Legal Ignorance in England and Wales: A Study of Contract, Tort, Unjust Enrichment and Civil Procedure Law

Paula GILIKER*

Abstract:

This article was written as part of a comparative law project to consider how different European legal systems (common and civil law) address the problem of legal ignorance in private law, that is, the extent to which the rules of contract, tort and unjust enrichment make allowances for ignorance of the law by legal actors. It also addresses the question of civil procedure and whether legal ignorance can provide a ground for disapplying or postponing the commencement of limitation periods. The aim of this article is to identify both the common law response and the motivation of the courts in this field to facilitate comparison with civil law systems. In seeking to understand common law legal reasoning, the starting point remains that citizens should be encouraged to familiarise themselves with the law. The law needs to set rules for the benefit of society in general. Issues such as security of transactions, legal certainty and efficiency also play a role. Nevertheless, some allowance is made for legal ignorance in the interests of fairness, although such examples are often controversial and subject to ongoing academic debate.

Keywords: Legal ignorance, mistake, misrepresentation, tort, unjust enrichment, limitation

1. Introduction: What do we mean by legal ignorance?

Lawyers will be familiar with the phrase that ignorance of the law is no excuse (*ignorantia juris non excusat* or *ignorantia legis neminem excusat*). This signifies that even if the defendant is unaware that he or she is committing an unlawful act, he or she may be found liable. Equally, where the claimant enters a legal transaction in ignorance of the true legal position, the transaction is *prima facie* valid. In both cases, the onus is on the parties to familiarise themselves with the correct legal position. This may seem harsh, however, especially where non-commercial parties are involved. Ordinary citizens are not trained lawyers, familiar with the intricacies of legal rules. Even commercial parties can be mistaken and will not take legal advice on every transaction. Nevertheless, the view of the common law courts is that broader social concerns must be taken into account. A requirement of actual (subjective) knowledge of the law would undermine the efficient functioning of the legal system, giving rise to difficult and time-consuming enquiries into the state of mind of the legal actors. It would also prejudice the position of other parties whose protection would be subject to the subjective state of mind of the claimant or defendant.

This article will examine the extent to which the rules of contract, tort, unjust enrichment and civil procedure in England and Wales make allowances for legal ignorance from the perspective of both claimants and defendants. It will consider, in particular, whether the policy that ignorance of the law is no excuse has been strictly adhered to and whether, in practice, arguments of individual justice have at times prevailed. In outlining the position in England and Wales, this paper seeks to complement other papers in this edition of the *European Review*

* Professor of Comparative Law, School of Law, University of Bristol (UK) Email: paula.giliker@bristol.ac.uk.

of Private Law with the aim of providing the reader with a clearer comparative picture of how states across Europe, both common law and civil law, have addressed the issue of legal ignorance in private law.

2. Legal ignorance in four specific areas of law

In this article, I will examine four areas of private law in which ignorance of the law has given rise to litigation. Section 3 will look at the laws of contract and unjust enrichment. Here, the debate has been claimant-centred and focussed on matters of mistake and/or misrepresentation of law. Where, for example, a person pays his taxes in the belief that the law requires him to do so, only to find out later that there is an exemption or, in the leading case, the law governing the transaction has subsequently been found to be retrospectively invalid by the courts, the question arises whether the claimant can recover the money paid under a mistaken assumption of law (action for unjust enrichment) and obtain a judgment that any contractual agreement is void (action in contract law).[1] Misrepresentation of law raises similar issues, arising, for example, where a person enters a contract in reliance on an assurance that the sitting tenant had no statutory rights, only to find, after the purchase of the premises, that this is not the case. Finally, this section will address the situation where the law was correctly understood when the contract is made, but legislation has intervened changing the law *prospectively* and rendering performance of the contract illegal. Here, the issue is treated as a question of frustration (supervening illegality) and separate rules apply.

Section 4 will focus on tort law. Here the discussion centres on the defendant and the extent to which, in setting normative standards of behaviour to protect the interests of citizens, the courts should take into account the particular circumstances of the defendant. Given, for example, the standard of behaviour in negligence is that of the 'reasonable person', should the courts take account of the defendant's ignorance of this legal standard? Further issues have arisen in the context of public authority liability for false imprisonment. Where an individual is found to have been detained by a public body in the (mistaken) assumption that such detention is authorised by law, is legal ignorance a valid excuse? Is it relevant that, on the facts, the public authority defendant could not have known that its actions were contrary to the law?

Section 5 will examine the rules of civil procedure applicable to private law claims under the UK Limitation Act 1980, and the extent to which provision is made to disapply limitation periods when the delay is due to the fact that the claimant was ignorant of their right to sue. Again, the focus is claimant-centred. To what extent do the rules of limitation apply regardless of the subjective knowledge of the claimant and will matters such as mistake of law or deliberate concealment of a fact relevant to the claim by the defendant make a difference?

[1] Sheehan has argued for a narrower view of legal ignorance that arises only when the claimant has *no* belief or opinion as to what the law is (and would thus exclude mistake which relates to the actual belief of the claimant), but this is not the general view taken by the common law: D. SHEEHAN, 'What is a Mistake?' 20. *LS (Legal Studies*) 2000, p 538.

