injuries sustained on the premises.

Premises include all forms of buildings, land spaces, vehicles which are used for carrying persons including tractors and structures such as scaffolding, ladders, walls, pylons, and grandstands.

Case Law *Liability for dangerous premises – duty of care*

CASE 2-116 *Wheeler -v- Copas* [1981] 3 All ER 405

In the English High Court case of *Wheeler -v- Copas*, the plaintiff had borrowed a ladder from the defendant. The ladder was broken and the plaintiff was injured whilst he was using it.

It was held that even though a ladder constituted premises, the defendant was no longer an occupier as the ladder was lent to the plaintiff and the defendant no longer had control over the ladder. The defendant was however held liable in negligence.

There are basically four types of entrants to premises, namely contractual entrants, invitees, licensees and trespassers. The standard of care required of the occupier differs according to the different types of entrants.

A person who, although not an occupier of premises, creates danger to persons who are expected to enter those premises, owes a duty to ensure that the entrants are not injured while on the premises.

Case Law *Liability for dangerous premises – standard of care for invitees*

CASE 2-117 *Ng Shin Hon -v- Chow Wai Chuang* [1968] 1 MLJ 37

In the Malaysian High Court case of *Ng Shin Hon -v- Chow Wai Chuang*, the plaintiff engineer who was responsible for the inspection of the defendant contractor's work, suffered injury when he walked into a trench in the ground covered by metal sheets.

The Malaysian High Court held that the trench was dug without the plaintiff's instruction and so he had no knowledge about it. The contractor was under a duty to take reasonable care to prevent damage to persons whom he may reasonably expect to be affected, whether they be invitees, licensees or other contractors. He had created a concealed danger and a trap for the plaintiff whom he knew would come onto the land.

Thus, an occupier will be liable to an invitee who suffers any injury or damage to property, if the following factors are established:

i) Firstly, if the occupier knows or ought to have known of the danger,
ii) Secondly, the danger is unusual to that class of plaintiff in the sense that the danger is not usually found in carrying out the task, having regard to the nature of the place or the premises,
iii) Thirdly, the danger is not known to the plaintiff, and

iv) Fourthly, the occupier has failed to reasonably avoid the damage from occurring, be it through a notice, warning lights, guarding or otherwise.

Case Law *Liability for dangerous premises – unusual or extraordinary danger*

CASE 2-118 *London Graving Dock Co -v- Horton* [1951] AC 737

In the House of Lords case of *London Graving Dock Co -v- Horton*, it was held that an unusual or extraordinary danger is one that is not common for the purposes of a particular invitee.

So, for instance, a gangway that is considered safe and reasonable for stevedores is not an unusual danger for them, but it is an unusual danger for people who work in different circumstances or for members of the society generally. What is unusual is measured through the objective test, subject to the reasons for which the invitee enters the premises.

Therefore, unusual danger depends on the type of plaintiff, the circumstances surrounding the premises and the plaintiff's knowledge.

Case Law *Liability for dangerous premises – unusual or extraordinary danger*

CASE 2-119 *Lee Lau & Sons Realty Sdn Bhd -v- Tan Yah & Ors* [1983] 2 MLJ 51

In the Malaysian Federal Court case of *Lee Lau & Sons Realty Sdn Bhd -v- Tan Yah & Ors*, the invitee who was also an independent contractor and who managed a forklift belonging to the defendants died when the forklift fell on him while it was being repaired.

The Malaysian Federal Court first laid down the principle that if the circumstances on the premises were dangerous *per se*, this did not mean that there was any unusual danger. An unusual danger or risk is one which is not usually found in carrying out the task which the invitee has in hand.

On the facts of the case, the Malaysian Federal Court held that the danger that was present in the course of his work (raising the forklift mechanically and using two rubber tree stumps to support the heavy horizontal iron bar) did not constitute an unusual danger as it was an usual risk in the nature of his job, and could reasonably have been foreseen by the plaintiff whilst he was doing his job.

If the plaintiff knows of the existence of the danger; then the danger ceases to be an unusual danger. The plaintiff's knowledge will absolve the defendant of any liability only if the plaintiff completely and truly knows the nature and extent of the danger.

The differences between a contractual entrant and an invitee, and the standard of care owed by the occupier to each may be summarised as follows:

Contractual entrant	Invitee
There is a written/oral/express/ implied agreement with regard to the entrance into the premises, and there is consideration on the part of the entrant.	An invitee does not have a contractual right to enter the premises. However, a legal invitee such as a policeman has a statutory right to enter the premises.
The standard of care towards a contractual entrant is higher than towards an invitee. Generally, the duty is to take reasonable care to avoid injury arising from foreseeable danger. The scope of the duty to a contractual entrant is the widest compared to other types of entrant.	The duty is to take reasonable care to prevent injury arising from unusual danger. The scope of duty is narrower.

■ **Table 2-3** *Difference between contractual entrant and invitee*

As between invitees and licensees, the similarity is that both enter the premises lawfully, but for different purposes. The main differences between an invitee and a licensee may be laid down as follows:

Invitee	Licensee
The occupier usually gains some economic advantage by having the invitee on his premises and the invitee himself may have a similar interest. An invitee is therefore *'invited'* onto the premises usually for business purposes.	A licensee however, may have an economic interest for being on the premises, but this interest is non-existent on the part of the occupier. A licensee is therefore *'allowed'* onto the premises as a matter of grace.
The duty is to take reasonable care not to expose him to any unusual danger, which includes a concealed danger.	The duty is to take reasonable care not to expose him to a concealed danger; therefore excluding any apparent (and even unusual) danger.

■ **Table 2-4** *Difference between invitee and licencee*

In Malaysia, the Courts have long determined the existence of a duty of care of an occupier to trespassers by determining on the facts of each case, whether the presence of the trespasser is likely in the circumstances.

Case Law *Liability for dangerous premises – standard of care for a trespasser*

CASE 2-120 ***Government of Malaysia & Anor -v- Kong Ee Kim*** **[1965] MLJ 81**

In the Malaysian Federal Court case of *Government of Malaysia & Anor -v- Kong Ee Kim*, the plaintiff who was squatting behind a bush while depasturing her chickens on a village road, was injured when a vehicle used to level and clear land driven by a worker of the defendant came into contact with her.

On the facts, the Malaysian Federal Court held that the defendant ought to have foreseen the physical presence of persons behind a bush and so a duty of care was established.

The general principle is that an occupier must accept that children are less careful as compared to adults. The safety of children to a large extent lies on their parents and therefore an occupier has the right to question this responsibility or lack of it, if the warnings given by him are considered

sufficient. What may be an obvious danger to an adult might well constitute a concealed danger for a child.

Case Law *Liability for dangerous premises – standard of care for a child trespasser*

CASE 2-121 *Southern Portland Cement Ltd -v- Cooper* [1974] 1 MLJ 194

In the Privy Council case of *Southern Portland Cement Ltd -v- Cooper*, the defendant was a quarrying company. They were aware that children were in the habit of playing not far from the working area of the quarry. There was a sandhill on their premises, beneath which lay an electric power cable. A 13 year old boy was severely injured when while playing on the sandhill, his arm came into contact with the electric cable.

The Privy Council held that the doctrine of allurement applied and that the duty to avoid danger is proportionate to the degree of danger as well as the attractiveness of the premises to a child. The duty is based on humanitarian considerations which on the facts, was not discharged by the defendants.

Case Law *Liability for dangerous premises – standard of care for a child trespasser*

CASE 2-122 *Lembaga Letrik Negara -v- Ramakrishnan* [1982] 2 MLJ 128

In the landmark Malaysian Federal Court case of *Lembaga Letrik Negara -v- Ramakrishnan*, the plaintiff was a ten-year old child who had climbed an electric pole which was under the control of the local government in order to free a trapped bird. He was electrocuted and thrown to the ground and suffered extensive injuries. The pole was situated immediately adjoining a public footpath which the defendants knew to be well-used by members of the public. They however did not put up any anti-climbing devices such as warning signs, barbed wires or spikes despite the potential danger and its proximity to the footpath.

The Malaysian Federal Court found that the child was a trespasser and that an occupier owes a duty to a trespasser if the occupier knows that the circumstances on his premises may be dangerous to any visitor and that the presence of a trespasser is known or reasonably to be anticipated. This duty is fulfilled if the occupier has taken precautions based on common humanity and in the light of his own circumstances and his financial position.

The nature and extent of that duty is lower than that which would be expected of the reasonable man in the ordinary law of negligence. The nature of the duty depends on what the defendant knew as distinct from what he ought reasonably to have known. Thus, once it is shown that the occupier is aware that a trespasser is on his land or might come onto his land, and he knows of the danger on his land which his trespasser is unaware of, the duty arises.

The defendant occupier here, was found liable as they had erected, maintained and controlled a highly dangerous pole of hidden lethal potentialities which was within easy reach of children. The defendants ought to have known that children might climb the pole and they had breached this duty when they failed to put up warning signs and adequate anti-climbing devices.

Notices may be in the form of a warning, a disclaimer or an exclusion clause. It may also take the form of a device which prevents visitors from getting into contact with the danger. The existence of a notice of warning may be raised by the defendant to show that he has not breached his duty. A clear notice properly brought to the attention of trespassers can be a complete defence.

Case Law *Liability for dangerous premises – a valid exclusion clause as complete defence*

CASE 2-123 *Ashdown -v- William Samuels & Sons Ltd* [1957] 1 QB 409

In the English High Court case of *Ashdown -v- William Samuels & Sons Ltd*, a factory was situated beside a railway track and there were shunting operations on the defendant's land. The plaintiff, an employee at the factory, did not take the road provided but took a shortcut across the defendant's land and was subsequently injured.

The English High Court held that an exclusion clause may be raised as a complete defence if the clause is clear and sufficient. Notices of the danger on the defendant's land were put up and the English High Court held that the notices were adequate. They were clear and sufficient to exempt liability on the defendant.

2.6 The Main Remedies in Tort

A "judicial remedy" is one that is sought and obtained by the plaintiff through action in a Court of law. The judicial remedies that will be discussed are damages, injunction, and specific restitution of property.

2.6.1 Damages

This remedy comprises monetary compensation and is the main and most common form of remedy sought by a plaintiff in a tort action. In order to successfully claim for damages, the plaintiff must prove two things; firstly, that a tort has occurred; and secondly, that the plaintiff has suffered some damage. It must be stressed that the requirement of proving damage is a general principle as there are torts which are actionable per se that is; these torts are actionable without proof of damage such as intentional torts. Damages may still be awarded by the Court as recognition of the plaintiff's right. Where actual damage is suffered by the plaintiff, the amount of damages will differ accordingly to reflect the loss suffered.

Restitutio in Integrum

The general rule is that damages are to be assessed on a compensatory basis, which is to restore the plaintiff to his position prior to the commission of the tort. This is known as the principle of *"restitutio in integrum"*.

Restitutio in integrum is generally achievable if the loss is financial. Even where the loss is not financial per se, the principle of *restitutio in integrum* is an adequate and fairly easy guide to the estimation of damage, as long as the damage can be quantified in relation to some material loss.

However, in less clear cases such as the estimation of damages for pain and suffering, future loss of amenity and generally in personal injuries cases, a subjective element would be involved. What results is an amount which might be perceived to be the best for the plaintiff in the circumstances.

Limitations to the principle of *restitutio in integrum*

Even though the defendant is generally fully liable for the damage sustained by the plaintiff, the plaintiff has a corresponding duty to minimise or mitigate his loss.

Types of Damages

"General damages" refer to damage or loss that the law presumes a person incurs as a consequence of a tort. The exact amount is not or cannot be quantified at the time of the trial. An award for general damages includes, for instance, damages for pain and suffering, and society's prejudice as a result of a libel or slander. A claim for loss of future earnings and loss of earning capacity comes under general damage. This type of compensatory damages is usually referred to as damages "at large", in the sense that they are not capable of being assessed by reference to any mechanical, arithmetical or objective formula.

General damages are normally unliquidated damages in that the amount is not fixed. General damages may include actual as well as anticipated pecuniary loss or any social disadvantages which result or are thought to result from the tort. It also includes any natural injury to the plaintiff's feelings.

Case Law *Remedies in tort – general damages*

CASE 2-124 *Ong Ah Long -v- Dr S Underwood* [1983] 2 MLJ 324

In the Malaysian High Court case of *Ong Ah Long -v- Dr S Underwood*, it was held that general damages are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act so far as money can compensate.

"Special damages" refer to damage or loss which the law does not presume to arise from the tort. The plaintiff must give notice in his pleadings that he is claiming for special damages, with full details and particulars. It must therefore be specifically pleaded and strictly proved. A special damage may be described as something particular and quantifiable, other than the general damage that is suffered by the plaintiff such as medical or hospital bills or the loss of earnings right up to the date of trial. Special damages are calculated from the date the tort occurred until the time the case is brought to Court. They consist of liquidated damages, or an amount which may be computed or determined monetarily.

The purpose of an award of damages is primarily to compensate the plaintiff for his loss. There are however, three types of damages that are not compensatory in nature but serve their own purpose. These are:

1) "Contemptuous damages" are awarded to a plaintiff when the Court feels that the plaintiff does not have a good claim. It is awarded when the Court does not in fact support the plaintiff's claim and the amount of damages is the smallest denomination of money. Contemptuous damages are common when the Court feels that morally, the plaintiff deserved what happened to him, such as libel, assault and false imprisonment. Contemptuous damages may be awarded for all types of torts, whether actionable per se or otherwise.

2) "Nominal damages" are awarded when the plaintiff proves that the defendant has committed a tort, even though the plaintiff has not suffered any actual loss. The plaintiff is awarded damages in recognition of the fact that there has been a violation of his rights. Nominal damages are also awarded in cases where damage is shown but its amount is not sufficiently proved. Nominal damages are only granted to torts, which are actionable *per se*, and do not necessarily involve a small sum of money.

   The difference between contemptuous damages and nominal damages is that in the latter, there is no moral connotation and both parties may be ordered to bear their own costs.

3) "Exemplary damages" are awarded to deter the defendant from repeating his act in the future. Therefore, its function is not compensatory, but as a punishment and deterrent to the defendant. Exemplary damages may be awarded in addition to general (compensatory) or aggravated damages.

   Exemplary damages may only be awarded in the following circumstances:

   i) where the plaintiff has been a victim of oppressive, arbitrary or unconstitutional acts of servants of the government; or
   ii) where the defendant's act in disregarding the plaintiff's right has been calculated by him to bring in profit which exceeds the amount of compensation that he might have to pay the plaintiff; (and this is not confined to money making only); or
   iii) where a statute allows for the award of exemplary damages.

Case Law *Remedies in tort – exemplary damages*

CASE 2-125 *Kerajaan Negeri Selangor -v- Sagong bin Tasi* [2005] 6 MLJ 289

In the Malaysian Court of Appeal case of *Kerajaan Negeri Selangor -v- Sagong bin Tasi*, the plaintiffs were aboriginal people of the Temuan tribe, the first people of the State of Malaya. They had occupied lands in the Bukit Tampoi area for at least 210 years, having inherited the lands from their ancestors through the generations. Part of the land which was the subject matter of the proceedings was gazetted as Aboriginal Land under the relevant statute. Other parts of the land were not gazetted.

The defendants were the State Government of Selangor, a public limited company, the Malaysian Highway Authority and the Government of Malaysia. A large strip of the plaintiffs' land was excised for the purpose of constructing an expressway. The plaintiffs were evicted under harsh, cruel and oppressive methods by the defendants and their houses were demolished, although compensation was paid to them under a statute.

The trial judge held that the plaintiffs were the owners of the gazetted land under customary title (affirmed by the Malaysian Court of Appeal). Both the state government as well as the Federal government were not the absolute owners of the lands. The plaintiffs were the beneficial owners, and so the entry onto the lands by the public company as well as the highway authority constituted a trespass.

The Malaysian Court of Appeal disagreed with the trial judge that the highway authority is not liable to pay aggravated or exemplary damages. Here, high handed tactics were employed to dispossess the plaintiffs and the circumstances justified the award of exemplary damages. It was also necessary to teach the defendant that tort does not pay.

4) "Aggravated damages" are awarded when the plaintiff has suffered injury or loss other than pecuniary loss, such as a smear on his reputation, feeling of shame, pain and so forth. Aggravated damages may be awarded for malicious falsehood. In awarding aggravated damages, the Court will take into account the defendant's conduct and his motive when the tort was committed. Aggravated damages may be awarded in addition to general damages. Libel cases are good examples of the award of this type of damages. Aggravated damages are not intended to punish the defendant, as is the case with exemplary damages; but it serves to compensate the plaintiff for the mental distress he has suffered arising from the tort.

Case Law *Remedies in tort – aggravated damages*

CASE 2-126 *Abd Malek Hussin -v- Borhan Hj Daud & Ors* [2008] 1 MLJ 368

In the Malaysian Court of Appeal case of *Abd Malek Hussin -v- Borhan Hj Daud & Ors*, the plaintiff claimed that he was arrested without a warrant of arrest by a group of Special Branch officers.

He was informed that the arrest was affected under the *Internal Security Act*. After the arrest, he was taken to the Police Headquarters where his clothes were removed and he was subjected to physical as well as mental torture overnight. Medical treatment was only given to him three days later. He was detained for a total of 57 days and his family was allowed to see him only twice during that time. Access to counsel was denied. Moreover, he was kept under solitary confinement and the interrogations against him were not on matters affecting the security of the country but on political matters.

The Malaysian Court of Appeal found the arrest unlawful both under the Federal Constitution and the *Internal Security Act*. General damages of RM500,000 were awarded, including for pain and suffering and the mental anguish and humiliation suffered by the plaintiff.

Aggravating factors in this case were the commission of a breach of the plaintiff's constitutional and fundamental rights including the right of access to counsel, the denial of access to family within a reasonable time and the infrequency of visits, the length of the period of solitary confinement, repeated assaults on the plaintiff and the interrogation on matters not relevant to the security of the country. Taking these factors into account, an award of RM1 million aggravated damages was made.

The Malaysian Court of Appeal further held that this was a case where an award of exemplary damages is appropriate as there had been an oppressive, arbitrary and unconstitutional action by servants of the Government. RM1 million exemplary damages was also awarded.

2.6.2 Injunction

This is an additional remedy and may be obtained in addition to general damages where damages alone are not an appropriate or sufficient remedy. An injunction is an order by the Court which has the effect of either prohibiting the defendant from repeating or continuing his act, or it may be an order requesting the defendant to do something positive. It is an equitable remedy and so the grant of an injunction lies at the discretion of the Court.

Injunctions are normally granted for the torts of nuisance and repeated or continuing trespass to land and in special circumstances to prevent the publication of a defamatory matter. Public interest is taken into account in the grant of an injunction. There are two types of injunctions, "prohibitory" and "mandatory" injunctions, which may be granted either before trial or at the end of the trial.

1) *Prohibitory injunction* requires the defendant to cease his activities and is normally granted in cases of nuisance and repeated trespass.
2) *Mandatory injunction* requires the defendant to do a positive act, for instance, to demolish a wall that he has built which constitutes interference to the airspace of the plaintiff, or to remove an object that he has placed on the plaintiff's land such as ground anchors.

2.6.3 Specific Restitution of Property

The remedy of "specific restitution of property" would arise in the torts of conversion or detinue, or trespass to land. It must be remembered that the primary remedy for conversion and detinue is an action for damages and therefore an order by the Court for the delivery of the goods to the plaintiff is at the discretion of the Court. The Court will not normally order a specific restitution of property if damages would be an adequate remedy.

2.7 Limitation of Actions

A plaintiff who seeks an equitable remedy must come to Court quickly if the remedy is not to be lost. This principle coexists with the specific time-limits laid down by the statutes of limitation. The time-limits set by the statutes of limitation are wholly based on policy considerations.

The predominant policy consideration would be the apparent unfairness that a defendant should have a claim hanging over him for an indefinite period. It has been also argued that the time-limit is necessary because with the lapse of time, proof of a claim becomes more difficult as documentary evidence is likely to have been destroyed and the memories of witnesses will fade. Above all, in the interest of justice, it is thought right that a person who does not promptly act to enforce his rights should lose them.

2.7.1 Principles of Limitation of Action in Tort

In the Malaysian context, the computation of time is governed by Section 54 of the *Interpretation Acts 1948 and 1967* (Act 388), which is reproduced below:

> *…Computation of time*
>
> *54.(1) In computing time for the purposes of any written law—*
>
> *(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;*
>
> *(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this sub-section as excluded days) the period shall include the next following day which is not an excluded day;*
>
> *(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and*
>
> *(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*
>
> *(2) Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises…*

2.7.2 The Relevant Statutory Time Periods Applicable to Tort

Actions founded on tort must be brought before the expiration of six years from the date on which the cause of action accrues; otherwise a defendant may plead limitation as a defence to the action against him. Section 6(1)(a) of the *Limitation Act 1953* (Act 254) provides:

> *…Limitation of actions of contract and tort and certain other actions*
>
> *6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say—*
>
> *(a) actions founded on a contract or on tort…*

It is important to note that limitation must be specifically pleaded by the defendant for it to act as an absolute defence to the claim. It is not an automatic right presumed by the Court.

Section 4 of the *Limitation Act 1953* (Act 254) provides:

> *…Limitation not to operate as a bar unless specially pleaded*
>
> *4. Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded…*

Case Law *Limitation of action – calculating the expiry of a limitation period*

CASE 2-127 *Tasja Sdn Bhd -v- Golden Approach Sdn Bhd* [2011] 3 CLJ 751

In the Malaysian Federal Court case of *Tasja Sdn Bhd -v- Golden Approach Sdn Bhd*, one of the issues was Whether a defence of limitation under Section 4 of the *Limitation Act 1953* (Act 254) must be pleaded before a claim can be dismissed on the ground that it is time-barred.

This limitation period may be extended if the plaintiff is under a disability or postponed in cases of fraud or mistake, where time only begins to run when the fraud or mistake is discovered or could with reasonable diligence, be discovered.

With regards to persons under a disability, Section 24 of the *Limitation Act 1953* (Act 254) provides:

> *…Extension of limitation period in case of disability*
>
> *24. (1) If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years, or in the case of actions to which sub-section 6(4) or Section 8 of this Act applies, one year from the date when such person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation had expired:*
>
> *(2) Where any such person as is referred to in sub-section (1) of this Section was on such date under two disabilities or where before the disability which he was under on such date had ceased he was affected by another disability he shall be deemed for the purposes of this Section to have continued under a disability until both such disabilities have ceased…*

Whereas, with regards to fraud or mistake, Section 29 of the *Limitation Act 1953* (Act 254) provides:

> *…Postponement of limitation period in case of fraud or mistake*
>
> *29. Where, in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
>
> *(b) the right of action is concealed by the fraud of any such person as aforesaid; or*
>
> *(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:*
>
> *Provided that nothing in this Section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—*
>
> *(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or*
>
> *(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made…*

However, where the party sued is the Government of Malaysia, Section 2(a) of the *Public Authorities Protection Act 1948* (Act 198) provides that the limitation period is three years. Section 2(a) of the *Public Authorities Protection Act 1948* (Act 198) provides:

> *…Protection of persons acting in execution of statutory or other public duty*
>
> *2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:*
>
> *(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof…*

Case Law *Limitation of action – calculating the expiry of a limitation period*

CASE 2-128 *State Government of Selangor & Anor -v- Murtini Kasman & Ors*
[2014] 7 CLJ 774

In the Malaysian Court of Appeal case of *State Government of Selangor & Anor -v- Murtini Kasman & Ors*, the Pakatan Rakyat coalition during the 2008 General Elections issued campaign manifesto that in the event Pakatan Rakyat were to be elected in Selangor, the State Government of Selangor would give an allowance to every single mother in Selangor. However, upon being voted to power, the State Government did not introduce such allowance scheme. In 2012, the respondents comprising single mothers in Selangor, filed a suit in the High Court against the State Government and the Chief Minister of Selangor on the ground that the latter failed to honour its election manifesto.

Hishamudin Mohd Yunus JCA, in delivering the judgement of the Malaysian Court of Appeal held that a government should not be bound by an election manifesto. The obligation to honour an election promise, must at best, be only a moral obligation. A manifesto contains promises by a political party made during the campaign period prior to an election to attract votes. They are not solemn promises or representations made by a government. A political party and the government are two different legal entities and they remain so, notwithstanding that the political party that made the promise in its manifesto wins the election and eventually forms the government. Furthermore, due to the lateness of filing the writ, limitations had set in by reason of *Section 2(a)* of the *Public Authorities Protection Act 1948 (Act 198)*.

The executor of a deceased person's estate may bring an action for damages under Section 7(1), (2) & (5) of the *Civil Law Act 1956* (Act 67) for the benefit of the deceased's spouse, parent or child within three years after the death of the person deceased. Sections 7(1), (2) & (5) of the *Civil Law Act 1956* (Act 67) provide:

> *…Compensation to the family of a person for loss occasioned by his death*
>
> *7. (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].*
>
> *(2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased…*
>
> *(5) Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased…*

Summary

Under Criminal law, wrongs committed are called crimes. Under Civil law, wrongs committed are called torts. In civil cases, the injured party (the plaintiff) can sue the person believed to be legally responsible for the harm (the defendant). Tort law establishes an expectation that people should act with reasonable care towards other people and their property. A defendant found responsible for injuring the plaintiff will usually be ordered to pay the plaintiff money, called "damages". Damages are meant to compensate the plaintiff for any financial, physical, or emotional costs associated with the injury. The plaintiff does not always need to sue in order to receive damages. Often the two parties can meet and make an agreement – or settlement – on compensation for the injury.

There are three major types of tort liability – intentional wrongs, acts of negligence, and strict liability. An intentional wrong occurs when a person purposefully harms another person or his or her property. Negligence – the most common unintentional tort – occurs when one person unintentionally inflicts injury upon another person. Even though the injury was not intentional, the person who caused injury can still be held liable for acting carelessly and causing harm. The doctrine of strict liability allows plaintiffs to recover damages from defendants engaged in unusually dangerous activities where the risk of harm cannot be eliminated by exercising reasonable care. For example, demolishing a building, or using explosives in an urban area.

Tort law deals with disputes between individuals or groups of individuals. Although a tort and a crime are different legal actions, the same harmful activity can sometimes be both a crime and a tort.

Intentional torts are actions taken deliberately with intent whether or not the result is to harm another person or another's property. The intent to harm does not have to be hostile or immoral. The law of intentional torts requires that the person causing the harm either knew or should have known that his or her actions would result in harm. A victim of an intentional tort can recover damages. There are three types of damages – compensatory, nominal, and punitive. One category of torts is torts that cause injury to persons. These types of torts include battery – in which a person intentionally makes contact with another person in a harmful or offensive way – and assault – which occurs when a person intentionally causes someone to fear immediate harm. Intentional torts may harm a person's real, personal, or intellectual property. Trespass is an intentional tort in which a person enters another person's private property without permission. A nuisance is a tort that occurs when someone interferes with your ability to use and enjoy your own property, even if the person has never physically entered your property. The tort of conversion occurs when someone unlawfully takes, damages, or interferes with another's personal property.

There are certain defences a person may use to try to prove that he or she should not be found liable for an intentional tort. These defences include consent, privilege, self-defence, and defence of property. Consent is the most common defence to a tort. The defendant argues that the plaintiff agreed to the harmful conduct and should not be able to sue. Privilege justifies behaviour that would otherwise be a tort when it serves the public interest. Self-defence and defence of property justify the use of certain forces to protect one's person or property.

Tort law establishes standards for the care that people must show to one another. Negligence is the conduct that falls below this standard. Negligence law is concerned with paying victims for the injuries that have been caused by someone else's conduct. Negligence applies to many kinds of wrongful conduct. Four elements must exist for a plaintiff to win a negligent action – duty, breach of duty, causation, and loss, injury or damage. The plaintiff must prove all these elements in order to be successful in a negligence claim.

Strict liability means that the defendant is liable to the plaintiff regardless of fault. In some situations, even if the defendant acted in a reasonable manner and took all necessary precautions, he or she may still be liable. Finally, if the tortfeasor is engaged in certain dangerous activities and someone is injured or killed, then under strict liability the tortfeasor is held liable no matter how careful or careless he or she may have been. To win a strict liability case, the plaintiff must prove only causation and damages.

Further Reading

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- Palmer, Norman. *Palmer on Bailment.* 3rd ed., Sweet & Maxwell/Thomson Reuters, 2009.

Review Questions

1. What is the primary feature of a tort?
- a) It must result in a criminal charge.
- b) It must involve a breach of contract.
- c) It must involve a wrongful act or omission.
- d) It must always result in actual damage.

2. A customer slips on a wet floor in a supermarket where there is no warning sign. Identify the possible torts involved:
- I. Negligence
- II. Trespass to land
- III. Nuisance
- IV. Strict liability

a) I only
b) I and III
c) I and IV
d) II and IV

3. Which of the following best describes the role of intention in torts?
- a) Intention is irrelevant in all torts
- b) Intention is crucial in negligence cases
- c) Intention is relevant in all intentional torts
- d) Intention is always required to prove liability

4. What is the difference between damage and damages in tort law?
- a) Damage is the harm caused; damages are the compensation awarded
- b) Damage is the compensation awarded; damages are the harm caused
- c) Both terms are interchangeable
- d) Damage refers to physical harm only; damages refer to all types of compensation

5. In which of the following scenarios could the defence of statutory authority be successfully used?
- a) A factory emitting pollutants due to outdated equipment
- b) A construction company causing noise during legal working hours
- c) A government agency widening a road as part of an authorized project
- d) A private security firm detaining individuals without legal authority

6. A security guard at a mall detains a shopper on suspicion of theft without evidence or proper procedure. Which torts might the shopper claim?
I. False imprisonment
II. Defamation
III. Assault
IV. Trespass to land
a) I and II
b) I and III
c) II and IV
d) III and IV

7. A journalist publishes an article that accuses a public official of corruption without any evidence. What defences might the journalist use?
I. Justification
II. Fair comment
III. Qualified privilege
IV. Absolute privilege
a) I and II
b) II and III
c) I and IV
d) II and IV

8. What is the main purpose of damages in tort law?
a) To punish the defendant
b) To restore the plaintiff to their original position
c) To prevent the defendant from repeating the act
d) To provide an apology to the plaintiff

9. What type of damages are awarded for pain and suffering?
a) Special damages
b) General damages
c) Contemptuous damages
d) Nominal damages

10. A company constructs a road over a plaintiff's land without permission. The plaintiff sues for trespass. What remedies might be available?
I. Specific restitution of property
II. General damages
III. Exemplary damages
IV. Prohibitory injunction
a) I and II
b) I and IV
c) II and III
d) III and IV

You will find the answers at the back of the book.

3

The Law of Contract

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Learning Outcomes

After completing this topic, you should be able to:

- *Describe what a contract is*
- *Identify the four essential elements of an enforceable contract*
- *Determine the sources of contract law*
- *Summarise the requirements of a valid offer*
- *Summarise the requirements of a valid acceptance*
- *Explain why the presence of consideration in an agreement is essential*
- *Discuss what forms consideration takes*
- *Identify and discuss circumstances under which a Courtwill enforce an agreement despite the absence of consideration*
- *Explain the term capacity to contract*
- *Identify those parties considered to be legally incompetent and therefore incapable of entering into a contract*
- *Explain what makes an agreement illegal*
- *Define the term discharge and identify the major reasons that lead to the termination of contracts*
- *Explain breach of contract*
- *Describe the types of remedies available to a party injured by a breach of contract*

Why this Topic is Important

This topic is important because contracts and agreements come into play in almost every aspect of life; the study and the application of the law of contract make up a core component of the learning and the practice of law. Contract law lies at the cornerstone of our system of laws and serves as the foundation of our entire society. Our society depends upon free exchange in the marketplace at every level. The law of Contract makes this possible. Exchanges in the marketplace always depend upon voluntary agreements between individuals or other "legal persons". The law of Contract makes these agreements "enforceable", i.e. either of the parties can legally compel the performance of the other. It is important to study the different types of contracts that can be made and pay special attention to the common problems that arise in their construction, whilst also understanding how contracts are enforced or avoided, and how one party to a contract can obtain recompense and other relief from the party, which has breached the terms of the contract.

3.1 The Nature and Classification of Contracts

Broadly speaking, in modern societies, contracts are designed to regulate marketplace transactions. The nature of contracts is essentially concerned with economic activities, namely transactions involving the supply of goods or services for a price being its principal subject matter.

The essential elements in a contract are as follows:

- there must be an offer
- acceptance of that offer
- both parties making the contract must have the capacity to contract
- there must be no mistake, misrepresentation or undue influence
- the object must be lawful
- both parties must intend to enter into legal relations
- there must also be consideration

The law of contract, on the other hand is concerned with the enforcement of promises. Promises, especially those made in a commercial setting, may be, and generally are, contained in agreements wherein one promise is exchanged either for another, or for an act or payment, but in the event of a dispute the only issue for the Court is normally whether the promise made by one party to another is enforceable.

In common law legal systems, a contract is an agreement having a lawful object entered into voluntarily by two or more competent parties, each of whom intends to create one or more legal obligations between them.

Case Law *What is a valid agreement?*

CASE 3-1 *Seloga Jaya Sdn Bhd -v- UEM Genisys Sdn Bhd* [2010] 5 CLJ 745

In *Seloga Jaya Sdn Bhd -v- UEM Genisys Sdn Bhd,* **James Foong FCJ** delivering the judgement of the Federal Court held at page 756, para 25 that:

> *"...the hallmarks of a valid agreement described in s.10 of the Contracts Act which says: All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void…".*

Contracts are classified differently depending on the context or jurisdiction. They may be classified in a variety of ways, namely:

a) **according to their subject matter**

This remains the most prominent classification adopted for contracts, as the vast majority of contracts entered into by the parties are in pursuant of achieving a particular specific outcome or desired consequences. Examples of such contracts would include contract for the sale of goods and of land, insurance, employment, hire, etc.

b) **according to their parties**

Contracts can sometimes be classified according to their parties and it could be argued that it may overlap with the other classifications discussed. The reason it is still considered is because of the division between commercial and non-commercial contracts. Commercial

contracts can be described as those which are made between two or more parties who are in business for the purposes of trade whilst non-commercial contracts would include contracts on marriage and contracts under which legal claims are settled.

c) **according to their form**

This form of classification is based on their form or means of formation and for this purpose, distinctions can be drawn between formal and informal contracts, and express and implied contracts, and contracts which are and which are not made at a distance.

d) **according to their effect**

Contracts are sometimes classified according to their effect and so distinctions can be drawn between unilateral and bilateral contracts and valid, void, voidable and unenforceable contracts.

3.2 The Doctrine of Privity of Contract

Under the common law doctrine of privity of contract, the general rule is that contracts cannot be enforced either by or against third parties. Only parties to the agreement can enforce the contract against each other.

Case Law *Doctrine of privity of contract – applicability in Malaysia*

CASE 3-2 *Kepong Prospecting Ltd & Ors -v- Schmidt* [1968] 1 MLJ 170

In the landmark case of *Kepong Prospecting Ltd & Ors -v- Schmidt,* doubts were raised as to whether the doctrine of privity of contract applied in Malaysia given the wide definition of Section 2(d) of the *Contracts Act 1950* (Act 136).

The issue was whether the wording of Section 2(d) of the said Act which provided for the consideration of an agreement being made by "any person" gave rise to an exception to the doctrine of privity of contract.

Lord Wilberforce, in delivering the judgement of the Privy Council, held at page 174 paragraphs C – E that:

> *"...It is true that Section 2(d)...gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect… [There is support for] the English conception of a contract as an agreement on which only the parties to it can sue...".*

Therefore, following the decision of the Privy Council above, although consideration may move from a third party under Section 2(d) of the *Contracts Act 1950* (Act 136), the position in Malaysia

is that only those who are parties to a contract can enforce it or have rights under it. Other people might benefit indirectly from the contract being enforced, but third parties cannot bring legal action in their own name to have it enforced.

In relation to insurance, an exception is found in paragraph 11, Schedule 8, FSA.

> *Requirements relating to group policies*
>
> *11. (1) A licensed insurer shall be liable to a person insured under a group policy if the group policy owner has no insurable interest in the life of that person and if that person has paid the premium to the group policy owner regardless that the insurer has not received the premium from the group policy owner.*
>
> *(2) The licensed insurer of a group policy, where the group policy owner has no insurable interest in the life of a person insured, shall pay the moneys due under the policy to that person insured or any person entitled through him.*
>
> *(3) Where the premium is paid by a person insured under a group policy, such person insured or any person entitled through him may, upon written notification to the group policy owner, take all necessary steps to recover moneys due under the policy from the licensed insurer in either of their own names, as the case may be, or adding the group policy owner as a party to a recovery action or proceedings…*

3.3 The Rules Governing The Formation of A Contract

The traditional approach in resolving whether a contract has been formed involved ascertaining the terms of offer, acceptance and consideration. **Bradgate R** (2010)[8] articulated that in order to bring about an enforceable contract the parties, through a process of offer and acceptance, must enter into an agreement whose terms are sufficiently certain to allow for legal enforcement, with the intention that the agreement be legally binding, and the agreement must be supported by consideration, and the agreement must comply with any formal requirements laid down by law.

The following observation made in *Halsbury's Laws of England,*[9] should be noted:

> *"…Agreement is usually reached by the process of offer and acceptance and, where this is so, the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made. In the nineteenth century, the popular theory was that there could be no contract without a meeting of the minds of the parties,*

8 Bradgate, R. (2010). Formation of Contracts. In *The Law of Contract* (4th ed., p. 255). Butterworths Common Law Series.
9 Marylebone, Q. (1998). Paragraph 632. In *Halsbury's Laws of England* (4th ed.). Reissue.

> *consensus ad idem. This is still the general rule, so that, where the intended acceptance is not in accordance with the terms of the offer, the Court may find that there is no binding contract, even though both parties to the purported contract contend that there is a binding contract…".*

In ascertaining the terms of an offer, it is pertinent that the parties are clear as to the requirements of terms, conditions and warranties forming part of the agreement.

These classifications are defined as follows:

Contractual terms are statements which form part of the contract. Parties to a contract will normally be bound to perform any promise that they have agreed to and failure to perform will lead to an action for breach of contract, although the precise nature of the remedy will depend upon the nature of the promise broken. Additionally, some terms will be automatically included in contracts by operation of statute and may not be excluded.

A condition is a fundamental part of the agreement – it is something which goes to the root of the contract. Breach of a condition gives the injured party the right either to terminate the contract and refuse to perform their part of it, or to go through with the agreement and sue for damages.

A warranty is a subsidiary obligation which is not vital to the overall agreement, and in relation to which failure to perform does not totally destroy the whole purpose of the contract. A breach of a warranty does not give the right to terminate the agreement. The injured party has to complete their part of the agreement and can only sue for damages.

3.3.1 Contracts Act 1950

The relevant provisions of the *Contracts Act 1950* (Act 136), which deal with offer, acceptance, and consideration, are located within Sections 2 to 9. These sections provide as follows:

> *2. Interpretation*
>
> *In this Act, the following words and expressions are used in the following senses, unless a contrary intention appears from the context:*
>
> *when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal;*
>
> *when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise;*
>
> *the person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee';*

> *when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;*
>
> *every promise and every set of promises, forming the consideration for each other, is an agreement; …*
>
> *an agreement enforceable by law is a contract; …*

Offer

Section 2(a) of the *Contracts Act 1950* (Act 136) deals with "offer", which is referred to as a "proposal". An offer is an indication by one party to another of his willingness to enter into a legally binding contract on certain specified terms. The proposal amounting to an offer must be such that, on acceptance, without further negotiations as to the terms, a binding contract comes into effect.

Case Law *What is an offer?*

CASE 3-3 *Preston Corp. Sdn. Bhd. -v- Edward Leong & Ors.* [1982] CLJ (Rep) 272

In the case of *Preston Corp. Sdn. Bhd. -v- Edward Leong & Ors.*, **Salleh Abas FJ** delivering judgement of the Federal Court held at page 276 paragraph *g*:

> *"…An offer is an intimation of willingness by an offeror to enter into a legally binding contract. Its terms either expressly or impliedly must indicate that it is to become binding on the offeror [promisor] as soon as it has been accepted by the offeree [promisee]…".*

It should also be noted that certain legal consequences follow when one party makes a proposal. Though there is no legally binding contract at the stage when a proposal is made, the promisor nevertheless, empowers the promisee to bring into existence a binding contract on acceptance, unless the proposal was validly revoked.

However, not all statements made by a party to initiate a contract will amount to a proposal. A person may make a statement of his willingness to enter into a contract by inviting other parties to make an offer. Such statements are usually referred to as "invitations to treat". Examples of invitations to treat are generally found in auctions, options, circulars of price lists, advertisements, club memberships, and tenders.

Acceptance

Section 2(b)of the *Contracts Act 1950* (Act 136) deals with "acceptance". Acceptance is the exercise of the power by the person to whom the offer has been made, to enter into a contract by

manifesting assent in return. Section 2(c) of the *Contracts Act 1950* (Act 136) defines the person making the proposal (offer) as the "promisor" and the person accepting the proposal (offer) as the "promisee".

The general rule under English Law is that only the person to whom the offer is made may accept it. Similarly, within the Malaysian context, Section 2(b) of the *Contracts Act 1950* (Act 136) provides that only the addressee of a proposal may accept a proposal.

Section 7 of the *Contracts Act 1950* (Act 136) provides for the form acceptance.

> *Acceptance must be absolute*
>
> *7. In order to convert a proposal into a promise the acceptance must—*
>
> *(a) be absolute and unqualified;*
>
> *(b) be expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in that manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.*

It is clear that the acceptance must be absolute and unqualified. Where the acceptance is qualified by such words as *"subject to contract"* or *"subject to a formal contract being drawn up by our solicitors"*, then the Courts would be inclined, in the absence of strong and exceptional circumstances, to hold that there is but a mere conditional contract.

The effect of Section 7(b) of the *Contracts Act 1950* (Act 136) is that acceptance need only be expressed in some usual and reasonable manner, unless the proposer prescribes a specific manner in which the proposal is to be accepted. Where there are no requirements that the acceptance must be in writing, an oral acceptance would be sufficient to create the contract.

A proposer cannot prescribe silence as a manner of acceptance. Though the general rule is that the offeror cannot bind the offeree by stating that if the offeree does nothing he will be bound to a contract, there may be exceptions to this rule depending on the facts of the case. For example, if the offeree himself stipulates that his silence shall constitute an acceptance, or in a counteroffer situation there is intimation that silence would be regarded as an acceptance of the counteroffer, such acceptance may be valid.

Case Law *Acceptance – nature of conduct*

CASE 3-4 *Mirant Asia-Pacific Construction (Hong Kong) Ltd & Anor -v- Ove Arup & Partners International Ltd & Anor* [2004] BLR 75

In *Mirant Asia-Pacific Construction (Hong Kong) Ltd & Anor -v- Ove Arup & Partners International Ltd & Anor,* **May LJ**, delivering the judgement of the English Court of Appeal held at pages 79 – 80 that the acceptance may be by conduct. Mere silence accompanied by a course of conduct may contribute to the conclusion that an agreement has been concluded.

Further, a distinction should be made between a *conditional contract* and *counteroffer*. Whilst the former may give rise to a valid contract, the latter does not. In certain cases, the Courts may consider the purported acceptance that is qualified by the introduction of a new term as a counteroffer destroying the original offer.

Case Law *Acceptance – distinction between conditional contract and counteroffer*

CASE 3-5 *Malayan Flour Mills Bhd -v- Saw Eng Chee & Anor* [1997] 2 CLJ Supp 35

In *Malayan Flour Mills Bhd -v- Saw Eng Chee & Anor,* it was held by the Malaysian High Court that as the acceptor had added new terms to his acceptance, the acceptance was not valid as it merely amounted to a counteroffer. **Kang J**, approving excerpts from *Cheshire, Fifoot & Furmstone*,[10] held at page 44 paragraph f that the effect of the counteroffer is to destroy the original offer.

An acceptance should be made within a reasonable time after receipt of the proposal. What amounts to a reasonable time is a question of fact depending on such matters as the nature of the subject matter or the method by which the offer is communicated. A delay in accepting a proposal may cause the proposal to lapse.

Case Law *Acceptance – within a reasonable time*

CASE 3-6 *Macon Works & Trading Sdn Bhd -v- Phang Hon Cin & Anor* [1976] 2 MLJ 177

In the case of *Macon Works & Trading Sdn Bhd -v- Phang Hon Cin & Anor,* **Hashim Yeop A Sani J** explained that an offer lapses after a reasonable time not because this must be implied in the offer but because failure to accept within a reasonable time implies rejection by the offeree. at page 179 paragraphs *c – d*.

10 Furmston, M. Cheshire, *Fifoot and Furmston's Law of Contract.* 12th ed., Butterworths, pp. 29–43.

Application of acceptance in insurance cases

Case Law *Application of acceptance in insurance cases*

CASE 3-7 *Borhanuddin Jantara & Anor -v- American International Assurance Co. Ltd.* [1986] CLJ (Rep) 73

The Malaysian Supreme Court in *Borhanuddin Jantara & Anor -v- American International Assurance Co. Ltd.*, considered whether there was a valid acceptance by the insurance company of an insurance proposal.

In this case, the deceased, two weeks before her death in a plane crash, had submitted a proposal form to insure her life. Paragraph (c) of the proposal form provided as follows:

> *"…The assurance herein applied for shall not take effect unless and until a policy is issued and delivered to me on this application and the first premium thereon actually paid in full during my lifetime and good health, provided, however, that if any payment of premium is made in cash at the time of signing this application and a conditional receipt issued therefore, the terms of the receipt shall apply hereto and are agreed to…".*

The deceased subsequently paid a cash sum of RM118.00 for which a receipt was issued by the company. No reference was made in the receipt as to whether the sum was paid as a deposit or as a premium, except to say that *"the said sum is received only for the account of the payer and the company is in no way committed thereby to the acceptance thereof for the purpose offered"*. Two days after she made her cash payment, she died. The administrators of her estate instituted proceedings to claim the sum insured under the insurance policy. The company argued that there was no binding contract between the deceased and the company and as such it was not liable to pay the insured sum. The company contended that as the policy had not been issued nor delivered, the deceased, at the time of her death was not covered by any valid policy of insurance.

In dismissing these arguments raised by the company, the Supreme Court held that considering the facts of the case, there was a valid acceptance of the proposal and a binding contract was in force. **Salleh Abas LP**, delivering the judgement of the Supreme Court, held that there was nothing left for the deceased to do before the respondents could issue and deliver the policy and the moment the deceased had performed her part of the bargain by paying the first premium, it became the duty of the respondents to issue and deliver a policy to herat page 78, paragraphs *d – f*.

However, contrast this with the decision of the Malaysian Court of Appeal in *Madam Loh Sai Nyah -v- American International Assurance Co Ltd* [1998] 2 CLJ 327. In this case, the Court of Appeal failed to take into account statutory provision under the Insurance Act that the knowledge and action of the agent is imputed upon the insurer. It also failed to take into account the industry practice of immediate coverage for accidental death in application for life coverage. The fact that the agent had delayed in handing over the payment to the company is not a factor that can be used to deny the claim. In any event, the SC's decision in *Borhanuddin* is of a higher authority and is binding.

Communication of Acceptance

An acceptance is only effective when it has been communicated.

Section 4(2)(a) of the *Contracts Act 1950* (Act 136) provides that as against the proposer, it is complete when it is put in a course of transmission to the proposer so as to be out of the power of the acceptor. Therefore, by posting a letter accepting a proposal, even if the letter goes astray, it may give rise to a binding contract which could bind the proposer, unless the proposer makes it clear that acceptance must be made *by notice in writing* to the proposer.