3. Legal ignorance in contract and unjust enrichment law

3.1 Mistakes of law

There has been a long-standing debate in English law whether entering a contract under a genuine misunderstanding of the true legal position should be taken into account by the courts. If ignorance of the law is no excuse, should a claimant be able to rely on a genuine misunderstanding of the law to request a declaration that the contract is null and void with restitution of any sums paid under the contract? For 200 years it was an accepted common law principle that a contract could not be vitiated by a mistake of law (as opposed to a mistake of fact). In *Furness Withy (Australia) Pty Ltd v. Metal Distributors (UK) Ltd*,[2] Dillon L.J. traced the rule back to the nineteenth century case of *Bilbie v. Lumley*.[3] In *Bilbie*, Lord Ellenborough C.J. expressly relied upon the maxim *ignorantia juris non excusat* to deny an insurance underwriter recovery due to mistake of law. This was despite the fact he had paid out on a policy which, unknown to him at the time, he could have avoided for non-disclosure of material facts. Lord Ellenborough C.J. held that:

> Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.[4]

The administration of justice, it was argued, required that parties should not be able to rely on ignorance of the law to avoid liability or invalidate an agreement. It would be too easy to allege (and hard to disprove). Both parties had the same opportunity to find out the relevant legal rules and should use it.

Dillon L.J. noted, however, that by 1989, the rule had received considerable criticism on the basis that it operated harshly on claimants. McCamus commented in 1983 that '[i]t would be difficult to identify another private law doctrine which has been so universally condemned.'[5] Further, since *Bilbie*, the common law courts had developed a number of exceptions to bypass the rule.[6] Examining the case-law, the primary reason for retaining the rule seems to have been an interest in the finality of settlements of disputes[7] and the detrimental consequences that followed from re-opening completed transactions.[8] However, ongoing criticism, judicial

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[2] EWCA 10 Nov 1989 [1990] 1 Lloyd's Reports p (236) at 250.

[3] Court of King's Bench 28 June 1802 http://www.commonlii.org/uk/cases/EngR/1802/245.pdf = (1802) 2 East 469. However, 'liability mistakes', that is, where money has been paid under a mistaken belief of the payer as to the existence of a liability to pay, were viewed as actionable as a mistake of fact: Court of Exchequer 18 Nov 1841 *Kelly v. Solari*, http://www.commonlii.org/uk/cases/EngR/1841/1087.pdf ; Court of Exchequer 7 June 1856 *Aiken v. Short*, http://www.commonlii.org/uk/cases/EngR/1856/621.pdf .

[4] *Bilbie v. Lumley* (1802) 2 East 469 at p 472. Birks argues that this case is disappointingly weak in that it hardly goes beyond bare assertion, but concedes that it was nevertheless followed: P. BIRKS, 'Mistakes of Law', 53. *CLP* (*Current Legal Problems*) 2000 p (205) at 206.

[5] J.D. MCCAMUS, 'Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law*: Ignorantia Juris* in the Supreme Court of Canada', 17. *UBCL Rev* (*University of British Columbia Law Review)* 1983, p (233) at 236.

[6] For example, in UKHL (Ireland) 31 May 1867 *Cooper v. Phibbs* (1867) LR 2 HL 149, an exception was allowed where the mistake of law was as to private rights and in *Furness Withy* itself, a contract could be void for a mistake as to foreign law because foreign law is treated by the English courts as a question of fact. Note also the criticisms of this rule by the English Law Commission in its Consultation Paper: LAW COMMISSION, *Restitution of Payments Made Under a Mistake of Law* (1991) (Report No. 120).

[7] See P. BIRKS, 'Mistakes of Law', 53. *CLP* 2000. p (205) at 214-215.

[8] See, for example, Brennan J. in HCA 7 October 1992 *David Securities Pty Ltd v. Commonwealth Bank of Australia*, http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/48.html at para. 12: 'The reason for introducing any limitation on restitution of payments made under a mistake of law should be identified: it is to achieve a degree of certainty in past transactions … Unless some limiting principle is introduced, the finality of any payment would be as uncertain as the governing law'.

creation of exceptions to the rule and the problematic distinction between mistakes of fact (actionable) and mistake of law (non-actionable)[9] made it inevitable that, at some point, the courts would review the position stated in *Bilbie v. Lumley*.[10]

In 1998, the House of Lords in *Kleinwort Benson Ltd. v. Lincoln City Council*[11] finally determined that the mistake of law rule could no longer continue to be part of English law. The leading judgment by Lord Goff stated that English law would now recognise that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of unjust enrichment.[12] On the facts, Kleinwort Benson had made payments to a local authority under agreements which were thought to be legally enforceable, but found subsequently, following a decision of the House of Lords in a different case,[13] to be unlawful. The claim was therefore one of restitution (or unjust enrichment), that is, that Kleinwort Benson had paid money under a mistake of law and now sought recovery of these funds. *Bilbie v. Lumley* was overruled. The modern test in unjust enrichment was declared to be whether the mistake (fact/law) had caused the enrichment to be transferred.[14] There are no extra requirements that the mistake be fundamental nor that the recipient shared the payer's mistake. Only the payer's state of mind is relevant.