Section 4(2)(b) of the *Contracts Act 1950* (Act 136) provides that the communication of an acceptance is complete as against the acceptor when it comes to the knowledge of the proposer.

Revocation of Offer and Acceptance

A revocation, to be effective, must be communicated. Section 5 of the *Contracts Act 1950* (Act 136) provides:

> *…Revocation of proposals and acceptances*
>
> *5. (1) A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.*
>
> *(2) An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards…*

The illustration to Section 5 of the *Contracts Act 1950* (Act 136) clearly brings out the operation of this rule:

> *...A proposes, by a letter sent by post, to sell his house to B.*
>
> *B accepts the proposal by a letter sent by post.*
>
> *A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.*
>
> *B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards…*

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards, which means that the acceptance is effective as against the acceptor only when it comes to the knowledge of the proposer. This will, therefore, mean that the acceptor can revoke his acceptance before it comes to the knowledge of the proposer.

In such circumstances, the offeree has the best of both worlds in that by posting his acceptance, he is at that point in time able to enforce the agreement against the proposer and before it comes to the knowledge of the proposer, he is able to revoke his acceptance by some speedier means of communication.

Intention to Create Legal Relations

Although the *Contracts Act 1950* (Act 136) is silent on the question of intention to create legal relationships, there seems to be no doubt that a vital requirement for a valid contract is that the parties must have the intention to enter into such relationships.

In order to determine whether there was an intention to create a legal relationship, consideration would be given as to the status of the parties to the alleged agreement, namely whether it was an agreement made privately between family members or whether it was a commercial agreement.

Examples of Social and domestic agreements where there is the (rebuttable) presumption that the parties do not intend to create legal relations.

- it is assumed that social arrangements and day-to-day family matters are not intended to have legal consequences
- domestic arrangements are not legally binding unless very strong evidence of contractual intention can be found
- In Balfour v Balfour 1919[11] it was held that a husband's promise to pay his wife an allowance was not legally binding even though the husband's work had taken him abroad (however, when the parties separate because of the break-up of their marriage, an agreement they make concerning money or property is likely to be legally binding)
- In Simpkins v Pays 1955[12] the claimant (who lodged with the other parties) agreed with the defendant and the defendant's grand-daughter to 'go shares' in a weekly newspaper fashion competition and successfully sued for her share of the prize money even though the winning entry was in the name of the defendant only. Here, there was a joint enterprise which the parties expected to share any winnings and not just a domestic agreement
- 'collective agreements' between trade unions and employers (about pay, working conditions and the like) are presumed not to be binding unless there is a written contract which expressly states otherwise
- 'contracts of engagement' are not intended to create legal relations

ACTIVITY

Conduct research and find out whether domestic and social agreements are enforceable as contracts.

11 *Balfour v Balfour* [1919] 2 KB 571.
12 *Simpkins v Pays* [1955] 1 WLR 975.

Case Law *Intention to create legal relationships*

CASE 3-8 *Choo Tiong Hin & Ors -v- Choo Hock Swee* [1959] MLJ 67

In *Choo Tiong Hin & Ors -v- Choo Hock Swee*, the Court of Appeal of Singapore held that an agreement between the plaintiff and his two adopted sons was not binding, as there was no legal intention for such a family arrangement to be binding. **Whyatt CJ**, in delivering the judgement of the Court of Appeal, spelled out the issue in the case as follows at page 69:

> *"…It is, of course, elementary that an agreement is not a contract in the strict sense of the word, unless it is the common intention of the parties that it shall be legally enforceable. Such an intention is normally inferred from the nature of the agreement. For instance, in the case of agreements regulating commerce or business, it is obvious that the parties intend legal consequences to follow; per contra, in the case of agreements relating to social engagements, it is inferred as a matter of course that there is no common intention to create legal obligations…If an agreement is made between members of a family in the course of family life…the law will ordinarily imply, from the circumstances of the case, that the parties did not intend their agreement to have legal consequences…".*

Consideration

The general meaning of consideration is stated in *Halsbury's Laws of England*[13] as follows:

> *"…Meaning of 'consideration'. Valuable consideration has been defined as some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise.*
>
> *Thus, consideration for a promise may consist in either some benefit conferred on the promisor, or detriment suffered by the promisee or both. On the other hand, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is causally linked to that promise. Furthermore, consideration must be distinguished from both a motive and a condition. Consideration may be executed or executory, but it may not be past; it need not be adequate, but it must be of some value; and it must move from the promisee…".*

Within the Malaysian context, Section 2(d) of the *Contracts Act 1950* (Act 136) above defines consideration as "…*when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise*…" whilst Section 26 of the *Contracts Act 1950* (Act 136) provides that an agreement without consideration is void, unless it falls within any of the three exceptions therein provided.

13 Marylebone, Q. "Paragraph 728." *Halsbury's Laws of England.* 4th ed., vol. 9(1), Reissue.

…Agreement without consideration, void, unless—

26. An agreement made without consideration is void, unless—

it is in writing and registered

(a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;

or is a promise to compensate for something done

(b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or

or is a promise to pay a debt barred by limitation law

(c) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract…

Section 26 of the *Contracts Act 1950* (Act 136) helpfully gives several illustrations (reproduced below) to explain when such an agreement could be treated as a contract.

…ILLUSTRATIONS

(a) A promises, for no consideration, to give to B RM1,000. This is a void agreement,

(b) A, for natural love and affection, promises to give his son, B, RM1,000. A puts his promise to B into writing and registers it under a law for the time being in force for the registration of such documents. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A RM50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B RM1,000, but the debt is barred by limitation. A signs a written promise to pay B RM500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth RM1,000 for RM10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth RM1,000 for RM10. A denies that consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given…

Case Law *Doctrine of consideration*

CASE 3-9 *Guthrie Waugh Bhd -v- Malaippan Muthucumaru* [1972] 2 MLJ 62

The Malaysian Federal Court in *Guthrie Waugh Bhd -v- Malaippan Muthucumaru,* agreed with the proposition of law propounded by **Sharma J** in the High Court in relation to the doctrine of consideration under Malaysian law. In the Malaysian High Court, **Sharma J** considered in detail the relevant provisions of the *Contracts Act 1950* (Act 136) relating to consideration and commented at page 39 that a unilateral declaration is not enough to make a contract and that no question of a contract under seal arises unless the matter is covered by Section 26(a) of the Contracts Ordinance [now Act].

In the Malaysian Federal Court, **Gill FJ**, in agreeing with the principles stated by **Sharma J** in the High Court, stated at page 65 paragraphs *D – G*:

"…As regards consideration [Sharma J] held, in my opinion quite rightly, that –

(a) further consideration consistent with the deed could be proved by parol evidence,

(b) he was entitled to look at the whole of the correspondence which preceded the contract to see what the promise was,

(c) an express agreement to give time is good consideration as a forbearance to sue,

(d) even past consideration is good consideration in Malaysia,

(e) where a debtor is released and a new debtor is accepted that furnishes good consideration,

(f) where a creditor entitled to sue, gives time to pay on defendant's request, that is enough forbearance to constitute consideration,

(g) it was not necessary that there should be an arrangement for forbearance for any definite time, it was enough if from surrounding circumstances a request for forbearance could be implied…".

Act or forbearance

An act or forbearance may constitute valid consideration under the *Contracts Act 1950* (Act 136).

Case Law *Consideration – act or forbearance*

CASE 3-10 *Guthrie Waugh Bhd -v- Malaippan Muthucumaru* [1972] 1 MLJ 35

In *Guthrie Waugh Bhd -v- Malaippan Muthucumaru,* **Sharma J** in the Malaysian High Court held at page 39 paragraphs *H – I* and page 40 paragraph *A* that a forbearance to exercise a legal right is good consideration. Forbearance may be expressed or may be implied from the circumstances.

Burden or detriment

The common law approach to consideration involves the notion that a valuable consideration may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Case Law *Consideration – burden or detriment*

CASE 3-11 *South East Asia Insurance Bhd. -v- Nasir Ibrahim* [1992] 1 CLJ (Rep) 295

The Malaysian Supreme Court in *South East Asia Insurance Bhd. -v- Nasir Ibrahim,* held that the essence of consideration was that the promisee had taken upon itself some kind of burden or detriment, for example, a legal responsibility.

Gunn Chit Tuan SCJ, in delivering the judgement of the Malaysian Supreme Court, observed at page 301 paragraphs *g – I*: that the promisee in this case has undertaken a legal responsibility to its own detriment. The detriment undertaken by the promisee, in this case, is a past performance and should be sufficient consideration.

Executory or executed consideration

Section 24 of the *Contracts Act 1950* (Act 136) provides a good illustration of promises being treated as good consideration.

> *…ILLUSTRATIONS*
>
> *(a) A agrees to sell his house to B for RM10,000. Here, B's promise to pay the sum of RM10,000 is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the RM10,000. These are lawful considerations.*

(b) A promises to pay B RM1,000 at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A RM1,000 yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations…

Case Law *Consideration – executory or executed consideration*

CASE 3-12 *David Wong Hon Leong -v- Noorazman bin Adnan* [1995] 4 CLJ 155

The Malaysian Court of Appeal in *David Wong Hon Leong -v- Noorazman bin Adnan*, spelt out the distinction between executory and executed consideration. **Gopal Sri Ram**, in delivering the judgement of the Malaysian Court of Appeal, held that it is well settled *that consideration may be executory or executed.* at page 160 paragraph *h* and page 161 paragraphs *a – b*:

An executed contract comprises clear promises made by both parties and such a contract is usually referred to as a bilateral contract. In the case of an executory contract, as only one party has made a promise which is binding on him and as the other party has made no such promise (until the act is performed), such a contract is referred to as a unilateral contract. An example of an executory contract would be a reward offered for any person finding and returning a lost pet.

Unlawful consideration

Section 24 of the *Contracts Act 1950* (Act 136) provides that where the consideration is unlawful, the agreement is void. It should also be noted that where the consideration is against public policy, such consideration is also unlawful. The illustrations given in Section 24 paragraphs (e) to (k) of the *Contracts Act 1950* (Act 136) highlight examples of considerations which are unlawful.

…ILLUSTRATIONS…

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay RM1,000 to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being an agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under a written law, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's advocate, promises to exercise his influence, as such, with B in favour of C, and C promises to pay RM1,000 to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code…

Adequacy of consideration

Case Law *Consideration – adequacy of consideration*

CASE 3-13 *Tan Chiw Thoo -v- Tee Kim Kuay* [1997] 1 CLJ 541

The Malaysian Federal Court in *Tan Chiw Thoo -v- Tee Kim Kuay,* considered the distinction between *'adequacy'* of consideration and *'sufficiency'* of consideration. **Peh Swee Chin FCJ**, delivering the judgement of the Federal Court, held that in law, the Courts will often enquire into the "sufficiency" but not the "adequacy" of consideration, "sufficiency" in law is synonymous with "validity" in regard to consideration at page 551 paragraphs *f – g*.

Hence, consideration need not be adequate and nominal consideration in an agreement is sufficient.

Case Law *Consideration – adequacy of consideration*

CASE 3-14 *Guthrie Waugh Bhd -v- Malaippan Muthucumaru* [1972] 2 MLJ 62

In *Guthrie Waugh Bhd -v- Malaippan Muthucumaru,***Gill FJ**, in the Malaysian Federal Court held at page 66 paragraph *I* that it is trite law that the Court is not concerned with the inadequacy of consideration.

However, the adequacy of the consideration may be an issue in cases where the position is taken that there was no free consent given to the agreement. In such a case, the Court may consider the issue of the adequacy of the consideration in determining whether there was free consent.

Case Law *Consideration – adequacy of consideration*

CASE 3-15 *Phang Swee Kim -v- Beh I Hock* [1964] MLJ 383
CASE 3-16 *Kederi bin Ranu -v- Atmarambhat* [1865-67] BHCR 11

In the landmark decision of the Malaysian Federal Court in *Phang Swee Kim -v- Beh I Hock*, it was held that the transfer of a piece of land on the payment of $500 was good consideration, in the absence of fraud or duress. **Barakbah CJ** (Malaya), in delivering the judgement of the Malaysian Federal Court, cited at page 385 paragraphs C – D with approval, the Indian case of *Kederi bin Ranu -v- Atmarambhat* at pages 18 – 19 which declared that mere inadequacy of consideration is not sufficient ground for setting aside a contract. It is only when found in circumstances such as suppression of the value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance that the Court would consider setting the contract aside.

A more recent decision of the Malaysian Court of Appeal in *Sandrifarm Sdn Bhd -v- Pegawai Pemegang Harta Malaysia*, considered the inter-relationship between adequacy of consideration and lack of free consent. The issue in that case was whether an agreement, which the consideration was said to be inadequate, may be set aside on the ground of a lack of free consent on the part of the vendor under a sale and purchase agreement.

Case Law *Inter-relationship between adequacy of consideration and lack of free consent*

CASE 3-17 *Sandrifarm Sdn Bhd -v- Pegawai Pemegang Harta Malaysia* [2000] 3 CLJ 313

In *Sandrifarm Sdn Bhd -v- Pegawai Pemegang Harta Malaysia*, the vendor had agreed to sell a piece of land to the plaintiff (appellant) for the sale price of RM1.9 million. The plaintiff paid a sum of RM190,000 being 10% of the purchase price. Subsequent to this, the vendor had the land valued by the government valuer who valued the property at RM3.765 million. Relying on this valuation report, the vendor refused to proceed with the sale. It was argued on behalf of the vendor that the consideration for the agreement was grossly inadequate, relying on the value of the property as disclosed in the government valuation report.

The Malaysian Court of Appeal held, reversing the decision of the trial judge at the High Court, that as there was no evidence of any misrepresentation or fraud, the question of the consent of the vendor not having been freely given did not arise. It was also held that the valuation done by the government valuer was irrelevant, as the vendor ought to have obtained such a valuation before he agreed to sell the property to the plaintiff.

Shaik Daud Ismail JCA, in delivering the judgement of the Malaysian Court of Appeal, held at page 317 paragraphs e – f that there was no evidence of any misrepresentation or fraud.

Consideration from a third party

Under the common law, it is clear that consideration must move from the promisee.

However, within the Malaysian context, consideration may move from a party who is not necessarily the promisee. Section 2(d) of the *Contracts Act 1950* (Act 136) provides that consideration may move from "…*the promisee or any other person*…" In other words, consideration under the *Contracts Act 1950* (Act 136) may move from a third party, and as such, a situation may arise where a contract may be enforceable notwithstanding that the promisee himself did not provide the consideration for the contract.

Past consideration

The general rule under English law is that past consideration is no consideration. However, it is now clearly established that not only past acts, but also earlier promises made at the request of the promisor, constitute good consideration.

Within the Malaysian context, it would appear that Section 2(d) of the *Contracts Act 1950* (Act 136) is capable of treating past consideration as good consideration. It reads,

> *…when, at the desire of the promisor, the promisee or any other person has done or abstained from doing…*

Case Law *Past consideration constitutes good consideration*

CASE 3-18 *South East Asia Insurance Berhad -v- Nasir Ibrahim* [1992] 1 CLJ (Rep) 295

The Malaysian Supreme Court in *South East Asia Insurance Berhad -v- Nasir Ibrahim,* held that past consideration would constitute good consideration. **Gunn Chit Tuan SCJ**, delivering the judgement of the Malaysian Supreme Court, held at page 301 paragraphs *g –I* that past performance is sufficient consideration where there is a promise in consideration of some act previously done by the promisee at the request of the promisor.

If the act done was at the desire of the promisor, then such an act would constitute consideration. A claim may be founded on an act done prior to the promise. Such a claim would be valid so long as the promisee had done or abstained from doing something in pursuance of a promise made by the promisor.

ACTIVITY

Research the term "promissory estoppel". How is it related to consideration?

3.4 Factors which could Affect the Validity of Contracts

As mentioned previously, a contract can be defined as *"a promise or set of promises which the law will enforce"* The agreement will create rights and obligations that may be enforced in the Courts. However, there are situations where the parties have reached an agreement but the question arises as to the validity of the contract.

3.4.1 Capacity to Contract

By virtue of Section 11 of the *Contracts Act 1950* (Act 136), only persons who are *"of the age of majority according to the law to which [they are] subject"* are competent to contract. Section 11 of the *Contracts Act 1950* (Act 136) reads as follows:

> *…Who are competent to contract*
>
> *11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject…*

Case Law *Capacity to contract – minors*

CASE 3-19 *Leha Binte Jusoh -v- Awang Johari bin Hashim* [1978] 1 MLJ 202

The Malaysian Federal Court in *Leha Binte Jusoh -v- Awang Johari bin Hashim* considered whether an agreement entered into by the respondent who was a minor at that time, was null and void and that no specific performance could be decreed.

Ong Hock Sim FJ, in delivering the judgement of the Malaysian Federal Court, held at page 203 paragraphs *C – F* that the Contracts Act makes it essential that parties to the contract should be competent and of age to contract. Otherwise, the agreement is void.

Section 2 of the *Age of Majority Act 1971* (Act 21) provides that all persons attain the age of majority at 18 years. The general rule that all contracts entered into by minors are void has several statutory exceptions, such as:

- the *Age of Majority Act 1971* (Act 21) relating to marriage;
- the *Contracts (Amendment) Act 1976* (Act A329) relating to scholarship agreements;
- the *Children and Young Persons (Employment) Act 1966* (Act 350) relating to employment; and
- the Financial and Services Act 2013 (Act 758) relating to capacity of minors to insure.

Paragraph 4, Schedule 8 of the Financial and Services Act 2013 (Act 758) clearly allows a minor to enter into a contract of life insurance. A minor who is between the ages of ten to sixteen years can, with the consent in writing of his parent or guardian, effect a life policy upon his own life and that of another upon whom he has an insurable interest. A minor who has attained the

age of sixteen can do so without the written consent of his parent or guardian. Paragraph 4, Schedule 8 provides:

> *Capacity of minors to insure*
>
> *(1) Notwithstanding any law to the contrary, a minor who has attained the age of ten years but has not attained the age of sixteen years, with the consent in writing of his parent or guardian -*
>
> *(a) may effect a life policy upon his own life or upon another life in which he has an insurable interest; or*
>
> *(b) may assign the life policy on his own life or take an assignment of a life policy.*
>
> *(2) A minor who has attained the age of sixteen years –*
>
> *(a) may effect a life policy upon his own life or upon another life in which he has an insurable interest; or*
>
> *(b) may assign the life policy on his own life or take an assignment of a life policy,*
>
> *and is competent in all respects to have and to exercise the powers and privileges of a policy owner in relation to a life policy of which he is the owner as he would be if he had attained the age of majority.*
>
> *(3) A minor who has attained the age of sixteen years shall obtain the consent in writing of his parent or guardian to assign a life policy on his own life under subsubparagraph (2) (b).*

What is the fundamental distinction between "voidable" and "void" insurance contracts?

In "voidable" insurance contracts, the contractual agreement is valid and binding, unless one party avoids it due to a breach by the other party. In "void" insurance contracts, the contractual agreement is itself invalid and, therefore, not binding.

ACTIVITY

Conduct research and find examples of "illegal and void" contracts. Compare them with examples of "voidable" contracts.

3.4.2 Mistake

The general statement of the law is stated in *Halsbury's Laws of England:*[14]

> *"…A mistake will not result in negative consent unless it is material to the formation of the agreement in the sense that, if the party mistaken had realised his mistake, he would not have entered that agreement. However, provided that a mistake is material in this sense, it may prevent the parties from reaching agreement in any of the following situations: (1) when one party is mistaken about the identity of the other; (2) when one party intends to deal with one thing and the other with a different thing; (3) when one party intends to deal on one set of terms and the other on a different set of terms…".*

Generally, a mistake in the law of contract deals with two distinct situations, namely;

a) it affects the formation of a legally binding contract; or
b) the enforcement of an ostensibly binding contract.

In the first situation, there is a mistake or a misunderstanding in the communications between the parties which prevents an effective agreement, for example, if the parties misunderstood each other.

In the second situation, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law. This is sometimes referred to as "mutual mistake" or "common mistake".

Sections 21 to 23 of the *Contracts Act 1950* (Act 136) deal with the effect of mistake on an agreement. Section 23 of the *Contracts Act 1950* (Act 136) provides that a mistake of fact caused by one of the parties to an agreement does not render the contract void. Section 23 of the *Contracts Act 1950* (Act 136) reads as follows:

> *…Contract caused by mistake of one party as to matter of fact*
>
> *23. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact…*

Section 22 of the *Contracts Act 1950* (Act 136) provides for the effect of a mistake as to law and it reads as follows:

> *…Effect of mistake as to law*
>
> *22. A contract is not voidable because it was caused by a mistake as to any law in force in Malaysia, but a mistake as to law not in force in Malaysia has the same effect as to a mistake of fact.*

14 Marylebone, Q. "Paragraph 703." *Halsbury's Laws of England.* 4th ed., Reissue.

Section 21 of the *Contracts Act 1950* (Act 136) provides that an agreement is void if both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement. Section 21 of the *Contracts Act 1950* (Act 136) reads as follows:

> *…Agreement voids where both parties are under mistake as to matter of fact*
>
> *21. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void…*

Section 21 of the *Contracts Act 1950* (Act 136) also provides some illustrations (reproduced here) on the applicability of that Section, which are helpful.

> *…ILLUSTRATIONS*
>
> *(a) A agrees to sell B a specific cargo of goods supposed to be on its way from England to Kelang. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.*
>
> *(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.*

For a mistake to be operative under Section 21 of the *Contracts Act 1950* (Act 136), it must be one that is essential to the agreement.

Case Law *Validity of contracts – mistake*

CASE 3-20 *Sinniah Pampayan -v- Muthuvelu Pillai Palanichamy Pillai* [1996] 4 CLJ 538

The Malaysian Court of Appeal in *Sinniah Pampayan -v- Muthuvelu Pillai Palanichamy Pillai*, considered whether a purported sale of a house was valid given that it was founded upon the mistaken belief that the house belonged to the respondent when in fact it belonged to the State Government.

K.C. Vohrah J, in delivering the judgement of the Malaysian Court of Appeal, held at page 543 paragraphs a – e that there was no mistake as it is clear that the plaintiff could sell and, in fact, merely sold this right to own the premises in the future albeit contingent on the three conditions earlier stated.

In cases where the mistake relates to a law in force in Malaysia, the contract is not voidable. However, where the mistake relates to foreign law, the agreement is void. *(i.e., Section 22, Contracts Act 1950 [Act 136].)*

In the context of insurance, a misstatement of age in a life policy does not affect the validity of the policy contract. The insurer cannot use the mistake as a reason to avoid the life policy or refuse a claim under the said policy. Where the true age differs from that on which the life policy is based, an adjustment is to be made to the sum insured and the bonuses or a reduction of premium is made accordingly or the period of coverage be adjusted accordingly. The said consequences of a misstatement of age in a life policy are provided for in paragraph 1, Schedule 8 of the Financial and Services Act 2013 (Act 758).

3.4.3 Misrepresentation

A misrepresentation is a false statement of fact or law which induces the other party to enter into the agreement. Generally speaking, such statements have to be made before the contract is entered into. Thus, the requirements of an action for misrepresentation are that it must purport to be a statement of fact or law, it must have induced the other party to enter the contract and it must have been a false statement.

The following requirements must be met, to have a damaging effect on the contract:

a) The misrepresentation must be one of fact – This is to be contrasted with statements of law and statements of opinion or belief, requirement. Statement of opinion or belief may amount to actionable misrepresentation if the maker does not actually hold the opinion or belief, since they misrepresent their own state of mind.

   In *Edgington v Fitzmaurice* (1885)[15] per Bowen LJ "...there must be a misstatement of existing fact; but the state of a man's mind is as much a fact as the state of his digestion… A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact".

b) The misrepresentation must be made by a party to the contract – statements made by a third party is not actionable, requirements.

c) The misrepresentation must be material. The misrepresentation must concern something which would influence a reasonable person in deciding whether to proceed with the contract or what terms to accept. This requirement of materiality does not apply if the representation is fraudulent.

d) The misrepresentation must induce the contract. The person seeking redress must have relied and acted upon the statement in question.

e) The claimant must suffer damage as a result of the misrepresentation.

The general provision is found in Section 18 of the *Contracts Act 1950* (Act 136). For insurance contracts, however, Paragraph 7 of Schedule 9 of the *Financial Services Act 2013* (Act 758) applies.

15 *Edgington v Fitzmaurice* [1885] 29 Ch D 459.

Section 18 of the *Contracts Act 1950* (Act 136) provides as follows:

> *...Misrepresentation*
>
> *18. "Misrepresentation" includes—*
>
> *(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;*
>
> *(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and*
>
> *(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement…*

It should be noted that Section 18 of the *Contracts Act 1950* (Act 136) has to be read with the *Explanation* and the *Exception* to Section 19 of the *Contracts Act 1950* (Act 136).

The *Explanation* provides as follows:

> *…A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable…*

The *Exception* reads as follows:

> *…If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence…*

Under the provisions of the Contracts Act 1950 where the consent to an agreement has been caused by coercion, fraud, misrepresentation or undue influence, the contract is rendered voidable at the instance of the innocent party.

The *Exception to* Section 19 of the *Contracts Act 1950* (Act 136) provides that if the party whose consent was caused by misrepresentation, silence or fraud, had the means of discovering the truth with ordinary diligence, the contract is not voidable.

Case Law *Misrepresentation – voidability of contract*

CASE 3-21 *Beca (M) Sdn. Bhd. -v- Tang Choong Kuang & Anor* [1986] CLJ (Rep) 64

The Malaysian Supreme Court in *Beca (M) Sdn. Bhd. -v- Tang Choong Kuang & Anor*, dealt with the applicability of the *Exception to Section 19* of the *Contracts Act 1950* (Act 136). **Lee Hun Hoe CJ** (Borneo), in delivering the judgement of the Malaysian Supreme Court, observed at page 71 paragraphs b – f that the house buyers could not be expected to know that the developers had no license at the time and that it would be expecting too much of the buyers to say that they "had the means of discovering the truth with ordinary diligence".

There are situations where a duty is imposed on a party to disclose certain information. This is especially so in contracts of insurance where the doctrine of *ubberimae fidei* or utmost good faith applies. Under this doctrine, the proposer is under a duty to disclose all material facts and a duty not to misrepresent. Schedule 9 of the *Financial Services Act 2013 (Act 758)* contains detailed provisions governing both the duty of disclosure and representations.

A distinction is made between consumer insurance contracts and other insurance contracts. A consumer insurance contract means a contract of insurance by an individual wholly for purposes unrelated to his trade, business or profession.

Before a contract of insurance is entered into, the insurer is to inform the proposer that there is a duty on the part of the proposer to disclose to the insurer a matter that he knows to be relevant to the insurer's decision on whether to accept the risk or not and the rate and terms to be applied or a reasonable person in the circumstance could be expected to know to be relevant – paragraphs 4(4) and 5(7) This duty does not apply if it is a matter that diminishes the risk, is of common knowledge and is known or ought to be known to the insurer – paragraph 4(2). In addition, the duty to disclose can also be waived by the insurer – paragraph 4(2)(d), Schedule 9.

If the proposer fails to answer any questions asked or gives an incomplete or irrelevant answer to a question in the proposal form and the insurer does not seek clarification or pursue the matter further, it is deemed that the requirement of disclosure has been waived by the insurer – paragraph 4(3) and paragraph 5(5) & (6), Schedule 9. It falls upon the insurer to follow up on any incomplete or non-answers in the proposal form and questions asked.

For a consumer insurance contract, the insurer may ask specific questions relevant to insurer's decision on whether or not to accept the risk and the rates and terms to be applied. There is a duty on the part of the consumer to take reasonable care not to make a misrepresentation when answering the questions – paragraph 6, Schedule 9. When no specific questions are asked, the requirement of disclosure is deemed to have been waived by the insurer – paragraph 5(1)-(4), Schedule 9. There is a duty on the part of the consumer proposer to disclose any other matter that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the applicable rates and terms – paragraph 5(8), Schedule 9.

The misrepresentation may be deliberate or reckless, careless or innocent. A misrepresentation is deliberate or reckless if the proposer knew that:–

a) it was untrue or misleading, or did not care whether or not it was untrue or misleading; and
b) the matter to which the misrepresentation related was relevant to the insurer or did not care whether or not it was relevant to the insurer.

A misrepresentation made dishonestly falls under this category as well. A misrepresentation is careless or innocent if it is not deliberate or reckless. It is for the insurer to prove that the misrepresentation was deliberate or reckless, on a balance of probability – paragraph 7(3) – (7), Schedule 9.

There is a corresponding pre-contractual duty of disclosure and duty not to misrepresent on the part of the insurer, insurance agent, insurance brokers, financial adviser or financial adviser's representative to induce a person into entering into a contract of insurance and its variation or renewal thereof. There is a prohibition of misleading, false or deceptive statement, fraudulent concealment of a material fact and the use of unauthorised sales brochures or illustrations – paragraph 11, Schedule 9. Such non-disclosure or misrepresentation on the part of the insurer, insurance agent, insurance brokers, financial adviser or financial adviser's representative makes the insurance contract voidable and the person so induced to enter into the contract is entitled to rescind it – paragraph 11(2), Schedule 9.

Is a breach of contract equivalent to a tort?

A breach of contract is the breach of duty that is agreed to in an agreement, whereas a tort is the breach of duty imposed by general law.

Remedies for Misrepresentation

In cases where the consent to an agreement has been caused by coercion, fraud, misrepresentation or undue influence, the contract is rendered voidable at the instance of the innocent party. Further relief may also be granted depending on the particular ground upon which the contract had been so rendered voidable.

Section 19 of the *Contracts Act 1950* (Act 136) provides as follows:

> *…Voidability of agreements without free consent*
>
> *19. (1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.*
>
> *(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.*

Exception—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable.

Section 19(1) of the *Contracts Act 1950* (Act 136) deals with the effect of agreements entered into without free consent. It should also be noted that Section 19 of the *Contracts Act 1950* (Act 136) only applies to cases where the consent to an agreement was caused by coercion, fraud or misrepresentation.

Where the non-disclosure or misrepresentation was on the part of the insurer, insurance agent, insurance brokers, financial adviser or financial adviser's representative, the insurance contract becomes voidable and the person so induced to enter into the contract is entitled to rescind it – paragraph 11 (2), Schedule 9.

Case Law *Rescission of contract*

CASE 3-22 *Tan Jing Jeong v Allianz Life Insurance Malaysia Bhd & Anor* [2012] 7 MLJ 179

In the Malaysian High Court case of ***Tan Jing Jeong v Allianz Life Insurance Malaysia Bhd & Anor***, the plaintiff had, at the end of 2014, bought a life insurance policy of RM8 million in coverage known as the 'Investpro' from the first defendant ('D1') through one of its agents, the second defendant ('D2'). The payable premium of the said policy was RM400,000 p.a. It was provided that 45% of the premium of RM400,000 was earmarked for an investment-linked fund. It was represented to the plaintiff that a one-time payment premium of RM400,000 was sufficient to cover the rest of the premiums throughout the subsequent years in relation to the Investpro policy. D2 did not inform the plaintiff that the balance of 55% of the premium would be used to pay for the costs of the administrative charges and no such mention was made expressly to that effect in the policy. The plaintiff was later notified that the investment-linked fund total account value of the policy had, by 31 December 2005 dwindled to RM19,024.48 from the initial figure of RM180,000. He was also required to pay the premium for the next policy year in the sum of RM400,000.

The plaintiff sued D1 and D2 for having sold to him the Investpro policy by way of misrepresenting to him about it, as well as by way of non-disclosure of material fact regarding the feature of the Investpro. The plaintiff argued that they ought to have disclosed the material fact to him, as it would have impacted on his decision whether to buy the Investpro policy or not, in the first place. As a result, the plaintiff claimed that he was entitled to rescind what was actually a voidable contract at his instance and for a refund of the premium that he had paid to the defendants with respect to the Investpro policy.

Abang Iskandar J allowed the plaintiff's claim and held that there is a positive duty on the part of the insurer and its agent to make sure that the potential contract fits the needs and benefits, the assured. The effect of non-disclosure of a material fact in an insurance contract is exactly the same as that of a misrepresentation and justifies the aggrieved party to avoid the contract. It was clearly established as a factual circumstance that D2 did not disclose that material fact to the plaintiff in this case (see para 27).

Remedies available to the insurer in respect of misrepresentation made by the proposer are set out in Part 3, Schedule 9.

Life insurance of more than two years

For contracts of life insurance which have been in effect for more than two years, the insurer cannot rescind or avoid the contract on the grounds of non-disclosure or misrepresentation. The non-contestability of the validity of the insurance contract is to protect policy owners. The only exception is when the insurer shows that the statement was on a material matter or suppressed a material fact and that it was fraudulently made or omitted to be made by the policy owner or insured – paragraph 13, Schedule 9. A material matter or fact means that which if known by the insurer, would have led to its refusal to issue a life policy or would have led it to impose terms less favourable to the policy owner.

Life insurance of two years and less & consumer insurance contract of general insurance

For these two classes of insurance contracts, if a misrepresentation was deliberate or reckless, the insurer may avoid the insurance contract and refuse all claims arising from the said contract – paragraph 15, Schedule 9.

If a misrepresentation was careless or innocent, the insurer's remedies depend on what it would have done if the consumer had in fact exercised reasonable care as required. If the insurer would not have entered into or renewed on any terms, the insurer may avoid the contract and refuse all claims. However, any premium paid is to be returned to the consumer. If the insurer would have entered or renewed the contract, but on different terms (excluding premium), the contract is to be treated as if it had been entered into or renewed on those different terms if the insurer so requires. If the insurer would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim – paragraph 16, Schedule 9.

In the event of discovery of careless or innocent misrepresentation when there is no outstanding claim, the insurer may return the premium if it would not have entered into a contract in the first place. Where the insurer would have issued a policy but on different terms or with higher premiums, the consumer would be so notified or it may terminate the contract after reasonable notice is given to the consumer – paragraph 17, Schedule 9.

3.4.4 Duress and Undue Influence

Duress

"Duress" has its origins in the common law, whereas the much wider doctrine of undue influence is the creation of the Courts of Equity. Duress at common law means actual violence or threats of violence to the person and not to his goods. With the intervention of the Courts of Equity in the form of the doctrine of undue influence, the importance of duress as a means to set aside transactions entered into without free consent, was diminished.

Coercion

Section 15 of the *Contracts Act 1950* (Act 136) provides as follows:

> *…"Coercion"*
>
> *15. "Coercion" is the committing or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.*
>
> *Explanation—It is immaterial whether the Penal Code is or is not in force in the place where the coercion is employed.*
>
> *ILLUSTRATION*
>
> *A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Penal Code.*
>
> *A afterwards sues B for breach of contract at Taiping.*
>
> *A has employed coercion, although his act is not an offence under the law of England, and although Section 506 of the Penal Code was not in force at the time when or place where the act was done…*

The various definitions of "coercion" under Section 15 of the *Contracts Act 1950* (Act 136) limit the wrong or threatened wrong to crimes under the *Penal Code* (Act 574) alone and not to include tortious wrongs. Acts which are offences other than under the Penal Code or which are merely civil wrongs will not amount to "coercion" within the ambit of Section 15 of the *Contracts Act 1950* (Act 136).

Where the consent to an agreement is caused by coercion, the agreement is voidable at the option of the party whose consent was so caused. Section 15 of the *Contracts Act 1950* (Act 136) was discussed in the Malaysian High Court case of *Nuri Asia Sdn Bhd -v- Fosis Corporation Sdn Bhd.*

Case Law *Consent to an agreement coercion*

CASE 3-23 *Nuri Asia Sdn Bhd -v- Fosis Corporation Sdn Bhd.* [2006] 5 CLJ 307

In the Malaysian High Court case of *Nuri Asia Sdn Bhd -v- Fosis Corporation Sdn Bhd.*, Low Hop Bing J, in delivering the judgement of the Malaysian High Court, held at page 315 paragraphs 34 and 35 that the written guarantee was tainted with coercion, Thus, no free consent was given resulting in the written guarantee being vitiated. The elements of coercion in this case are the use of criminal force or occasioning assault or criminal intimidation under the Penal Code.

Undue Influence

The doctrine of *"undue influence"* is a development of equity to cover cases of particular relations and is sometimes used as a comprehensive phrase to include cases of coercion, domination or pressure within or without those special relations.

Section 16 of the *Contracts Act 1950* (Act 136) provides as follows:

> *…"Undue influence"*
>
> *16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*
>
> *(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—*
>
> *(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or*
>
> *(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.*
>
> *(3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.*
>
> *(b) Nothing in this subsection shall affect Section 111 of the Evidence Act 1950 [Act 56].*

ILLUSTRATIONS

(a) A having advanced money to his son, B, during his minority, upon B's coming of age, obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the moneylender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence…

In cases where a special relationship is established, there is generally the presumption that influence has been exercised over the other contracting party. In this situation, it is for the party who had benefited from the transaction to rebut the presumption of undue influence.

Under Section 16(1) of the *Contracts Act 1950* (Act 136) it is necessary to establish two matters:

a) that one party was in a position to dominate the will of the other; and
b) that party used that position to obtain an unfair advantage over the other.

Therefore, it is not every relationship in which some element of confidentiality or fiduciary duty exists, that the presumption of undue influence will arise. Whether a person is in a position to dominate the will of another is a question of fact.

Case Law *Undue influence – domination of will*

CASE 3-24 *Polygram Records Sdn. Bhd. -v- Hillary Ang & Ors* [1994] 3 CLJ 806

In the Malaysian High Court case of *Polygram Records Sdn. Bhd. -v- Hillary Ang & Ors*, **V. Sinnadurai J**, in delivering the judgement of the Malaysian High Court, held at page 819 paragraphs *e – i* and page 820 paragraphs *i*: *that agreements entered into under undue influence are voidable, and not void, at the option of the party whose consent was obtained through undue influence. Where there is no special relationship between the parties, undue influence needs to be established or proven.*

Section 20 of the *Contracts Act 1950* (Act 136) makes provisions to allow the innocent party, whose consent to the agreement is caused by undue influence, to set aside the contract, either

"absolutely, or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as the Court may seem just". By virtue of Section 20 of the same *Act*, agreements entered into by undue influence are voidable, and not void, at the option of the party whose consent was obtained through undue influence.

Can a lawful threat constitute "duress"?

A lawful threat can constitute duress. The objective of the person issuing the threat is important. If its purpose is "unlawful", as with the threat of blackmail, then it may constitute "duress".

3.4.5 Illegality and Public Policy

The general rule under the *Contracts Act 1950* (Act 136) is that the Courts would not *enforce* an illegal contract. Section 24 of the *Contracts Act 1950* (Act 136) provides that an agreement which is unlawful is void and Section 2(g)of the same *Act* provides that such an agreement is not enforceable by law.

The *Contracts Act 1950* (Act 136) draws no distinction between illegal or void contracts. Section 2(g) of the *Contracts Act 1950* (Act 136) provides as follows:

> *…(g) an agreement not enforceable by law is said to be void;…"*
>
> *whilst Sections 24 and 25 of the Contracts Act 1950 (Act 136) read as follows:*
>
> *"…**What considerations and objects are lawful, and what not***
>
> ***24.** The consideration or object of an agreement is lawful, unless—*
>
> *(a) it is forbidden by a law;*
>
> *(b) it is of such a nature that, if permitted, it would defeat any law;*
>
> *(c) it is fraudulent;*
>
> *(d) it involves or implies injury to the person or property of another; or*
>
> *(e) the* Court *regards it as immoral, or opposed to public policy.*
>
> *In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.*

Void Agreements

Agreements void if considerations and objects are unlawful in part

25. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

ILLUSTRATION

A promise to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of RM10,000 a year. The agreement is void, the object of A's promise and the consideration for B's promise, being in part unlawful…

Case Law *Illegality of contract*

CASE 3-25 *Chung Khiaw Bank Ltd. -v- Hotel Rasa Sayang Sdn. Bhd. & Anor*
[1990] 1 CLJ (Rep) 57

The Malaysian Supreme Court in the case of *Chung Khiaw Bank Ltd. -v- Hotel Rasa Sayang Sdn. Bhd. & Anor*, had to consider the question of the illegality of a contract. **Hashim Yeop Sani CJ** (Malaya), in delivering the judgement of the Malaysian Supreme Court, held at page 65 paragraphs *e* and *i*: where it is shown that a contract is void because it is prohibited by statute, the Court as a general rule should not lend its assistance to enforce the contract.

3.5 Circumstances in Which a Contract may be Discharged

There are four possible ways in which a contract may be discharged. These are:

1) Performance;
2) Agreement between the parties to the contract;
3) Breach of contract; and
4) Frustration.

3.5.1 Performance

The general rule is that the parties must perform precisely all the terms of the contract in order to discharge their contractual obligations.

A contract becomes discharged through performance when both parties have fully performed their contractual obligations.

3.5.2 Agreement

A contract may be discharged by agreement when both parties agree to bring the contract to an end and release each other from their contractual obligations. For a contract to be discharged through agreement, there must be Accord & Satisfaction. Each party must agree to end the contract. The agreement must be freely given. Both parties must also provide consideration. There is in effect a contract to end a contract.[16]

The general rule is that what has been created by agreement may be extinguished by agreement.

3.5.3 Breach

A failure to perform the terms of a contract constitutes a "breach". A breach which is serious enough to give the innocent party this option of treating the contract as discharged can occur in one of two ways:

1) Either one party may show by express words or by implications from his conduct at some time before performance is due that he does not intend to observe his obligations under the contract (anticipatory breach); or
2) He may in fact break a condition or otherwise break the contract in such a way that it amounts to a substantial failure of consideration.

3.5.4 Frustration

A contract may be discharged by frustration. A contract may be frustrated where there exists a change in circumstances, after the contract was made, which is not the fault of either of the parties, which renders the contract either impossible to perform or deprives the contract of its commercial purpose. Where a contract is found to be frustrated, each party is discharged from future obligations under the contract and neither party may sue for breach.[17]

3.6 Remedies for Breach of Contract

The remedies available to the injured party will depend on the nature of the breach and the results will differ between the parties. The usual remedy for a breach of contract is an award of damages, which is a common law remedy. However, if a monetary remedy is not satisfactory, the Court may exercise its discretion and order any one of several equitable remedies.

The remedies available for breach of contract are:

1) Rescission
2) Restitution

16 "Discharge by Agreement." E-Law Resources, *http://e-lawresources.co.uk/Discharge-by-agreement.php* . Accessed 22 Oct. 2014.

17 "Frustrated Contracts." E-Law Resources, *http://e-lawresources.co.uk/Frustrated-contracts.php* . Accessed 22 Oct. 2014.

3) Damages
4) Specific Performance
5) Injunction
6) *Anton Piller* Order
7) *Quantum Meruit*

3.6.1 Rescission

"Rescission" is an equitable remedy, which allows an innocent party to cancel the contract by rescinding or, if there has been misrepresentation by the other party raising that misrepresentation as a defence if sued for damages or specific performance by the other party. Its purpose is to reverse the contract and restore the parties as near as practicable to their original pre-contractual positions, relieving each party of their obligations and permitting recovery of any benefits conferred on each other.

3.6.2 Restitution

"Restitution" (or restoration) is sometimes referred to as a *quasi-contract*. It is not contractual and does not rely on the plaintiff suffering loss or damage. Its basis is unjust enrichment, that is, those situations where it would be very unfair if the defendant was to be allowed to retain the money, or the goods or services, without payment.

3.6.3 Damages

The main purpose of "damages" is to enable the innocent party to receive monetary compensation from the party responsible for the breach of contract. Damages are not awarded to punish a wrongdoer but rather to put the injured party back in the position that they would have occupied if the contract had been performed as originally intended. Therefore, damages are calculated on the basis of looking at what the position should have been if the contract had been properly performed. Damages are granted to a party as compensation for the damage, loss or injury they have suffered through a breach of contract. Section 74 of the *Contracts Act 1950* sets out the provision for such compensation. In other words, the general principle for the assessment of damages is compensatory. The said Section 74 reads:

> *…Compensation for loss or damage caused by breach of contract.*
>
> *74. (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*

Compensation for failure to discharge obligation resembling those created by contract.

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.

Explanation— In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Section 74 of the *Contracts Act 1950* provides that when a contract has been breached, the party who suffers from the breach is entitled to receive, from the party breaching, compensation for any loss or damages caused to him, which naturally arise in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of contract.

Section 75 of the *Contracts Act 1950* provides:

…Compensation for breach of contract where penalty stipulated for

75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception—When any person enters into any bail-bond, recognisance, or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Federal Government or the Government of any State, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation— A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.

Mitigation of loss

The law imposes a duty upon the person claiming damages (the injured party) to take all reasonable steps to reduce or minimise or mitigate their loss. If they fail to take these steps, the amount of damage they can expect to recover will be reduced. If the plaintiff is able to avoid a loss, damages will not be recoverable for the potential loss that the plaintiff may have suffered.

3.6.4 Specific Performance

"Specific performance" is a discretionary order granted by the Courts directing a person to carry out their obligations under the contract. In cases where common law damages are not an adequate remedy, particularly contracts involving land or where the subject matter is unique, like a rare artwork, specific performance may be granted by the Court where it finds that damages would be inadequate compensation.

The *Specific Relief Act 1950* provides for the remedy of specific performance. Specific performance is a discretionary remedy. Under Section 21 of the *Specific Relief Act 1950*, the Court has discretion to refuse specific performance where the granting of it would cause undue hardship to the defendant. The Court will exercise its discretion not to decree specific performance under Section 20 of the *Specific Relief Act 1950* where damages will provide an adequate remedy.

3.6.5 Injunction

An "injunction" is a discretionary Court order. Unlike specific performance, this is a Court order restraining a party from breaking their contract or from committing a wrongful act (an order prohibiting performance) and will not be awarded if damages are an adequate remedy.

An injunction may be:

- *prohibitory*, preventing the breach of a contract;
- *mandatory*, requiring a person to perform some contractual obligation; or
- *interlocutory*, where it freezes the status quo between the parties until the dispute can be heard by the Court.

The remedy of an interlocutory injunction is used by a party to maintain the status quo to the subject-matter in a pending suit. A mandatory injunction is a Court order requiring something to be done. An injunction may also be in the form of a restraining order, stopping something from being done. This type of injunction is called the prohibitory injunction. An injunction is an equitable remedy.

Mareva injunction

A *Mareva* injunction prevents the defendant from removing or disposing of any assets in the jurisdiction until the Court makes a decision. As a result of its potential to seriously interfere with the defendant's legal rights, a plaintiff must be able to establish all the following:

- the defendant has assets that are in the Court's jurisdiction;

- there is a real risk that the defendant will remove or get rid of any assets before judgement; and
- the plaintiff can establish a substantive cause of action such as a claim for damages.

Case Law *Remedy for breach of contract – Mareva injunction*

CASE 3-26 *Mareva Compania Naviera SA -v- International Bulk Carriers SA* [1975] 1 All ER 213

In the English Court of Appeal case of *Mareva Compania Naviera SA -v- International Bulk Carriers SA*, the ship owners hired out their ship, *Mareva*, to International Bulk Carriers. The hire of the ship was to be paid half-monthly in advance. After International Bulk Carriers were only able to meet the first two instalments, Mareva sued for damages and unpaid hire. They also sought an injunction to stop the hirers from removing from the Court's jurisdiction any monies received from the voyage.

The issue was whether an injunction was obtainable to prevent the removal of assets before judgement.

The Court of Appeal granted an injunction to continue until the dispute came to trial to prevent the defendants from disposing of any assets.

3.6.6 Anton Piller Order

An *Anton Piller* order may be made available in exceptional circumstances where it can be shown that the defendant has incriminating evidence in their possession, which is necessary to the plaintiff's case and which may well be destroyed before a Court order for discovery can be made.

Case Law *Remedy for breach of contract – Anton Piller order*

CASE 3-27 *Anton Piller -v- Manufacturing Processes Ltd* [1976] CH 55

In the English case of *Anton Piller -v- Manufacturing Processes Ltd*, the Anton Piller company was under the belief that one of its agents was supplying confidential information to one of its competitors. They believed that the agent had documentation in their possession that would prove their breach. However, they are concerned that a subpoena would give the agent advance warning of their intentions and that any relevant documents would then be destroyed. The issue was whether the company could obtain an order enabling them to enter the agent's premises to inspect the documents and remove or copy the relevant ones.

The English Court held that as there was a strong *prima facie* case of infringement which could cause damage to the applicant, and clear evidence that the defendants had incriminating material in their possession which they would destroy, the order was granted.

3.6.7 Quantum Meruit

"Quantum meruit" means "as much as he has earned" and only arises in cases of part performance. The contract may be discharged by breach, but where the contract is for goods or services, there is a

new implied contract imposed by law on the party taking the benefit that they will pay a reasonable amount for the quantum or portion given. It is not available to the party in breach.

Quantum meruit can arise where:

- a defendant has prevented a plaintiff from carrying out the remainder of their contractual duties;
- the parties cannot agree on payment; and
- the parties agree on payment for the part-performance but not the actual amount.

3.7 The Assignment of Contractual Rights and Duties

An "assignment" is a transfer of the rights of a party to a property or to a contract to another party who then stands in his place. Assignment of policies is a common feature in insurance. Assignments of insurance policies are, in fact, utilised by banks to secure repayment of loans in the event of the borrower's death or (Total and Permanent Disability) TPD. Assignments of insurance policies are also used in partnerships and businesses where keyman insurance is relevant. It is an acceptable method of business transaction.

An assignment takes places when the liabilities imposed or the rights acquired under a contract between *A* and *B* are transferred to *C* who is not a party to the original contract.[18]

An assignment in insurance means the transfer of one's rights and interest in the policy to another. Under an assignment basically, three parties are involved. A person who transfers rights under the policy is called the assignor while the person to whom the rights are transferred is called the assignee and the third party is the insurer.

Only marine policies and life policies are assignable. The general rule is that a contract of insurance is a highly personal contract and as such is not assignable. **Poh Chu Chai** writes:[19]

> *"A contract of insurance constitutes a highly personal contract and as a general rule, such a contract is generally not assignable."*

R. C. Kohli explains:[20]

> *"Transfer of interest from one to another is called assignment. In insurance also when rights and obligation under the contract are transferred from one to another, the same is called assignment of the policy. There can be another assignment in insurance which is assignment of benefits under the policies. Assignment of policy and assignment of benefits are quite*

18 Marylebone, Q. "Paragraph 336." *Halsbury's Laws of England.* 4th ed., vol. 9, Reissue.
19 Poh, C. *Principles of Insurance Law.* 5th ed., Butterworths Asia, 2000, p. 1193.
20 Kohli, R. *An Introduction to Insurance Practice and Principles in Singapore and Malaysia.* Singapore Insurance Training Centre, 1982, p. 77.

distinct. Whereas in the former all the rights and obligations are transferred, in the latter only benefits (i.e. money due under the policy etc) are transferred. In insurance the assignment means assignment of rights under the contract. An assignee for all purposes becomes the owner of the policy and enjoys all rights thereunder. However, by assignment no change is made in the subject matter insured by the policy and it remains unaltered."

This discussion is therefore confined to life insurance contracts only. For the purposes of life insurance, there are two forms of assignments namely:

1) assignment of the policy; and
2) assignment of the proceeds of the policy, i.e. not the policy itself but the right to recover the policy moneys.

Both, the policy and the proceeds of the policy can be assigned either under Section 4(3) of the *Civil Law Act 1956* or in equity.[21]

Where the policy is assigned, the assignee becomes the policy owner and he can deal with the policy as though he is the policy owner. The original policy owner loses all his rights and interests in the policy.

Where the proceeds of the policy are assigned, the policy owner remains the policy owner throughout the policy period. The assignment only takes effect when the policy moneys become payable.

Paragraph 7, Schedule 10 of the FSA provides for assigned or pledged policies:

Assigned or pledged policy moneys

7. (1) Notwithstanding a nomination under paragraph 2 or the creation of a trust under subparagraph 5(1), where the policy moneys, wholly or partly, have been pledged as security or assigned to a person, the claim of the person entitled under the security or the assignee shall have priority over the claim of the nominee and subject to the rights under the security or the assignment being preserved, the licensed insurer shall pay the balance of the policy moneys to the nominee.

(2) Where more than one person is entitled under the security or the assignment, the respective rights of the persons entitled under the security or the assignment shall be in the order of priority according to the priority of the date on which written notification of the security or the assignment was given to the licensed insurer, both security and assignment being treated as one class for this purpose.

21 Ng, K. "Assignment of Life Policies." *Malayan Law Journal,* vol. 3, 2007, p. I.

In Islamic law, generally the *Syariah* permits the transfer of rights and obligations arising from a contract. The legal effect of such a transfer is an assignment of rights and obligations from an original contracting party to a third party. There is no requirement that there be a pre-existing relationship between the third party and the original contracting party that makes the transfer. However, the *Syariah* permits assignment in a narrower scope of circumstances, depending on the nature of the contract and jurisdiction.

3.7.1 Effect of an Assignment

Right to Sue

An absolute assignee under Section 4(3) of the *Civil Law Act 1956* may sue in his own name without the assistance of the insured. An equitable assignee acquires only beneficial interests and therefore must sue with the assignor as co-plaintiff, if he consents, or if the assignor does not consent, to join the assignor as a co-defendant with the insurer.[22]

Discharge

An absolute assignee under Section 4(3) can give a good discharge for the policy moneys without the concurrence of the assignor. An insurer may safely pay to an assignee the policy moneys provided they had no notice of any competing equitable claims or if they had, they had paid on an assignment that they had the earliest notice of.

Further Dealings

The interest of the absolute assignee under Section 4(3) will not be affected if the assignor subsequently deals with the policy for his own purpose as a third party taking the policy from the assignor will take the policy with notice of the assignee's interest.

For equitable assignments, the person having possession of the policy seems to have better rights over a subsequent assignee, who does not have such possession. Notice to the insurer is also very important in view of the priority for payment of the policy moneys.

3.7.2 Priority of Assignments

Paragraph 7(2) of Schedule 10 of the FSA has reverted the position on priority to the common law position i.e. that the priority is based on the date the insurer was notified of the assignment and not the date of actual assignment. This only applies to the payment of policy moneys by the insurer. If there are two assignees claiming the policy moneys, the assignee, whose assignment was notified to the insurer in writing earlier, will have priority and payment to the assignee will give the insurer a valid discharge.

22 Lian Mah Motor Sdn Bhd v Ding Nguk Bing & Anor. (1991). *Mallal's Digest, Paragraph 691.*

Summary

The law of contract is about the enforcement of promises. Not all promises are enforced by Courts. To enforce a set of promises, or an agreement, Courts look for the presence of certain elements. When these elements are present, a Court will find that the agreement is a contract. The Court must initially determine whether the agreement constitutes a contract. In order for an agreement to be considered a valid contract, it must satisfy certain requirements. One party must make an offer and the other party must accept it. There must be an exchange of promises, meaning that omething of value must be given in return for a promise. In addition, the terms of a contract must be sufficiently definite for a Court to enforce them. As a student, you need to be aware of the elements required to constitute an enforceable contract.

To say that we have a contract means that the parties have voluntarily assumed liabilities with regard to each other. The process of agreement begins with an offer. For a contract to be formed, this offer must be unconditionally accepted. The law imposes various requirements as to the communication of the offer and the acceptance. Once there has been a valid communication of the acceptance, the law requires that certain other elements are present. If these elements are not present, a Court will not find that a contract exists between the parties. In the absence of a contract, neither party will be bound to the tentative promises or agreements they have made. It is thus, of critical importance to determine whether or not a contract has been formed.

The concept of "consideration" is the principal way in which Courts decide whether an agreement that has resulted from the exchange of offer and acceptance should be legally enforceable. It is only where there is an element of mutuality about the exchange, with something being given by each side, that a promise to perform will be enforced. A promise to make a gift will not generally be treated as legally binding. It is the presence of *consideration* which makes this promise binding as a contract. It is possible to see consideration as an important indication that the parties intended their agreement to be legally binding as a contract.

Although there is a separate requirement of an intention to create legal relations, it is clear that historically, this requirement was also fulfilled by the requirement of consideration.

We have examined many of the basic requirements necessary for the formation of an enforceable contract: *offer, acceptance* and *consideration*.

To these requirements, we must add four more:

1) that the parties must have the legal capacity to enter into contracts;
2) that the parties intend to create legal relations;
3) that the terms of their agreement are certain and not vague; and
4) that their agreement is a complete agreement that does not need further development or clarification.

Once all of these requirements are present, Courts will, in the absence of any vitiating elements, recognise an agreement as an enforceable contract.

Further Reading

- Poh, Chu. *Principles of Insurance Law.* 5th ed., Butterworths Asia, 2000.
- Kohli, Ramesh. *An Introduction to Insurance Practice and Principles in Singapore and Malaysia.* Singapore Insurance Training Centre, 1982, p. 77.

Review Questions

1. What term refers to the party making a proposal in a contract?
a) Promisee
b) Promisor
c) Offeree
d) Trustee

2. What is the primary purpose of the doctrine of privity of contract?
a) To allow third parties to enforce contract terms
b) To ensure that only parties to the agreement can enforce the contract
c) To ensure all contracts are in writing
d) To make contracts voidable at the option of either party

3. A consumer buys a faulty product and seeks a refund based on a breach of contract. What principle of contract law is the consumer relying on?
a) Privity of contract
b) Consideration
c) Acceptance
d) Condition

4. An individual agrees to sell a car to a buyer but later discovers the car was stolen before the agreement. What is the status of this contract?
a) Valid
b) Void
c) Voidable
d) Enforceable

5. What remedies might be available for a misrepresentation in a contract?
I. Rescission
II. Damages
III. Specific performance
IV. Injunction
a) I and II
b) II and III
c) I and IV
d) III and IV

6. What distinguishes a contract discharged by performance from one discharged by agreement?
a) A contract discharged by performance requires court approval
b) A contract discharged by agreement involves mutual consent
c) Performance discharge requires an anticipatory breach
d) Agreement discharge occurs only through frustration

7. If a contract is rendered void due to a law change making performance illegal, how is the contract discharged?
a) Performance
b) Agreement
c) Breach
d) Frustration

8. A tenant informs the landlord that they will not be able to pay rent two months before it is due. This is an example of which type of breach?
a) Performance breach
b) Anticipatory breach
c) Agreement breach
d) Frustration breach

9. In which situations might quantum meruit apply?
I. A defendant has prevented a plaintiff from completing their contractual duties.
II. The contract terms are clear and unambiguous.
III. The parties agree on payment for part-performance but not the amount.
IV. The plaintiff has suffered a minor inconvenience.
a) I and II
b) I and III
c) II and IV
d) III and IV

10. Which of the following are true about the remedies for breach of contract?
I. Rescission allows the contract to be reversed and parties restored to their original positions.
II. Specific performance is typically granted when monetary damages are adequate.
III. Damages aim to compensate the injured party for losses.
IV. An injunction is a remedy at common law.
a) I and III
b) II and IV
c) I, III, and IV
d) II and III

You will find the answers at the back of the book.

4 The Law of Agency

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Learning Outcomes

After completing this topic, you should be able to:

- *Understand the basic principles of agency, including:*
  - *The definition of "agency"*
  - *Types of agents*
  - *Authority and power in the Law of Agency*
- *Discuss how agency is created, including express appointment, implied appointment, usual authority, ostensible authority, ratification, necessity, and estoppel*
- *List the duties of principal and agent*
- *Explain the authority of the agent*
- *Explain how agency is terminated*

Why this Topic is Important

This topic is important because "Agency" is a common, indeed vital, legal relationship. It appears in many areas of the law, including the solicitor and client relationship, employment law, partnership law, corporate law, and the buying and selling of properties, land and goods. It plays a vital role within the insurance industry as insurance agents are pivotal to the success of an insurance company, namely in the provision of insurance and the ongoing customer care of its clients.

Introduction

"Agency" is a relationship that is pivotal to or relevant to numerous businesses and commercial transactions. Agency is a triangular relationship that allows or constructs the creation of a legal relationship between a person (the principal) and a third party. This is done *through intermediation by* the agent as *a distribution channel*. An agent is a person who represents and is required to act in the best interests of the principal.

It is important for an insurance employee or a member of the public to understand some of the main principles relating to agency. Most, if not all, of us have acted as agents or have appointed agents to act on our behalf. Businesses usually act as, and employ or engage, agents in the course of carrying on their respective businesses. Outsourcing certain of an organisation's functions and work to agents (who may be individuals or companies) is quite common nowadays. Agency is a common, indeed vital, legal relationship. It appears interwoven in many areas of the law, including the solicitor and client relationship, employment law, insurance law, partnership law, corporate law, buying and selling of properties, land and goods.

Which are the three relationships in an Agency?

Principal-agent, Principal-third party, and Agent-third party.

4.1 Nature of Agency

A useful definition for nature of agency is:[23]

> *… (1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.*
>
> *(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.*
>
> *(3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.*
>
> *(4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority, and hence no power, to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.*

When a contract is made by the agent with a third party, can it be made without disclosing who the principal is? Against whom can the third party enforce the contract when the principal is undisclosed?

Yes. Contracts made by an agent with third parties can be for a disclosed or undisclosed principal. The contract can be enforced against either the agent or the principal.

4.1.1 The Law of Agency

The law of agency in Malaysia is mainly found in Part X (that is, Sections 135 to 191) of the *Contracts Act 1950* (Act 136). An "agent" is defined as *"a person employed to do any act for another or to represent another in dealings with third persons"*.

23 Bowstead, W., and F. Reynolds. *Bowstead on Agency*. 19th ed., Sweet & Maxwell, 2010.

Section 135 of the *Contracts Act 1950* (Act 136) reads:

> *…"Agent" and "principal"*
>
> *135. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal"...*

The person for whom such act is done, or who is so represented, is called the "principal".

Example

Agent and Principal

If Ali appoints Muthu to buy some goods on his behalf, Ali is called the "principal" while Muthu is his "agent".

The "agent" may be described as the person by whom the principal acts or is represented. And, the "third person/party" as the person with whom the agent brings the principal into a legal relationship.

In other words, agency is the relationship which subsists between the principal and the agent, who has been authorised to act for him or represent him in dealings with others. Thus, in an agency, there are in effect two contracts, i.e.:

1) The first, made between the principal and the agent from which the agent derives his authority to act for and on behalf of the principal.
2) The second, made between the principal and the third party through the work of the agent.

Section 136 of the *Contracts Act 1950* (Act 136) provides that any person who is eighteen years old or above and who is of sound mind may be a principal. As between the principal and third persons, any person may become an agent; but persons of unsound mind and who are below eighteen years of age are not liable towards their principals for acts done by them as agents, as provided for in Section 137 of the *Contracts Act 1950* (Act 136).

Example

Agent and Principal – liability of underage agents

If Ah Fong employs Timmy, who is sixteen years old, to buy some goods from Samy on his behalf and Samy supplies the goods, Ah Fong cannot allege that he is not liable to pay for the goods just because Timmy is not of the age of majority. Ah Fong is still liable to pay for the goods.

However, if Timmy had taken the goods and sold them for his own benefit, Timmy is not liable to pay Ah Fong for those goods.

In agency law, authority means the power, right or commission that an agent has or appears to have to do acts or to make contracts with third parties on the principal's behalf. Thus, whilst authority is a factual situation, power is a legal concept. Authority is the sum of the acts which the principal and the agent have agreed that the latter can do and in so doing bind the principal. Section 141 of the *Contracts Act 1950* (Act 136) provides:

> *… Extent of agent's authority*
>
> *141. (1) An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do the act.*
>
> *(2) An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.*
>
> *ILLUSTRATIONS*
>
> *(a) A is employed by B, residing in London, to recover at Teluk Intan a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.*
>
> *(b) A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business…*

In other words, when the principal confers authority on the agent; this means that the principal and agent have agreed that certain acts should be done by the agent on the principal's behalf. Thus, if the principal confers authority on the agent (factual situation) then the agent will have the power to affect the principal's relations by exercising this authority (legal situation).

The concept of "power" differs from that of "authority", in that power is a legal concept since power may exist where authority is lacking. Power and authority emanate from different sources. The existence and extent of the power are determined by public policy. Authority, on the other hand, is limited by the expression of the principal's will as contained in the agreement with the agent. As a result, in certain cases an agent who is neither expressly nor apparently authorised to do certain things may nevertheless have the power to bind his principal and confer rights on a third party.

ACTIVITY

Find and read Section 129 of the *Financial Services Act 2013* (Act 758). Conduct research and find out what is the penalty applicable when a licensed insurer or insurance agent, fraudulently induces a person to enter into or offer to enter into a contract of insurance with it or through him.

In addition to provisions under the *Contracts Act* governing the rights and duties of an agent, insurance agents are governed under the FSA. Specific provisions governing the conduct of

insurance agents are laid down in Schedule 7 and Schedule 9 of the FSA. In particular, Schedule 9 covers pre-contractual disclosure and representations and remedies for misrepresentation. Where there is a conflict or inconsistency between the *Contracts Act* and a provision of Schedule 9, FSA, provisions of Schedule 9 shall prevail. This means the duties stated under Schedule 9 override the general provisions as stated in the *Contracts Act*.

The regulator of the insurance industry, Bank Negara (BNM) has set the minimum standards of conduct via the relevant BNM Guidelines, which further elaborate on the standard of conduct of insurance agents and insurers.

Within the Malaysian Insurance Industry, the ethics and code of conduct for insurance agents are governed by the *Inter-Company Agreement on General Insurance Business* (ICAGIB). The Inter-Company Agreement on General Insurance Business was made on 24 April 1992, amongst all members of Persatuan Insuran Am Malaysia (PIAM) with the objectives of:

- promoting and protecting the interests of the general insurance industry, for the mutual benefits of all the members of PIAM and the public, in connection with general insurance business;
- regulating and controlling the conduct and activities of every person transacting general insurance business in Malaysia; and
- monitoring the tariffs, commissions, and remuneration applicable to general insurance business.

Article IV of the ICAGIB provides for the authorisation of agents, commission payment, compliance with regulations, scope of agency, suspension of registered agent and cancellation of agency and record keeping by the insurers.

The rules for the registration and regulation of general insurance agents are enacted under the Third Schedule of the ICAGIB. The rules, known as the General Insurance Agents Registration Regulations, were formulated in consultation with Bank Negara Malaysia (BNM) to provide the method of recruitment and supervision of intermediaries with a view to regulate, monitor and control the intermediaries' professional conduct, work and activities and thereby create a cadre of dedicated and disciplined intermediaries with high professional standards.

4.1.2 Sample of the Agency Agreement

AGENCY – PRODUCER AGREEMENT ("Agreement")

_____ Mutual Insurance Company (hereafter referred to as the **Company**) and the producing agent (hereafter referred to as **Agent**), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, agree as follows:

1. **Definitions Applicable to this Agreement.** As used in this **Agreement**, the following terms have the following meanings:
   a. "**Premiums Written**" means the premiums charged by the **Company** on policies issued or renewed by the **Company** for which **Agent** is listed as the producing agent. **Premiums Written** shall include premiums to be paid under installment plans for the policy term on policies issued or renewed, but shall not include premiums refunded or to be refunded during the next annual policy period to applicants and policyholders as determined by the **Company**.
   b. "**Retirement**" means the permanent cessation of the **Agent's** representation of the **Company**.
   c. "**Vested Agent**" means an individual who has entered into **this Agreement** and who has completed the **Vesting Period**.
   d. "**Vested Commission Payment**" means the commission payment owed by the **Company** to a **Vested Agent** under Section (8)(f) of this **Agreement**.
   e. "**Vesting Period**" means three consecutive years representing the **Company** as an agent. The **Vesting Period** includes time for which the **Agent** has acted as an agent for an insurance company that is merged into the **Company**, provided that on the effective date of the merger, **Agent** enters into this **Agreement** with the **Company**.
2. **Authority**
   a. The **Agent** agrees to represent the interests of the **Company** in good faith.
   b. The **Agent** agrees to abide by all applicable Malaysian laws and regulations and agrees to inform **Company** of any enforcement action taken against him/her by any governmental agency or regulatory body with jurisdiction over the **Agent**. The **Agent** also agrees to abide by all regulations and instructions, either written or oral, transmitted by the **Company**, respecting the conduct of the business covered hereby, including all underwriting rules and regulations adopted from time to time by the **Company's** Board of Directors in its sole discretion.
   c. The **Agent** agrees not to bind the **Company** on business which does not meet the requirements of the **Company's** current binding rules. A copy of the current binding rules is attached to this **Agreement** and may be changed by the **Company** from time to time in the Company's sole discretion and distributed to the **Agent**.

d. Nothing contained herein shall be construed to create the relation of employer and employee between the **Company** and the **Agent**. The **Agent** has full power and authority to receive and to make proposals for insurance covering such classes of risk as the **Company** may authorise, subject to underwriting rules of the **Company**.

3. **Premiums –** All premium billing will be on a direct bill basis between the **Company** and policyholders. The Agent has no authority to collect any premiums or to extend any credit on the Company's behalf. Any credit extended for payment of premiums to policyholders by the **Agent** shall be the sole risk and responsibility of the **Agent**.
4. **Ownership of Expirations –** All expirations shall be the property of the **Company** and shall remain in its undisputed possession. The **Company** has the immediate right to sell, transfer, or assign business covered by this **Agreement**.
5. **Cancellation and Premium Adjustments –** The **Company** shall at all times have the right to reject applications; amend, cancel or nonrenew any policy in accordance with policy provisions and Malaysian law; and return unearned premium to the policyholder. The **Agent** agrees to have any advance commissions on such business adjusted to reflect all such return premiums.
6. **Property of Agents and the Company –** Title to all undelivered policies, books, supplies and other property furnished to the **Agent** by the **Company** shall remain the property of the **Company** and shall be returned, along with all other indicia of agency, immediately to the **Company** upon termination of this **Agreement**.
7. **Losses or Claims –** The **Agent** agrees to report all losses and claims to the **Company** by telephone or mail within 72 hours of knowledge of said claim or loss. The **Agent** shall have no authority to adjust claims.
8. **Termination; Commissions in the Event of Termination**
   a. Either party may terminate this Agreement at any time upon 90 days' written notice to the other.
   b. Either party may terminate this **Agreement** immediately upon giving notice to the other for any of the following reasons:
      i. Fraud or other criminal activity arising out of or related to **Agent's** representation of the **Company**.
      ii. Suspension or revocation of **Agent's** license by any regulatory authority of competent jurisdiction.
      iii. Gross or willful misconduct.
   c. This **Agreement** shall terminate automatically on the effective date of the sale, transfer or merger of **Agent's** business unless **Company**, in its sole discretion, appoints the **Agent's** successor.
   d. Subject to Paragraphs (b) and (c) of this Section, either party may terminate this Agreement for breach by the other party after giving the other party notice and a 30-day period in which to cure such breach.

e. All policies and policyholder information held by **Agent** (subject to Section 4) of the **Agreement** and are the sole property of the **Company**. Upon termination, the **Agent** shall return all such information, in whatever form held by the **Agent**, to the **Company**.

f. Other than as provided in paragraph (g) below, in the event of termination, **Agent**, if he/she is not a **Vested Agent**, shall be entitled to the commission on **Premiums Written** attributable to policies with effective dates prior to the effective date of **Agent's** termination until the first expiration date of each such policy following the effective date of **Agent's** termination. In the event that the **Agent** does not agree with the **Company's** calculation of **Written Premium** at **Agent's** termination, he/she shall have the right to an accounting to be prepared by the **Company** no later than fourteen (14) months following the effective date of **Agent's** termination.

g. In the event of the **Retirement** or termination of a **Vested Agent**, the **Company** agrees to pay such **Vested Agent** a **Vested Commission Payment** calculated under Paragraph (i) below. The **Vested Agent** may, instead, sell his/her agency to another qualified agent under the terms outlined in Paragraph (ii) below.

   i. Upon **Retirement, Vested Agent** will receive a **Vested Commission Payment** that is equal to _____% of the annual average of the commission paid or owed to **Agent** by **Company** on **Premiums Written** during the 36-month period immediately preceding the date of his/her **Retirement**. The commission for the final year of this payment will be determined by applying current commission rates to premium in force at the date of **Retirement**, if and only if that date does not fall at December 31st. The **Vested Agent** may choose to receive the total of the **Vested Commission Payment** under this Paragraph (i) on **Retirement**, or all or part of the **Vested Commission Payment** may be deferred for up to six months after the date of his/her **Retirement** at the request of the **Vested Agent.**

   ii. The **Vested Agent** may choose to sell his/her agency to a successor agent who is qualified and who, in the **Company's** sole discretion, has been approved by and appointed as an agent of the **Company**. The **Vested Agent** is solely responsible for financing arrangements with the successor agent. The **Company** will comply with reasonable requests for records to assist the **Vested Agent** in determining recent commission levels or other pertinent information. The **Vested Agent's** sale of his/her agency transfers the **Vested Agent's Vested Commission** rights but does not transfer ownership of renewals which remain the property of the **Company**. In the event that the **Agent** has not completed the **Vesting Period,** the length of time that the **Agent** has been operating under this **Agreement** will be credited to the successor agent.

h. For a period of two years following termination of this **Agreement**, **Vested Agent** agrees not to do, directly, or indirectly, any of the following acts:
   i. **Vested Agent** will not either personally or through any other person, agency, company, or organisation directly or indirectly induce, attempt to induce or assist anyone else in inducing or attempting to induce any policyholder of the **Company** for which **Vested Agent** was the agent of record at the time of his/her termination to lapse, cancel, replace, or surrender any insurance policy in force with the **Company**.
   ii. **Vested Agent** will not induce or attempt to induce any other **Company** agent or employee to terminate any relationship with the **Company**.

9. **Assignment –** The **Agent** has no authority to assign this **Agreement** without the written consent of the **Company**.
10. **Advertising –** The **Agent** has no authority to develop or use any advertising or solicitation materials of any kind representing the **Company** without the **Company's** prior consent.
11. **Independent Contractor –** The **Agent** is an independent contractor and is not an employee of the **Company**. None of the employees of the **Agent** shall be deemed to be employees of the **Company**, nor shall they have authority to bind business on behalf of the **Company**. The **Company** shall not be responsible for any salaries, expenses, or compensation other than commissions to the **Agent**.
12. **Errors and Omissions Insurance –** Every **Agent** who elects to join in this **Agreement** agrees to obtain Errors and Omissions insurance, with limits of MYR1 million each occurrence, which shall remain in force throughout the time this **Agreement** remains in effect. Insurance limits below the required limits must be agreed to in writing by the **Company**.
13. **Cases of Disagreement –** Disagreements, if any, which arise with respect to the terms of this **Agreement** which cannot be settled between the **Company** and the **Agent** shall be submitted to two arbitrators, one each selected by the parties. If the two arbitrators cannot settle the disagreement, they shall select an umpire who is disinterested and who is experienced in agency contracts. A decision, in writing, submitted by any two of the persons acting hereunder, shall be binding upon all parties to this **Agreement**. Cost, if any, of the arbitration shall be born equally by the **Company** and the **Agent**.
14. **Commissions –** Commissions paid to the **Agent** by the **Company** shall be by supplemental schedule, which shall be attached to this **Agreement** and which may be amended from time to time by the **Company** in its sole discretion.

IN WITNESS WHEREOF the parties

AGENT **WITNESS**

_____ _____

Date: _____

_____ **Mutual Insurance Company**

_____ _____

Company Officer Company Officer

Date: _____

4.2 Agents, Principals and Third Parties

The evolution of commercial practice, coupled with the need for various functional classifications of intermediaries, have resulted in the recognition of a number of different kinds of commercial 'agents'. Some of the common types of commercial 'agents' are described below.

A "broker" is an intermediary who is engaged to make contracts between two principals (as counterparties) engaged in some aspect of trade, commerce or navigation. The broker's role is confined to the negotiation of contracts of sale and purchase. The broker does not obtain possession of the goods from the principal; whereas a factor does. A "factor" is an agent who has more extensive powers to act for a principal than a broker possesses. At common law, the factor is an agent for sale who is entrusted with possession of goods belonging to the principal for sale and who sells the goods in the name of the agent without disclosing the name or existence of the principal. The concept of the factor has been adopted by legislation where the factor has in some cases been termed a mercantile agent. The factor as a type of agent entrusted with the sale of goods is also applicable in the context of sales of goods by a non-owner. The broker is generally taken to be acting for a principal (even if the name of the principal is not disclosed). In some industries and professions such as insurance and real estate, the term "broker" is used to denote the agent who is charged with particular functions on behalf of particular clients.

A "commission agent" (or "commission merchant") is an agent appointed by a principal to sell goods (more commonly) or to buy goods (less commonly) on behalf of the principal. The reference to "commission" is not to the method of remuneration, but to the function, mandate or commission with which that the agent is charged.

A *"del credere"* agent is an agent who assumes a superadded duty to ensure the principal is paid by the third party. This superadded duty is compensated for by the payment of a *del credere* commission by the principal. The form of a *del credere* agency is that the *del credere* agent promises to pay the principal the price of the goods if the third-party defaults. The nature of a *del credere* agent's liability is that the agent assumes a secondary liability that is only invoked if the third-party defaults in paying the unpaid price of the goods (or whatever is payable by the third party under the principal-third party contract).

Del credere liability is a tool that can be used by a principal to minimise and spread the risk of non-payment by the third party under the sale contract. *Del credere* risk means the risk of non-payment by the third party and therefore, *del credere* agents need to be very careful in the selection of customers and to inform their principals of any adverse factors that would influence the decision of the principal to accept or reject the order placed. Thus, the *del credere* agent's risk is matched by the *del credere* commission. The amount of the *del credere* commission is factored into the agent's commission.

Powers of attorney are legal instruments under which principals ("donors") confer authority on agents ("attorneys" or "donees") to perform certain acts for the principal. Unlike most other agency relationships, powers of attorney are governed by statute, viz. the *Powers of Attorney Act 1949*.

Often, agents are expressly appointed by way of powers of attorney and these attorneys may deal with financial institutions. When financial institutions deal with attorneys, they must ensure that the attorneys' authority and power to do the acts in question are clearly laid down in the power of attorney document. When a person gives another a power of attorney, it means that the person authorises another to act on his or her behalf. Bank customers often allow others to operate their bank accounts; for example, when they are too busy, or they are ill or frequently abroad. Legally, this can be achieved by a power of attorney or by giving a mandate. For the operation of a bank account, the mandate is preferred in practice. A mandate, in the bank's standardised format is a letter to the bank concerned authorising another person to operate the account. On the other hand, the Power of Attorney, being a more formal document, is usually drawn up by a lawyer.

When construing a power of attorney, general words must be construed in the light of the stated objects of the power of attorney. This ensures that the power is exercised only in furtherance of the purpose for which the authority was granted. In West Malaysia, powers of attorney are governed by the *Powers of Attorney Act 1949* and must be registered with the High Court in order to be valid. A search must be conducted at the High Court Registry to confirm that the power of attorney has been registered and not revoked by the donor.

Under Section 5 of the *Powers of Attorney Act 1949*, a power of attorney may be revoked under the following circumstances:

i) the donor registers with the High Court, a written notice of revocation;
ii) the donee registers with the High Court, a written notice of renunciation;
iii) the donor or the donee has died;
iv) the donee has become of unsound mind;

v) the donor has been adjudged to be of unsound mind; or
vi) a receiving order has been made against the donor in bankruptcy.

A power of attorney created in some other way other than what is stated in the *Powers of Attorney Act 1949* must be struck down as null and void and of no effect.
When construing a power of attorney, general words need to be viewed in the light of the stated objects of the power of attorney.

A power of attorney is construed strictly by the Courts according to well-recognised rules. The powers of attorney are interpreted as giving only such authority as they confer expressly or by necessary implication.

4.3 Agents: The Scope of their Authority

An agent's acts are binding on the principal if they are done within the agent's authority. If an agent does an act, which exceeds that authority so given, the principal is not bound unless he adopts and ratifies the unauthorised act.

An agent's authority may be *actual* or *apparent*. "Actual authority" is authority expressly given by the principal (orally or in writing), or implied from the express authority given, from the circumstances of the case, custom or usage of trade, and the conduct of parties. On the other hand, "apparent" or "ostensible authority" is that, which is not expressly given by the principal but which the law regards the agent as possessing although the principal has not consented to his exercising such authority.

Secret or private restrictions on the authority of the agent do not affect a third party who does not know of such restrictions and who has acted in good faith in relying on the agent's apparent authority.

An insurance agent who solicits or negotiates a contract of insurance as an agent for the insurer is deemed, under paragraph 12 of Schedule 9, FSA, for the purpose of the said contract of insurance, to be the agent of the insurer. His knowledge, statement made or act done is deemed to be that of the insurer's. This applies even when the insurance agent has contravened any provisions of the Act.

4.4 Creation of Agency

Agency can be created in a number of ways. Like any other contract, a contract of agency can be expressed or implied from the circumstances and the conduct of the parties. In other words, the authority of an agent may be expressed (i.e. given by words spoken or written) or implied (i.e. inferred from things spoken or written or from the ordinary course of dealings).

Example

Creation of agency

Consider that *X* lives in Shah Alam and owns a shop in Kuala Lumpur. The shop is managed by *Y* who normally orders goods from *Z* in *X*'s name for the purpose of the shop and *Y* then pays for the goods out of *X*'s funds with *X*'s knowledge. One can say that *Y* has an implied authority from *X* to act as his agent in the purchase of the goods.

Case Law *Creation of agency*

CASE 4-1 *KGN Jaya Sdn Bhd -v- Pan Reliance Sdn Bhd* [1996] 2 CLJ 611

In the Malaysian Court of Appeal case of *KGN Jaya Sdn Bhd -v- Pan Reliance Sdn Bhd*, the respondent, an insurance agent for *Mercantile Insurance Sdn. Bhd.*, claimed to have appointed the appellant as its sub-agent to sell policies of the latter.

The respondent alleged that by the appointment, the appellant was authorised *inter alia* to receive premiums in respect of the cover notes it had sold but was obliged to submit the sums collected to the respondent after deducting the commission due to it. The respondent further alleged that the appellant had failed to remit to it the premiums so collected and so made a demand for the same amounting to RM175,024.41.

Following the appellant's denial of any knowledge of the claim, the respondent issued a writ and subsequently moved for summary judgement. The appellant did not dispute that between 1990 and 1991, statements of account were sent to it by the respondent.

Before the learned Judge, the appellant again pleaded pure denial. However, having pleaded that, the appellant went on to plead, *in seriatim*, that the agency was illegal, having contravened the Co-operative Societies Act 1948 and the Insurance Act 1963.

The learned Judge found no triable issues and accordingly entered judgement for the respondent. In this appeal, the appellant argued that summary judgement had been wrongly entered as the Judge, *inter alia*, had overlooked the point that there was no written agreement to support the claim that the appellant had been appointed as the respondent's sub-agent.

Gopal Sri Ram JCA, in delivering the judgement of the Malaysian Court of Appeal, held at page 616 paragraphs d – i and page 617 paragraphs a – e: that the law does not require that an agency or sub-agency agreement must be in writing. It may be express or implied as may be gathered from the facts and circumstances of a case and from the conduct of the parties.

Section 138 of the *Contracts Act 1950* (Act 136) provides that no consideration is necessary to create an agency. Generally, an agency may arise in the following ways:

1) By express appointment by the principal (actual express authority);
2) By implied appointment by the principal (actual implied authority);

3) By the agent occupying a position which would normally carry with it authority to do an act of the kind in question (usual authority);
4) By the principal adopting the act of an agent via the process of ratification when the agent acted without the authority of the principal (agency by ratification);
5) By necessity, i.e. by the law constructing an agency between a putative principal and a putative agent under the operation of law doctrine (agency by operation of law); and
6) By the doctrine of *estoppel* or "holding out", that is, by the principal representing to the third party that the agent had authority to do the act in question when in fact there was no underlying grant of authority for the agent so to act (agency by representation or ostensible authority).

4.4.1 By Express Appointment

This involves the actual consent of the principal and the agent. Agency is a consensual relationship.

Thus, agency entails a grant of express power (or authority) by the principal to the agent. Express appointment may be in a written or oral form. An example of an express appointment made in writing is a "Power of Attorney". Even a letter written or words spoken may be effective in appointing an agent. Actual express authority is one of the sub-sets of actual authority, the other subset being actual implied authority.

4.4.2 By Implied Appointment

Actual implied authority is by way of the implied consent of the principal and the agent. This is derived from the words and conduct of the parties in the way they have acted in connection to one another.

The law can infer the creation of an agency by implication when a person by his words or conduct holds out another person as having authority to act for him as provided for in Section 140 and *Illustration* of the *Contracts Act 1950* (Act 136). If, for example, he allows another person to order goods on his behalf and habitually pays for them, an agency may be implied. In such a case, he will be bound by the contracts as if he has expressly authorised them. Section 140 and *Illustration* of the *Contracts Act 1950* (Act 136) reads:

> *… Definitions of express and implied authority*
>
> *140. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.*

ILLUSTRATION

A owns a shop in Kajang, living himself in Kuala Lumpur, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purpose of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop…

It should also be noted that by virtue of Section 7 of the *Partnership Act 1961*, partners are each other's agents when contracting in the course of the partnership business.

4.4.3 By Usual Authority

Usual authority of the agent is created by the agent occupying a position which would normally carry with it authority to do an act of the kind in question.

4.4.4 By Ratification

"Ratification" is a general law doctrine which applies not only in agency law but in other areas such as contract law, the law of tort and company law. Generally, the effect of ratification is that it converts an unauthorised act into an act clothed with authority. In the context of agency, ratification occurs when an agent does an act without the authority of the principal, but because of the subsequent conduct of the principal, the unauthorised act effectively becomes ratified as the principal's own act as if the principal had previously authorised it. In other words, the ratification cures the original defect. Agency by ratification can arise in any one of the following situations:

1) An agent who was duly appointed has exceeded his authority;
2) A person who has no authority to act for the principal has acted as if he had the authority.

When any one of the abovementioned situations arises, the principal can either reject the contract or accept the contract so made by virtue of Section 149 of the *Contracts Act 1950* (Act 136).

Section 149 reads:

…Right of person as to acts done for him without his authority.

Effect of ratification

149. Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown the acts. If he ratifies them, the same effects will follow as if they had been performed by his authority…

When the principal accepts and confirms such a contract, the acceptance is called ratification. Ratification may be expressed or implied by virtue of Section 150 of the *Contracts Act 1950* (Act 136). Section 150 provides as follows:

> *… Ratification may be expressed or implied*
>
> *150. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.*
>
> *ILLUSTRATIONS*
>
> *(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.*
>
> *(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan…*

The effect of ratification is to render the contract as binding on the principal as if the agent had been properly authorised beforehand, as provided for in Section 149 of the *Contracts Act 1950* (Act 136). Ratification is retrospective, i.e. it dates back to the time when the original contract was made by the agent and not from the date of the principal's ratification.

Example

Creation of agency – by ratification

On 2 January 2009, Ahmad appointed Bobby as his agent to buy a car not exceeding RM40,000. On 5 January 2009, Bobby went to *ABC Motors Sdn Bhd* and ordered a car costing RM50,000, telling *ABC Motors Sdn Bhd's* salesman that he was buying the car on Ahmad's behalf. On 12 January 2009, *ABC Motors Sdn Bhd* delivered that car to Ahmad. If Ahmad confirms and adopts the contract on 12 January 2009, then Bobby is said to be his agent through ratification. Alternatively, Ahmad can also reject the contract on 12 January 2009 since Bobby has exceeded his authority.

A contract can only be ratified under the following circumstances:

1) The act or contract must be unauthorised.
2) The agent must, at the time of the contract expressly act as agent for the principal by virtue of Section 149 of the *Contracts Act 1950* (Act 136). He must not allow the third party to think that he is the principal.
3) The agent must have a principal, who is in actual existence or capable of being ascertained, when the contract is made.
4) The principal must have contractual capacity at the time when the contract is being made and at the time of ratification.
5) The principal must, at the time of ratification, have full knowledge of all material facts, unless it can be shown that he intends to ratify the contract whatever the facts may be and assume responsibility for them by virtue of Section 151 of the *Contracts Act 1950* (Act 136).

6) The principal must ratify the whole act or contract.
7) The ratification must not injure a third party.

To summarise, "ratification" is a juridical act, which converts a previously unauthorised act into an authorised act via the principal consenting to the previously unauthorised agency relationship.

4.4.5 By Necessity

An agency of "necessity" may be created if the following three conditions are met:

1) It is impossible for the agent to get the principal's instruction as provided for in Section 142 of the *Contracts Act 1950* (Act 136).
2) The agent's action is necessary, in the circumstances, in order to prevent loss to the principal with respect to the interest committed to his charge, e.g. when an agent sells perishable goods belonging to his principal to prevent them from rotting.
3) The agent of necessity must have acted in good faith.

In an emergency, an agent has authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances as provided for in Section 142 of the *Contracts Act 1950* (Act 136).

In other words, the elements of agency of necessity are:

- there must be a situation of necessity;
- the agent is unable to obtain instructions from the principal;
- the agent must act in good faith and in the interests of the principal; and
- the agent's acts must be reasonable and prudent.

4.4.6 By Estoppel

An agency can come into existence by means of the doctrine of *"estoppel"*. The creation of an agency by *estoppel* is a form of agency which is created constructively, that is, by imposition of law. The main purpose of the doctrine of *estoppel* is to provide protection against the detriment, which would flow from a party's change of position if the assumption (or expectation) that led to the change of position were "deserted" or "resiled from" by the other party.

There are three elements necessary to constitute estoppel:

1) a representation made by or on behalf of the principal to the third party concerning the authority of the agent;
2) reliance by the third party on the representation made by the principal to the third party; and
3) the third party must rely on the principal's representation and alter his or her legal position on the strength of the representation.

A person cannot be bound by a contract made on his behalf without his authority. However, if he by his words and conduct allows a third party to believe that that particular person is his agent even when he is not, and the third party relies on it to the detriment of the third party, he will be estopped or precluded from denying the existence of that person's authority to act on his behalf.

Example

Creation of agency – by estoppel

If Mahmud tells Samy in the presence of Tay Ah Lek that Mahmud is Tay Ah Lek's agent and Tay Ah Lek does not contradict this statement, Tay Ah Lek cannot later deny that Mahmud is his agent if Samy sells goods to Mahmud, believing him to be Tay Ah Lek's agent, and later sues Tay Ah Lek for the price.

4.5 Rights and Responsibilities

4.5.1 Duties of Principal and Agent

The relationship between the agent and principal is generally accepted as a fiduciary relationship, involving trust and confidence.

Once a particular relationship is characterised as a fiduciary relationship, its status as such automatically invokes equitable standards of conduct which the fiduciary must observe in relation to the beneficiary. In Malaysia, these equitable standards of conduct are codified as appears below.

The rights and duties of the principal and agent depend on the express or implied terms of the contract of agency. Where there is no such contract of agency, the rights and duties of an agent to his principal and, *vice versa,* are laid down in Sections 164 to 178 of the *Contracts Act 1950* (Act 136) which read as follows:[24]

> *Agent's duty in conducting principal's business*
>
> *164. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts the business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.*

24 As discussed earlier, in addition to provisions under the *Contracts Act* governing the rights and duties of an agent, insurance agents are governed under the FSA. Specific provisions governing the conduct of insurance agents are laid down in Schedule 7 and Schedule 9 of the FSA. In particular, Schedule 9 which covers pre-contractual disclosure and representations and remedies for misrepresentation. Where there is a conflict or inconsistency between the *Contracts Act* and a provision of Schedule 9, FSA, the provision of the Schedule 9 shall prevail. This means the duties stated under the Schedule 9 overrides the general provisions as stated in *Contracts Act*.

ILLUSTRATIONS

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make the investment. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

Skill and diligence required from agent

165. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Agent's accounts

166. An agent is bound to render proper accounts to his principal on demand.

Agent's duty to communicate with principal

167. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Right of principal when agent deals, on his own account, in business of agency without principal's consent

168. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Principal's right to benefit gained by agent dealing on his own account in business of agency

169. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

170. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.
Agent's duty to pay sums received for principal

171. Subject to the deductions specified in Section 170, the agent is bound to pay to his principal all sums received on his account.

When agent's remuneration becomes due

172. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of the act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Agent not entitled to remuneration for business misconducted

173. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent's lien on principal's property

174. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him.

Agent to be indemnified against consequences of lawful acts

175. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon him.

Agent to be indemnified against consequences of acts done in good faith

176. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

However, there are some instances whereby the agent can be held personally liable.

> *Non-liability of employer of agent to do a criminal act*
>
> *177. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.*
>
> *Compensation to agent for injury caused by principal's neglect*
>
> *178. The principal must make compensation to his agent in respect of injury caused to the agent by the principal's neglect or want of skill.*

The "duties" of an agent are summarised as follows:

1) To obey the principal's instructions – Section 164 of the *Contracts Act 1950* (Act 136). Failure to do so will result in breach of contract and the agent will be liable for any loss suffered by the principal.

Case Law *Agents – duty obey the principal's instructions*

CASE 4-2 *Turpin -v- Bilton* [1843] 5 Man. & G. 455
CASE 4-3 *Bostock -v- Jardine* 3 H. & C. 700

In the English case of *Turpin -v- Bilton,* the agent was held liable when he failed to insure a ship when instructed to do so and the ship was lost. Similarly, in another English case of *Bostock -v- Jardine,* the agent was liable when he bought more than he was directed to buy.

However, an agent is under no duty to obey the instructions of his principal if the instructions are unlawful.

2) In the absence of instructions from the principal, an agent is obligated to act according to the customs which prevail, in doing business of the same kind, at the place where he carries on his work. Otherwise, he has to make good any loss sustained by the principal.
3) To exercise care and diligence in carrying out his work and to use such skill as he possesses in accordance with Section 165 of the *Contracts Act 1950* (Act 136).
4) To render proper accounts when required. An agent is under a duty to account for all monies and property handled by him as agent for the principal and to produce such accounts when demanded by the principal – Section 166 of the *Contracts Act 1950* (Act 136).
5) To pay to his principal all sums received on his behalf. However, an agent may retain or deduct from such sums received, advances made or expenses incurred by him in carrying out his duty his commission and other remuneration payable to him for acting as agent.

Section 174 of the *Contracts Act 1950* (Act 136) gives the agent the right to retain his principal's property in his possession until his remuneration is paid unless his contract provides to the contrary.

6) To communicate with the principal. In cases of difficulty, an agent must use all reasonable diligence in communicating with and in seeking to obtain instructions from the principal. However, in emergencies, the agent may use his own discretion in adopting a course of action to safeguard the interest of the principal.
7) Not to let his interest conflict with his duty. The duty of an agent is to act solely for the benefit of the principal and he cannot allow his own personal interest to conflict with this duty – Section 169 of the *Contracts Act 1950* (Act 136).
8) Not to make any secret profit out of the performance of his duty. Secret profit means a bribe or payment of a secret commission or any financial advantage which an agent receives over and above the commission or other remuneration agreed by the parties.

   Thus, the difference between a bribe and a secret profit lies in their source. A bribe emanates from a third party while a secret profit stems from the use by the agent of the principal's property, which usage results in an unauthorised and undisclosed gain accruing to the agent.

   If the principal knows about the secret profit and consents to it, the agent is entitled to keep the profit he makes since the profit is no longer secret – Section 168 of the *Contracts Act 1950* (Act 136). If, however, the profits are secret, then the principal may do the following:

   a) repudiate the contract if it is disadvantageous to him;
   b) recover the amount of secret profit from the agent – Section 169 of the *Contracts Act 1950* (Act 136);
   c) refuse to pay the agent his commission or other remuneration;
   d) dismiss the agent for breach of duty;
   e) sue the agent and the third party giving the bribe, for damages for any loss he may have sustained through entering into the contract.
9) Not to disclose confidential information or documents entrusted to him by his principal.
10) Not to delegate his authority.
    Unless the principal expressly or impliedly consents to an agent delegating the duties assumed, an agent is not permitted to delegate to another person any duties or powers, which have been entrusted to the agent personally. This is summed up in a Latin maxim, *"delegates non potest delegare"*, which means that an agent cannot, without authority from the principal, devolve upon another person obligations owed to the principal which the agent has personally undertaken to fulfil. Such delegation was also not permitted on the basis that the principal reposes confidence in the particular person engaged as the agent, and that the Courts would not imply the capacity or authority to delegate as an ordinary incident of the agency relationship.

    Thus, the maxim *delegatus non potest delegare* applies to the relationship between principal and agent as theirs is a personal one. However, there are exceptions to this general rule, some of which are as follows:

- Where the principal approves or consents to the delegation of the authority.
- Where it is presumed from the conduct of the parties that the agent shall have power to delegate his authority.
- Where the custom, usage or practice of the trade or business permits delegation.
- Where the nature of the agency is such that delegation of the authority to another person is necessary to complete the business.
- In case of necessity or an unforeseen emergency.
- Where the act to be done is purely ministerial or clerical or administrative and does not involve the exercise of any special discretion or skill.

4.5.2 Duties of a Principal to his Agent

Where an agent enjoys certain rights against the principal, it follows that these rights would become the duties of the principal. These duties may be summarised as follows:

1) To pay the agent the commission or other remuneration agreed unless the agency relationship is gratuitous. The principal is only obliged to pay the agent if the agent complies with the terms of the agency agreement and when the agent has earned the payment. However, the agent's right to commission is not affected by the fact that the transaction has not been beneficial to the principal; or the fact that the transaction or contract has subsequently fallen through no fault of the agent.
2) Not to wilfully prevent or hinder the agent from earning his commission. The agent's right to commission is not affected even if the transaction has not been beneficial to the principal or if the transaction has subsequently fallen through no fault of the agent.
3) To indemnify the agent for acts done in the exercise of his authority. The principal is obliged to indemnify or reimburse the agent for costs incurred in carrying out the agency relationship. The agent only has a right to be indemnified for authorised transactions within the express, implied or usual authority of the agent and this right is not available where the loss is due to the agent's own negligence, default or insolvency. The right to be indemnified entitles the agent to recover not only his commission or remuneration but also the money he paid on the principal's behalf and all losses suffered by him in carrying out the directions of his principal. However, the agent loses his right to be indemnified if he acts beyond his duty or if he has performed his duty negligently.

To respect any "lien" the agent has over the property of the principal in the actual or constructive possession of the agent. The lien is, in the hands of the agent, a passive right of detention of the property of the principal. Where an agent has an outstanding claim against a principal for remuneration or an indemnity, the agent can enforce that claim by exercising a lien over any property or money of the principal's which is lawfully in the agent's possession.

4.6 Termination

Agency may be terminated in one of the following ways:

1) By agreement
2) By the principal revoking the agent's authority
3) By the agent's renunciation
4) By performance
5) By operation of law
6) By frustration

Sections 154 to 163 of the *Contracts Act 1950* (Act 136) deal with the manner in which an agent's authority may be terminated. The said Sections provide as follows:

> *…Termination of agency*
>
> *154. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated or declared a bankrupt or an insolvent.*
>
> *Termination of agency, where agent has an interest in subject-matter*
>
> *155. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.*
>
> *When principal may revoke agents' authority*
>
> *156. The principal may, save as is otherwise provided by the last preceding Section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.*
>
> *Revocation where authority has been partly exercised*
>
> *157. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.*
>
> *Compensation for revocation by principal or renunciation by agent*
>
> *158. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.*

Notice of revocation or renunciation

159. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Revocation and renunciation may be expressed or implied

160. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent, respectively.

161. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Agent's duty on termination of agency by principal's death or insanity

162. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Termination of sub-agent's authority

163. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

4.6.1 Termination by Agreement

The authority of an agent may be terminated by the act of the parties, by mutual agreement or mutual consent or revocation by the principal. The agency may also be terminated by renunciation of the agency by the agent. When both parties desire and agree that the agency shall be terminated, the agency is terminated.

Agency, being largely a consensual relationship, can be terminated by agreement. The agency relationship is a fiduciary one and so the Courts are reluctant to keep parties together if the sub-stratum of the relationship (in particular, trust and confidence) has dissipated.

In this method of termination, first, both the principal and the agent can agree that the agency is to come to an end. Secondly, if the agency is evidenced by a contract, then any provisions regarding the termination of the agency by agreement should be observed by the party wishing to terminate the agency. Thirdly, any time frame concerning the length of notice should be kept. If there is none, then the terminating party should consider giving a "reasonable" length of notice to the other party.

4.6.2 Termination by Revocation

The principal may revoke the authority of the agent at any time before it has been exercised to bind the principal. Generally, the principal can revoke the agent's authority where:

a) the principal gives notice of termination (a "reasonable" length of notice) to the agent; or
b) the agent is in default under the agency.

However, there are some qualifications to the principal's right to revoke the agent's authority; for instance:

- when the agent has an authority coupled with an interest – for example where the principal had consigned goods to the agent for the purpose of sale and the agent had loaned money to the principal on the security of the goods consigned for sale; and
- where the agent has carried out the mandate conferred and assumed by the agent.

4.6.3 Termination by Renunciation

Agency may be terminated when the agent relinquishes or surrenders his or her authority and by doing so, ending the agent's mandate. Renunciation is a unilateral act.

Where the agency is for an indefinite duration, the agent can terminate the agency by giving reasonable notice of termination to the principal – Section 159 of the *Contracts Act 1950* (Act 136). If reasonable notice is given, the agent will no longer be liable to the principal and he can claim reimbursement for all his services and expenses up to the date of the termination of his agency.

Where the agency is for a definite or fixed period of time, the agent cannot terminate the agency before the expiry of that period without just cause. Otherwise, he will be liable to the principal for damages for any loss caused by the premature termination of the agency – Section 158 of the *Contracts Act 1950* (Act 136). However, the Court will not order specific performance of the contract of agency. Revocation or renunciation of the agency may be expressed or implied by the conduct of the principal or agent as the case may be.

4.6.4 Termination by Performance

The contract of agency is brought to an end when the agent has performed the contract. This can happen when an agency is created for a single specific transaction and the transaction is completed – Section 154 of the *Contracts Act 1950* (Act 136).

4.6.5 Termination Upon Expiry of the Period Fixed in the Contract of Agency

If an agency is created for a fixed period, the agency is terminated at the expiry of that period whether or not the business or transaction has been completed.

4.6.6 Termination by Operation of Law

An agency may be revoked by operation of law in any of the following circumstances:

a) **Upon the death of the principal or the agent**

The death of either the agent or the principal terminates the agency. Thus, as a general rule, agency comes to an end when the principal or the agent dies. An agency which is terminated by the death of the principal is effective only when the agent has notice of the principal's death – Section 161, *Illustration (c)*, of the *Contracts Act 1950* (Act 136).

An exception to this general rule is when the agent has an interest in the property which forms the subject-matter of the agency. In such a case, when the principal dies, the agent may continue to exercise authority; and if the agent dies, the authority passes to the agent's personal representatives. Section 162 of the *Contracts Act 1950* (Act 136) goes on to provide that when the principal dies, the agent must take all reasonable steps to protect and preserve the interests entrusted to him.

b) **When the principal or agent becomes insane**

The insanity (or mental illness) of the agent or the principal also terminates the agency. Since an insane person is not capable of entering into a valid contract to appoint an agent or act as one, agency is terminated by such insanity. When the principal becomes insane, the agent is bound to take all reasonable steps to protect and preserve the principal's interests.

c) **When the principal or agent becomes insolvent or is made a bankrupt**

Upon insolvency, a person's rights and liabilities are vested in the Director General of Insolvency (previously known as the "Official Assignee") and, therefore, the agency relationship ceases.

4.6.7 Termination by Frustration

Upon the happening of an event which renders the agency unlawful, the agency may be terminated. An agency contract, like any other contract, may be discharged by frustration.

Summary

The whole concept of agency revolves around the need for businesses to outsource their functions to generate business and income. It is utilised by various businesses and even individuals to obtain the best possible expertise and knowledge that an agent may possess, including the agent's vast networking skills.

Within the insurance industry, this has proven vital in securing clients and generating income, in a highly competitive business environment. It is important for insurers and agents as well to understand the nature of agency and the roles and responsibilities that it involves. It would assist insurers and agents to avoid potential pitfalls when dealing with the public, which may also involve costly litigation.

The regulator of the insurance industry, Bank Negara has set the minimum standards of conduct via the respective guidelines. Specific provisions governing the conduct of insurance agents are laid down in Schedule 7 and Schedule 9 of the FSA. Understanding the roles and responsibilities involved would increase the level of professionalism and service provided, which in turn would instil confidence in the insurance industry.

Further Reading

📖 Bowstead, W., and F. Reynolds. *Bowstead on Agency.* 19th ed., Sweet & Maxwell, 2010.

Review Questions

1. Which section of the Contracts Act 1950 defines an agent?
a) Section 132
b) Section 135
c) Section 140
d) Section 150

2. What does the term "fiduciary relationship" imply in the context of agency law?
a) A relationship based on mutual distrust
b) A relationship where both parties have equal authority
c) A relationship involving trust and confidence
d) A contractual relationship without obligations

3. Why might a principal be prevented from revoking an agent's authority?
a) The agent has been disobedient
b) The agent has an authority coupled with an interest
c) The agent has not performed any acts
d) The principal wants to change the terms of the contract

4. What is the main purpose of ratification in agency law?
a) To terminate an agency
b) To authorize an agent's previously unauthorized act
c) To delegate an agent's authority to a sub-agent
d) To dispute an agent's actions

5. An agent buys goods for a principal without specific instructions and the principal later accepts the goods. What is this an example of?
a) Agency by necessity
b) Agency by ratification
c) Agency by express appointment
d) Agency by estoppel

6. In what scenario might an agency be created by estoppel?
a) The agent is expressly authorized in writing
b) The principal has never interacted with the third party
c) The principal's actions lead a third party to believe the agent has authority
d) The agent operates entirely independently

7. Which of the following are necessary to create agency by estoppel?
I. Representation by the principal
II. Agreement by the agent
III. Reliance by the third party
IV. Knowledge of the agent's actions by the principal
a) I and III
b) II and IV
c) I, II, and III
d) I, III, and IV

8. In which situations might an agent's authority be terminated by operation of law?
I. The agent dies
II. The principal becomes insolvent
III. The agent completes the task assigned
IV. The principal becomes unsound of mind
a) I and II
b) I, II, and IV
c) II and III
d) I, III, and IV

9. If an agent acts beyond their authority but the principal later accepts and adopts the act, what type of agency is created?
a) Agency by express authority
b) Agency by implied authority
c) Agency by ratification
d) Agency by estoppel

10. What are the duties of a principal towards an agent?
I. Pay the agreed remuneration
II. Indemnify the agent for lawful acts
III. Ensure the agent's personal well-being
IV. Not to hinder the agent's ability to earn commission
a) I and III
b) II and IV
c) I, II, and IV
d) I, III, and IV

You will find the answers at the back of the book.

5

Basic Insurance Principles

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Learning Outcomes

After completing this topic, you should be able to:

- *State the six fundamental insurance doctrines and principles*
- *Explain how the doctrines and principles are applicable in the insurance industry*

Why this Topic is Important

This topic is important because it will help the student to appreciate the unique nature of an insurance contract. These principles distinguish an insurance contract from other types of contracts. It is fundamental to developing the ability to analyse a wide range of transactions in the insurance industry and avoid future conflicts between the relevant parties in the insurance industry. An understanding of these six doctrines and principles will ensure the adoption of best practices which are in line with the said doctrines and principles, thereby enhancing the standard of professionalism in the insurance industry.

Introduction

The insurance contract is a unique contract. In addition to the basic elements of a contract, an insurance contract and its enforcement is governed by numerous doctrines and principles. The insurance industry has grown by leaps and bounds with these principles guiding it over the centuries. The development of the doctrines and principles, in turn have been guided by the practical realities and challenges of the insurance industry. The doctrines and principles that are fundamental to insurance are:

- Insurable interest
- *Uberrimae fides* or Utmost Good Faith
- Indemnity
- Proximate Cause
- Contributions
- Subrogation

5.1 Insurable Interest

The fundamental principle in insurance law is that a person cannot claim under an insurance policy unless they have an insurable interest in the subject matter at the time of the loss. In *Salbiah & Anor v Nanyang Insurance Co Ltd* (1966) 2 MLJ 16, the court held that if the insured person sells or trades in the insured car (e.g. for a new one), the insurance policy on the original car automatically ends, because the insured no longer has an insurable interest in that vehicle.

If there is no insurable interest, the contract is void and unenforceable. As a general rule, a person

has an insurable interest when he stands to benefit by the existence or safety of the subject matter insured or he may be prejudiced by its loss or damage thereto.

The only statutory definition is found in the English *Marine Insurance Act 1906:*

> *Section 5(1) Every person who has an insurable interest who is interested in a marine adventure.*
>
> *Section 5(2) In particular, a person is interested in a marine adventure when he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein; in consequence of which he may benefit by the safety or due arrival of the insured property, or he may be prejudiced by its loss or damage thereto, or by the detention thereof, or may incur liability in respect thereof.*

The judicial definition is found in the case of *Lucena -v- Craufurd*.

Case Law *Definition of insurable interest*

CASE 5-1 *Lucena –v- Craufurd 127 E.R. 630*

In *Lucena -v- Craufurd,* **Lawrence J.** explained at p. 642:

> *"A man is interested in a thing to whom advantage may arise, or prejudice happen from the circumstances which may attend to it… [I]nterest does not necessarily imply a right to the whole, or part of the thing, nor necessarily or exclusively that which may be subject to privation, but having some relationship to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of the advantage or benefit… To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."*

The above definitions are applicable in Malaysia via *Section 5 of the Civil Law Act 1956*. The requirements of insurable interest in life policies are stated in *paragraph 3, Schedule 8 of the Financial Services Act 2013 (Act 758)*:

> *Insurable interest*
>
> *(3) A person shall be deemed to have an insurable interest in the life of another person if that other person is—*
>
> *(a) his spouse or child;*

> *(b) his ward under the age of majority at the time the insurance is effected;*
>
> *(c) his employee; or*
>
> *(d) a person on whom he is wholly or partly dependent for maintenance or education at the time the insurance is effected.*
>
> *(4) In this paragraph, insuring the life of a person means insuring the payment of moneys on a person's death or on the happening of any contingency dependent on his death or survival and includes granting an annuity to commence on his death or at a time referred to in the annuity.*

For there to be a proper claim, insurable interest must exist and be properly identifiable. In *Mackenzie v Whitworth* (1875), Blackburn J said that if the insurance contract describes the subject matter (i.e. what is being insured) specifically, then recovery is limited to that specific interest. But if the contract describes the subject matter generally, then the insured (claimant) may prove the extent of their actual interest, and recover up to that limit.

5.2 Utmost Good Faith

There is no local statutory provision governing the doctrine of *uberrimae fides* or utmost good faith in Malaysia. The common law position therefore applies. The doctrine which applies to contracts of insurance, rests upon the recognition of the asymmetry of information between the parties to the insurance contract, that one party has special knowledge of the facts which will be relied upon by the other party to enter into the contract. Utmost good faith applies to both parties to the insurance contract.

Both insurer and insured must disclose all material facts to each other. This duty ceases when the contract is concluded as per the case of *Lee Bee Soon and Ors v Malaysia National Insurance Sdn. Bhd* [1980] 2 MLJ 252. The duty to act in good faith imposes an obligation for both parties to act in good faith during the subsistence of the contract.

The duty to exercise good faith is fundamental in an insured and insurer relationship as per the case of *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep. IR 209.

Section 17 of the *Marine Insurance Act 1906* states:

> *Insurance is uberrimae fidei*
>
> *A contract of marine insurance is a contract based upon utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party.*

Similarly, in the case T*uong Aik (Sarawak) Sdn. Bhd. v Arab-Malaysian Eagle Insurance Bhd.* [1966] 1 AMR 871, the court ruled that the Insurer was entitled to avoid the entire policy if a fraudulent claim was perpetuated by the insured. Fraud would of course be an act of bad faith or mala fide in this case.

The dictum in *Carter –v- Boehm* was made in the context of facts lying within the exclusive knowledge of the insured. The doctrine thus, imposes on the party with such special knowledge the obligation to disclose and the duty not to misrepresent. Both the duty to disclose and the duty not to misrepresent originate from the doctrine of utmost good faith.

Case Law *Special facts*

CASE 5-2 *Carter –v- Boehm* [1766] 3 Burr. 1905

In the celebrated case of *Carter –v- Boehm,* the peculiarity of a contract of insurance was noted.

Lord Mansfield elaborated at p. 1909 that insurance is a contract upon speculation. The special facts in the knowledge of the insured upon which the contingent chance is to be computed are relied upon by the insurer. His Lordship then declared that good faith forbids either party from concealing what he privately knows, to draw the other into the contract, in ignorance of the special facts.

The application of the doctrine is not limited to the two duties. It extends to the conduct of both parties in all dealings related to the policy. For example, the requirement of utmost good faith applies to both the insured and the insurer during the claims process. The insured must put in a claim in good faith by not including losses which are actually not incurred and the insurer must process the claim in good faith by not delaying unnecessarily or rejecting the claim based on minor technicalities.

5.3 Indemnity

The principle of indemnity in insurance law ensures that an insured who has suffered or incurred loss, damage or liability as a result of the insured peril happening is fully indemnified or compensated for such loss, damage or liability. The principle ensures that the insured is fully indemnified and nothing more, Thus, it prevents the insured from making a profit out of the said loss, damage or liability. It is applicable to indemnity policies, which is what most insurance contracts are. The principle is clearly stated in *Castellian –v- Preston*.

Case Law *Principle of indemnity*

CASE 5-3 *Castellian –v- Preston* [1883] 11 Q.B.D. 380

In the case of *Castellian –v- Preston,* **Brett LJ** in affirming at p.386 that a marine or fire policy is a contract of indemnity, reiterated that a contract of indemnity means that the assured shall be fully indemnified, but shall never be more than fully indemnified in case of a loss against which the policy has been made. That is the fundamental principle of insurance.

Under indemnity policies, to recover the loss under the policy, the insured is obliged to prove an actual loss in the insured property. The sum payable will be the measure of loss, within the limits of the indemnity policy. This is in line with the basis of the principle which is to compensate for the loss. If no actual loss is suffered, the insurer's obligation to indemnify the insured does not arise as there is nothing to indemnify for. Thus, there is a requirement to prove that the insured has an actual interest in the risk insured at the time the insured event occurs.

Two notable exceptions to indemnity policies are a life insurance policy and personal accident policies. These are not contracts of indemnity and are known as contingency policies. This was settled by the House of Lords in *Dalby –v- India and London Life-Assurance Co.* (1854) 15 C.B. 365. In contingency policies, the insured is only obliged to show the occurrence of the insured event for him to claim under the policies. Such policies do not provide indemnity but pay upon a contingent event, i.e. death or accident. The sum payable is stated in the policy.

5.4 Proximate Cause

An insurer is only liable to pay the claim under the policy if the loss was proximately caused by an insured peril. The event that took place must be within the scope of cover and the loss incurred is caused directly by the insured peril. This is the gist of the doctrine of proximate cause.

Disputes on insurance claims before the court are dealt with by firstly ascertaining the precise scope of the policy.

Secondly, the court will determine whether the loss is caused proximately by the insured peril based on the facts of the case.

Case Law *Insured risks – loss of goods*

CASE 5-4 *Moore –v- Evans* [1918] A.C. 185

In the English case of *Moore–v- Evans*, the plaintiffs, a firm of jewellers insured their stock against the risk of *'loss and/or damage or misfortune… arising from any cause whatsoever'*. Loss by theft or dishonesty was excluded. A consignment of pearls sent to Belgium and Germany could not be returned to the insured due to the outbreak of war between Britain and Germany in 1914. The goods in Germany remained in the hands of the consignees whilst the goods in Belgium were placed in a bank, with the consent of the insured. The insured made a claim for the loss of the jewellery.

The House of Lords decided that a policy insuring the loss of goods was primarily intended to cover the physical loss of the goods. It did not cover economic loss or loss of business opportunity. It was held by **Lord Atkinson** at p.191 that the detention of the goods abroad may be a misfortune to the plaintiff but it did not constitute loss or damage to the property.

When the occurrence of the insured event results in immediate damage to the insured property, no difficulty arises in the insured's claim. It is when the loss or damage is not immediate or when there are several events which contributed to the loss that it becomes challenging for the insured to prove that the loss was caused by the risk insured. It is for the court to ascertain and decide on whether the loss was proximately caused by the insured risk.

This was also noted in the case of *Kin Yuen Co Pte Ltd. v Lombard Insurance Ltd & Ors* [1992] 2 SLR 887, where the court stated that the determination of the proximate cause may not be plain and simple for it is very rarely that a loss is caused by a single predominant cause. Quite frequently, two or more circumstances which are not insured perils are at play in combination with the insured peril.

5.5 Contribution

An insurer's right of contribution arises when there is double insurance. It arises from principles of equity that persons who are liable for the same loss should contribute equally towards the loss.

In the case of *AXA Affin General Insurance Bhd v Mitsui Sumitomo Insurance* (M) (2009) MLJU 888, the issue to be determined was whether the plaintiff insurer was entitled to seek contribution from the defendant insurer. The court therefore had to decide whether there was double insurance. A double insurance situation will arise when a person insures a particular risk with two or more insurers, leading to the insurers being liable for the same loss. There cannot be double insurance unless there exists another contract of insurance and the same insured is covered in respect of the same property against the same risk.

In this case, the court dismissed this claim as the plaintiff insurer failed to discharge the onus of proof. As a result, the evidential burden did not shift to the defendant insurer.

The right was first applied in marine insurance and subsequently expanded to all indemnity policies. Section 80 of the *Marine Insurance Act 1906* provides:

> *80. Right of contribution*
>
> *(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.*
>
> *(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.*

Case Law *Right of contribution based on equity*

CASE 5-5 *American Surety Co. of New York –v- Wrightson* [1911] 103 L.T. 663

It was decided that an insurer's right of contribution is based on the principles of equity and applicable to non-marine indemnity policies as well.

Hamilton J. held that there should be a rateable proportion among the insurers who have to contribute.

The right of contribution is based on principles of equity. Where the insured has double-insured with several insurers, he is free to choose which insurer to claim from and the chosen insurer is obliged to pay the claim, thereby indemnifying the insured fully under the policy. After settling the claim, the insurer has the right to seek contributions from the other insurers who are equally or jointly liable for the loss.

In *Overseas Assurance Corporation (Malaysia) Sdn Bhd v MSIG Insurance (Malaysia) Bhd.* (2012) 2 MLJ 249; (2011) 8 CLJ 20 (CA), it was noted that the right of contribution arises out of equity, and that the following conditions must be fulfilled:

a. All policies concerned must cover the same subject matter.
b. All policies must be effected against the same peril.
c. All policies must be effected on behalf of the same insured.
d. All policies must be in force at the time of the loss.
e. There must be a valid contract of insurance.
f. None of the policies must contain an exclusion of the right to contribution.

Note however, that due to challenges in the application of contribution, most indemnity policies today contain express clauses with regards to contribution. The existence of such clauses may change the application of the right of contribution.

5.6 Subrogation

The doctrine of subrogation applies to contracts of indemnity only. An insurer who indemnifies an insured for the insured loss has the right to step into the shoes of the insured and take legal action against a third party responsible for causing the loss. An insurer's right of subrogation is a legal right enforceable with the assistance of equity. This is to mitigate or reduce the loss that was borne by the insurer. The scope of the insurer's right of subrogation is stated by Brett LJ in *Castellian –v- Preston*:

Case Law *Scope of insurer's right of subrogation*

CASE 5-6 *Castellian –v- Preston* (1883) 11 Q.B.D. 380

It was decided that in order to apply the doctrine of subrogation, the insurer must be placed in the position of the insured.

Brett LJ at p. 386, elaborated that the doctrine of subrogation extends to the underwriter being entitled to the advantage of every right of the insured, whether in contract or in remedy for tort capable of being insisted on or already insisted on or in any other right, legal or equitable.

In exercising its right of subrogation, the insurer would either sue the third party responsible for the insured's loss in the name of the insured or take an assignment of the insured's cause of action. This is because the cause of action rests with the insured.

Case Law *Insured's rights*

CASE 5-7 *Teo Kim Kien & Ors –v- Lai Sen & Anor* [1980] 2 MLJ 125

The Malaysian Federal Court decided that an insurer exercising his right of subrogation could require an insured to sue the tortfeasor responsible for causing the insured's loss.

Chang Min Tat FCJ at p. 126, explained that under the doctrine of subrogation, the insured must bring an action against the wrongdoer if he is called upon by the insurers to do so and is indemnified against the costs, but it is his own cause of action, not that of his insurer that he sues on. Against the wrongdoer, the insurer has no cause of action on his own.

The right of subrogation only arises after the insured is indemnified by the insurer for the insured loss.

Case Law *After insured is indemnified*

CASE 5-8 *City Tailors Ltd –v- Scottish Insurance Corporation* (1929) 98 LJKB 308

Scrutton LJ said at p. 233 that the insurer is subrogated to any legal rights of the assured only when he has paid, and not till then.

A right of subrogation accrues to the insurer who has indemnified the insured under a contract of indemnity. This will enable the insurer to reduce their 'loss' after paying the insured under the policy. The insurer in the exercise of his right of subrogation can require the insured to actually take legal action in his own name on behalf of the insurer, against the third party responsible for the loss or injury. The doctrine of subrogation arises from principles of equity.

It should be noted that the right to subrogation is not limited only to claims which the insured may make in respect to losses but it also applies to all claims which, if satisfied, will diminish the loss.

In the case of *Tiong Nam Trading & Transport (M) Sdn. Bhd. v Commercial Union Assurance (M) Sdn. Bhd.* [2008] 6 MLJ 342, the court held that the doctrine of subrogation has two distinct rights. Firstly, the insurer is to receive the benefit of all the rights and remedies of the insured against third parties which if satisfied could extinguish or diminish the loss suffered. Secondly the insurer is entitled to exercise, in the name of the insureds whatever rights the insured has to seek compensation for the loss to third parties.

Summary

The six doctrines and principles applicable to insurance contracts put insurance contracts into a category of their own. No other contracts have such doctrines and principles applied to them. *Insurable interest, utmost good faith* and *proximate cause* apply to all insurance contracts, contingency policies and indemnity policies. *Indemnity*, *contribution* and *subrogation* on the other hand, apply only to indemnity policies.

Further Reading

- Marylebone, Q. *Halsbury's Laws of England.* 4th ed., Butterworths, 1973.
- *Blackstone's Commentaries.* 13th ed., 1800.
- Poh, Chu Chai. *Principles of Insurance Law.* 6th ed., Lexis Nexis, 2005.

Review Questions

1. Which principle ensures that an insured is fully compensated for a loss but not more than fully compensated?
a) Insurable Interest
b) Utmost Good Faith
c) Indemnity
d) Subrogation

2. What is the primary role of 'proximate cause' in insurance claims?
a) To determine the policyholder's insurable interest
b) To identify the main cause of loss for a claim
c) To ensure the utmost good faith between parties
d) To calculate the exact amount of compensation

3. Under which principle can an insurer step into the shoes of the insured to recover losses from a third party?
a) Contribution
b) Indemnity
c) Subrogation
d) Proximate Cause

4. Which statement correctly describes the concept of 'utmost good faith' in insurance contracts?
a) Both parties are free to hide material facts.
b) Only the insurer must disclose all material facts.
c) Both parties must disclose all material facts.
d) Only the insured must disclose all material facts.

5. Alice purchased a life insurance policy on her husband's life. Under the principles of insurable interest, why is this policy valid?
a) Alice stands to gain financially from her husband's death.
b) Alice is dependent on her husband for support.
c) Alice has a legal relationship with her husband.
d) Alice and her husband have a moral relationship.

6. Bob's factory was damaged by a fire. His insurance policy covers fire damage. However, the fire was caused by a negligent third party. How can Bob's insurer recover its loss?
I. By suing the third party directly
II. By exercising the right of subrogation
III. By increasing Bob's premiums
IV. By refusing to pay Bob's claim

a) I and II
b) II and III
c) I and IV
d) III and IV

7. A ship carrying goods insured by Chris sinks due to a storm. Chris had double-insured the goods with two different insurers. Which principle applies to ensure both insurers contribute to the loss?
a) Subrogation
b) Proximate Cause
c) Contribution
d) Indemnity

8. Diane's insured warehouse is destroyed by an earthquake, an insured peril. During the insurance claim process, what principle must be established to determine the insurer's liability?
I. Indemnity
II. Proximate Cause
III. Insurable Interest
IV. Utmost Good Faith
a) I and II
b) II and III
c) III and IV
d) I and IV

9. Which of the following is NOT an example of having insurable interest according to the Financial Services Act 2013 (Act 758)?
a) A spouse insuring their partner's life
b) A person insuring their friend's life
c) An employer insuring their employee's life
d) A parent insuring their child's life

10. John purchases a life insurance policy for his business partner, Mark. Which conditions must be met for this policy to be valid under the principle of insurable interest?
I. John and Mark must be financially dependent on each other.
II. John must stand to suffer financial loss if Mark dies.
III. John must be Mark's legal guardian.
IV. John must be Mark's relative.
a) I and II
b) II and III
c) I and IV
d) III and IV

You will find the answers at the back of the book.

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Glossary of Terms

Term	Meaning
AC	Appeal Cases Law Reports
Acceptance	One of three requisites to a valid contract under common law (the other two being an "offer" and "consideration").The unconditional agreement to an offer. This creates the contract. Before acceptance, any offer can be withdrawn, but once accepted the contract is binding on both sides. Any conditions have the effect of a counteroffer that must be accepted by the other party.
All ER	All England Law Reports
ASEAN	The Association of South-East Asian Nations and currently comprises of 10 States namely, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.
Assault	An intentional or reckless act that causes someone to be put in fear of immediate physical harm. Actual physical contact is not necessary to constitute an assault (for example, pointing a gun at someone may constitute an assault), but the word is often loosely used to include both threatening acts and physical violence. Assault is a form of trespass to the person and a crime as well as a tort.
Bail	To entrust one's property to another for a special purpose under an agreement.
Bailee	Person who accepts possession of property in trust.
Bailment	The legal relationship that arises when one person delivers possession of personal property to another under an agreement, express or implied, by which the latter is under a duty to return the identical property to the former or to deliver it or dispose of it as agreed. It is the transfer of the possession of goods by the owner (the bailor) to another (the bailee) for a particular purpose. Examples of bailments are the hiring of goods, the loan of goods, the pledge of goods, and the delivery of goods for carriage, safe custody, or repair.
Bailor	Owner of the property, or person with physical possession of the property who turns over possession under a bailment.

Term	Meaning
Battery	The intentional or reckless application of physical force to another person. Common battery is a criminal offence as well as a tort, even if no actual harm results.
BNM	Bank Negara Malaysia
Bona fide	[Latin] In good faith; without fraud or deceit. The law requires all persons in their transactions to act with good faith.
Breach of contract	Failure by one party to a contract to uphold their part of the deal. A breach of contract will make the whole contract void and can lead to damages being awarded against the party which is in breach.
Case law	The entire collection of published legal decisions of the Courts which, because of stare decisis, contributes a large part of the legal rules which apply in modern society. If a rule of law cannot be found in written laws, lawyers will often say that it is a rule to be found in "case law". In other words, the rule is not in the statute books but can be found as a principle of law established by the judiciary in some recorded case. The word jurisprudence has become synonymous for case law.
Causation	The relationship between an act and the consequences it produces. It is one of the elements that must be proved if the legal action against the tortfeasor is to succeed. It must be proved that the loss or damage suffered was caused by the breach of the duty of care. Causation is the crucial link between the act and the loss.
Caveat emptor	[Latin: let the buyer beware] A common-law maxim warning a purchaser that he could not claim that his purchases were defective unless he protected himself by obtaining express guarantees from the vendor.
Civil law	Law inspired by old Roman law, the primary feature of which was that laws were written into a collection; codified, and not determined, as is common law, by judges. The principle of Civil law is to provide all citizens with an accessible and written collection of the laws which apply to them and which judges should follow.
CJ	Chief Judge (Malaysia)
CLJ	Current Law Journal (Malaysia)
Common law	Judge-made law. Law which exists and applies to a group on the basis of historical legal precedents developed over hundreds of years. Because it is not written by elected politicians but, rather, by judges, it is also referred to as "unwritten" law.

Term	Meaning
Compensation	Monetary payment to compensate for loss or damage. When someone has committed a criminal offence that caused personal injury, loss, or damage, and he has been convicted for this offence or it was taken into account when sentencing for another offence, the Court may make a compensation order requiring the offender to pay compensation to the person suffering the loss (with interest, if need be).
Conditions[25]	Major terms in a contract. Conditions are the basis of any contract and if one of them fails or is broken, the contract is breached. These are in contrast to warranties, the other type of contract term, which are less important and will not usually lead to the breach of the contract – but rather an adjustment in price or a payment of damages.
Consideration	A matter of inducement for something promised; something valuable given as recompense for a promise, which causes the promise to become binding as a contract.In a contract each side must give some consideration to the other. Often referred to as the "quid pro quo". Usually this is the price paid by one side and the goods supplied by the other. But it can be anything of value to the other party, and can be negative – e.g. someone promising not to exercise a right of access over somebody else's land in return for a payment would be a valid contract, even if there was no intention of ever using the right anyway.
Constitutional law	The body of law which defines the relationship of different entities within a state, namely, the executive, the legislature and the judiciary. Most Commonwealth nations have a written and/or codified Constitution except for the United Kingdom, New Zealand and Israel.
Contract	An agreement between persons which obliges each party to do or not to do a certain thing.
Contributory negligence	A person's carelessness for his own safety or interests, which contributes materially to damage suffered by him as a result partly of his own fault and partly of the fault of another person or persons.
Conversion	The tort of wrongfully dealing with a person's goods in a way that constitutes a denial of the owner's rights or an assertion of rights inconsistent with the owner's. Wrongfully taking possession of goods, disposing of them, destroying them, or refusing to give them back are acts of conversion.

25 The definition of the terms "conditions" and "warranties" for insurance contracts is actually the reverse, i.e. under insurance contracts, warranties are the major terms in the contract whereas conditions are the promises made in the insurance contract. The breach of a warranty under an insurance contract constitutes a breach of contract. This is one of the basic peculiarities and distinctions of insurance contracts. It has its roots and explanation in its historical development in marine insurance.

Term	Meaning
Court For Children	The Court for Children, previously known as the Juvenile Court, hears all cases involving minors except cases carrying the death penalty, which are heard in High Courts instead. Cases for children are governed by the *Child Act 2001*.
Court Of Appeal	The Court of Appeal hears all civil and criminal appeals against decisions of the High Courts of Malaya, and Sabah and Sarawak except where against judgement or orders made by consent.
Criminal law	That body of the law that deals with conduct considered so harmful to society as a whole that it is prohibited by statute, prosecuted and punished by the government.
Damages	A sum of money awarded by a Court as compensation for a tort or a breach of contract.
Defamation	The publication of an untrue statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him.
Duty of care	The legal obligation to take reasonable care to avoid causing damage. There is no liability in tort for negligence unless the act or omission that causes damage is a breach of a duty of care owed to the claimant.
EC	The European Communities (EC) was the forerunner to what we would now refer to as the European Union (EU).
Employer's liability	The liability of an employer for breach of his duty to provide for his employees competent fellow-workers, safe equipment, a safe place of work, and a safe system of work, including adequate supervision.
EU	The EU as we have now is the successor to the EC and it came about with the signing of the Maastricht Treaty of 1993 and currently there are 28 member states that are primarily located in Europe.
Exclusion clauses	Clauses in a contract that are intended to exclude one party from liability if a stated circumstance happens. They are types of exemption clauses. The Courts tend to interpret them strictly and, where possible, in favour of the party that did not write them. In customer dealings, exclusion clauses are governed by regulations that render most of them ineffective but note that these regulations do not cover you in business dealings.
Federal Court	All civil appeals from the Court of Appeal are heard by the Federal Court only after leave is granted by the Federal Court. The Federal Court also hears criminal appeals from the Court of Appeal only in respect of matters heard by the High Court in its original jurisdiction. The Federal Court is the highest judicial authority in the country.

Term	Meaning
Fiduciary duty/ relationship	Fiduciary duties comprise of the duty of loyalty and the duty of care. A fiduciary is an individual in whom another has placed the utmost trust and confidence to manage and protect property or money. This leads to the relationship wherein one person has an obligation to act for another's benefit.
FJ	Federal Judge (Malaysia)
Good faith	Good faith, in legal terminology, refers to the use of honesty and best efforts in dealings with others.
H. & C.	Hurlstone & Coltman's Exchequer Reports
High Court	The High Court consists of two Chief Judges, one in Peninsular Malaysia and one in Sabah and Sarawak. There are at least fifty-six judges and Judicial Commissioners and of these eleven are in Sabah and Sarawak and forty-five in Peninsular Malaysia. The High Courts have general supervisory and revisionary jurisdiction over all the Subordinate Courts and hear appeals from the Subordinate Courts in civil and criminal matters.
HL Cas	House of Lords Cases Law Reports
ICAGIB	Inter-Company Agreement on General Insurance Business
Incorporate	Inclusion in, or adoption of, some term or condition as part of the contract. It differs from its company law definition where it refers to the legal act of creating a company.
Injunction	A remedy sometimes awarded by the Court that stops some action being taken. It can be used to stop another party doing something against the terms of the contract. Injunctions are at the Court's discretion and a judge may refuse to give one and award damages instead. It may either prohibit a person from doing or continuing to do a certain act (a prohibitory injunction) or order him to carry out a certain act (a mandatory injunction).
International Law	The set of rules generally regarded and accepted as binding in relations between states and nations. It differs from national legal systems in that it only concerns nations rather than private citizens.
Islamic Law	The law according to the Muslim faith and as interpreted from the Quran. Islamic law is probably best known for deterrent punishment, which is the basis of the Islamic criminal system and the fact that there is no separation of religion and state. Under Islamic law, the religion of Islam and the government are one. Islamic law is controlled, ruled and regulated by the Islamic religion. Islamic law purports to regulate all public and private behaviour including personal hygiene, diet, sexual conduct, and child rearing.
J	Judge (Malaysia)
JCA	Judge of the Court of Appeal (Malaysia)

Term	Meaning
Judicial precedent	A principle or rule established in a legal case that a Court or other judicial body may apply when deciding subsequent cases with similar issues or facts.
Judicial review	The principal means by which the High Court exercises supervision over public authorities in accordance with the doctrine of ultra vires.
Judiciary	The judiciary (also known as the judicial system or judicature) is the system of Courts that interprets and applies the law in the name of the state.
Jurisdiction	A Court's authority to judge over a situation usually acquired in one of three ways: over acts committed in a defined territory (e.g.. the jurisdiction of the Supreme Court of Australia is limited to acts committed or originating in Australia), over certain types of cases (the jurisdiction of a bankruptcy Court is limited to bankruptcy cases), or over certain persons (a military Court has jurisdiction limited to actions of enlisted personnel).
Justice	The proper administration of the law; the fair and equitable treatment of all individuals under the law. A title given to certain judges, such as Federal judges, Court of Appeal judges and High Court judges.
Law	All the rules of conduct that have been approved by the government and which are in force over a certain territory and which must be obeyed by all persons on that territory (e.g. the "laws" of Malaysia). Violation of these rules could lead to government action such as imprisonment or fine, or private action such as a legal judgement against the offender obtained by the person injured by the action prohibited by law. Synonymous to Acts of Parliament or State Enactments although in common usage, "law" refers not only to legislation or statutes but also to the body of unwritten law, namely, common law, whenever it is applicable and relevant.
Legal person	Legal person refers to a non-human entity that is treated as a person for limited legal purposes, e.g. companies. Legal persons can sue and be sued, own property, and enter into contracts.
Legal remedy	A legal remedy is a form of Court enforcement of a legal right resulting from a successful Civil lawsuit.
Liability	A person or business deemed liable is subject to a legal obligation. A person/business that commits a wrong or breaks a contract or trust is said to be liable or responsible for it.
Libel	A defamatory statement made in permanent form, such as writing, pictures, or film.
Limitation	Statutory rules limiting the time within which civil actions can be brought.
Limited liability	Usually refers to limited companies where the owners' liability to pay the debts of the company is limited to the value of their shares. It can also apply to contracts where a valid limitation clause has been included in the terms.

Term	Meaning
Litigation	A dispute is in "litigation" (or being "litigated") when it has become the subject of a formal Court action or lawsuit.
LP	Lord President (now Chief Justice) (Malaysia)
Magistrates' Court	The Magistrates' Court deals with minor civil and criminal cases. The Magistrates' Courts hear all civil matters of which the claim does not exceed RM100,000. All criminal matters are initially brought before the Magistrates' Court before being allocated to either the Sessions Court or the High Court depending upon the seriousness of the offences and the maximum penalty involved.
Malicious falsehood	A false statement, made maliciously, that causes damage to another.
Man. & G.	Manning & Granger's Common Pleas Reports (England and Wales)
Misrepresentation	Where one party to a contract makes a false statement of fact to the other which that other person relies on. Where there has been a misrepresentation then the party who received the false statement can get damages for their loss. The remedy of rescission (putting things back to how they were before the contract began) is sometimes available, but where it is not possible or too difficult the Court can award damages instead.
MLJ	Malayan Law Journal
Native Court	The Native Court is peculiar only to Sabah and Sarawak. It exercises jurisdiction over matters affecting native customs where the parties are natives.
Negligence	The failure to use reasonable care. It is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do under similar circumstances.
Occupier's liability	The liability of an occupier of land or premises to persons on the land for the condition of the premises and things done there.
Offer	An explicit proposal to contract which, if accepted, completes the contract and binds both the person that made the offer and the person accepting the offer to the terms of the contract.An offer to contract must be made with the intention to create, if accepted, a legal relationship. It must be capable of being accepted (not containing any impossible conditions), must also be complete (not requiring more information to define the offer) and not merely advertising.
Partnership	When two or more people or organisations join together to carry on a business.

Term	Meaning
PIAM	Persatuan Insuran Am Malaysia
Private Law	Law which regulates the relationships between individuals. Family, commercial and labour law are examples of private law because the focus of those kinds of laws is the relationships between individuals or between corporations or organisations and individual, with the government a bystander.
Products liability	The liability of manufacturers and other persons for defective products.
Public Law	Those laws which regulate (a) the structure and administration of the government, (b) the conduct of the government in its relations with its citizens,(c) the responsibilities of government employees and (d) the relationships with foreign governments.
QB	Queen's Bench Division Law Reports
Qualified privilege	The defence that a statement cannot be made the subject of an action for defamation because it was made on a privileged occasion and was not made maliciously, for an improper motive.
Restitution	The return of property to the owner or person entitled to possession. If one person has unjustifiably received either property or money from another, he has an obligation to restore it to the rightful owner in order that he should not be unjustly enriched or retain an unjustified advantage.
Sessions Court	The Sessions Court is the highest of the subordinate or inferior Courts. Each Sessions Court shall be presided over by a Sessions Court judge appointed by the *Yang di-Pertuan Agong* on the recommendation of the Chief Judge.
Syariah Courts	There is a parallel system of state *Syariah* Courts which has limited jurisdiction over matters of state Islamic (*Syariah*) law. The *Syariah* Courts have jurisdiction only over matters involving Muslims, and can generally only pass sentences of not more than three years imprisonment, a fine of up to RM5,000, and/or up to six strokes of the cane.
Sole Proprietorship	An individual person carrying on business without having registered a single member company.
Special Court	The Special Court was established in 1993, to hear cases of offences or wrongdoings made by a Ruler. A Ruler includes the *Yang di-Pertuan Agong*, and the Head of states.
Statute	Written law, as laid down by the legislature.
Strict liability	(in Criminal law) Liability for a crime that is imposed without the necessity of proving mens rea with respect to one or more of the elements of the crime. (in tort) Liability for a wrong that is imposed without the claimant having to prove that the defendant was at fault.

Term	Meaning
Syariah	Traditional Islamic religious law; it covers the totality of religious, political, social and private life making no distinction between religion and life, in other words between transgressions of moral rules (sin) and of social rules.
Tort	Tort refers to that body of the law which will allow an injured person to obtain compensation from the person who caused the injury.
Tort law	The area of law that covers the majority of all Civil lawsuits. Essentially, every claim that arises in civil Court with the exception of contractual disputes falls under tort law. The concept of tort law is to redress a wrong done to a person, usually by awarding them monetary damages as compensation.
Trespass	A wrongful direct interference with another person or with his possession of land or goods.
UN	The United Nations (UN) is an international organisation designed to make the enforcement of international law, security, economic development, social progress, and human rights easier for countries around the world. The United Nations includes 193 member countries and its main headquarters are located in New York City.
Unwritten law	Law which rests on custom by judicial decision, and not on a written command, decree or statute.
Vicarious liability	Legal liability imposed on one person for torts or crimes committed by another (usually an employee but sometimes an independent contractor or agent), although the person made vicariously liable is not personally at fault.
Void	A void contract is one that cannot be performed or completed at all. A void contract is void from the beginning (ab initio – see the Latin terms below) and the normal remedy, if possible, is to put things back to where they were before the contract. Contracts are void where one party lacks the capacity to perform the contracted task, it is based on a mistake, or it is illegal.
Volenti non fit injuria	[Latin: no wrong is done to one who consents] The defence that the claimant consented to the injury or (more usually) to the risk of being injured.
Warranties[26]	Promises made in a contract, but which are less than a condition. Failure of a warranty results in liability to pay damages (see the financial terms below) but will not be a breach of contract unlike failure of a condition, which does breach the contract.

26 The definition of the terms "conditions" and "warranties" for insurance contracts is actually the reverse, i.e. under insurance contracts, warranties are the major terms in the contract whereas conditions are the promises made in the insurance contract. The breach of a warranty under an insurance contract constitutes a breach of contract. This is one of the basic peculiarities and distinctions of insurance contracts. It has its roots and explanation in its historical development in marine insurance.

Answers

Chapter 1	Chapter 2	Chapter 3	Chapter 4	Chapter 5
1. C	1. C	1. B	1. B	1. C
2. B	2. C	2. B	2. C	2. B
3. B	3. C	3. D	3. B	3. C
4. C	4. A	4. B	4. B	4. C
5. B	5. C	5. A	5. B	5. B
6. C	6. B	6. B	6. C	6. A
7. C	7. B	7. D	7. A	7. C
8. C	8. B	8. B	8. B	8. A
9. A	9. B	9. B	9. C	9. B
10. A	10. B	10. A	10. C	10. A

Asian Institute of Insurance

Level 6, Bangunan AICB,
No. 10 Jalan Dato' Onn,
50480 Kuala Lumpur, Malaysia

+603 2712 8882
customercare@aiiasia.org