The Court did not resolve, however, how the overruling of *Bilbie* would impact on the law of contract. In English law, a contract may be rendered void *ab initio* by a fundamental mistake, although this rule is applied restrictively, and the courts seem more willing, in practice, to rely on the doctrine of misrepresentation (which renders a contract voidable) than mistake.[15] The Court of Appeal in *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.*,[16] for example, argued in 2002 that the test for common mistake was one of *impossibility* of performance of the contract, rendering what the parties believed to be the subject matter of the agreement 'essentially and radically different' from what it actually was. It is commonly accepted that the test for mistake in unjust enrichment is more generous than that in contract in that contract law raises particular questions relating to the finality of contracts.[17]

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[9] Given that statements of law and of fact are so frequently intermingled in cases, it is difficult to maintain a clear divide between mistake of law and mistake of fact.

[10] Mistake of law was removed by the legislature in New Zealand in 1958 (New Zealand Judicature Amendment Act 1958, section 94(A)(1)) and by the courts in Canada in 1989 and Australia in 1992.

[11] UKHL 29th October 1998, http://www.bailii.org/uk/cases/UKHL/1998/38.html. For a comparison of legal developments in the common law jurisdictions of Ireland, Canada and Australia, see N. CLEARY, 'Restitution for mistake of law in Ireland', 55. *Irish Jurist* 2016, p 25.

[12] UKHL 29th October 1998 ibid per Lord Goff. This is also an interesting (and rare) example of a common law judge whose academic writings have influenced legal development – Lord Robert Goff being the co-author of restitution text: R. GOFF and G. JONES, *The Law of Restitution*, now in its 9th edition (with new authors): C. MITCHELL, P. MITCHELL and S. WATTERSON, *Goff & Jones: The Law of Unjust Enrichment* (London: Sweet and Maxwell 2016).

[13] UKHL 24 January 1991 *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 Appeal Cases (A.C) 1.

[14] H BEALE (ed), *Chitty on Contracts* (London: Sweet and Maxwell, 33rd edn 2018) at para. 29-036; *Kleinwort Benson v. Lincoln CC* [1999] 2 A.C. p (349) at 408 (Lord Hope); at 373 (Lord Goff); Queen's Bench Division (Commercial Court) 24 April 1979 *Barclays Bank v. WJ Simms* [1980] Queen's Bench Reports 677. The test is therefore one of 'but for' causation.

[15] J. CARTWRIGHT, *Misrepresentation, Mistake and Non-disclosure* (London: Sweet and Maxwell, 5th edn 2019); C. MACMILLAN, *Mistakes in Contract Law* (Oxford: Hart Publishing 2010).

[16] EWCA Civ 14 October 2002, http://www.bailii.org/ew/cases/EWCA/Civ/2002/1407.html . See also Queen's Bench Division 13 April 1988 *Associated Japanese Bank (International) Ltd v. Credit du Nord SA* [1989] 1 WLR (Weekly Law Reports) 255.

[17] See H. BEALE (ed), *Chitty on Contracts* (edn 2018) at para. 29-035; EWHC (Comm) 5 November 1990 *Citibank NA v. Brown Shipley & Co Ltd* [1991] 2 All England Reports p (690) at 700–701 (Waller J).

In *Brennan v. Bolt Burdon*,[18] the Court of Appeal responded to *Kleinwort Benson* and accepted that its authority would extend beyond unjust enrichment to the law of contract. Nevertheless, recognition that mistake of law could render a contract void did not change the general rule that any such mistake would have to be *fundamental* and meet the traditional common law test for mistake.[19] In *Brennan*, the claimant (a local authority tenant) had alleged that he had suffered from carbon monoxide poisoning due to the failure of his landlord to properly maintain his boiler. A compromise agreement had been reached based on the common assumption that the claim form had been served out of time. A subsequent decision of the Court of Appeal showed that this assumption was wrong. The claimant in *Brennan* sought to impeach the settlement agreement for mistake of law. In rejecting the claim, the Court of Appeal held that where the relevant law was *merely in doubt* and the party went ahead with the compromise anyway, the compromise agreement would not be void. It was the very essence of a settlement agreement that both sides recognised the risk that their opinions as to the point of law in question might not be correct. The Court found that there was not an operative common mistake where there had been doubt as to the law concerned and where the party wishing to reopen the contract went ahead with it anyway. Only an unequivocal, but mistaken view of the law, would render such a contract void. Later cases have emphasised the dividing line between mistakes and mispredictions of law, arguing that parties to a compromise agreement should have been aware that some lower court judgments would be susceptible to appeal. An actionable mistake of law was more likely to arise, therefore, where a well-established and unquestioned rule of law was dramatically overturned than where a single decision on a new and difficult point was overruled. [20]

The decision to adopt a broad interpretation of 'mistake of law' - to include mistakes arising (as in *Kleinwort Benson* and *Brennan*) by virtue of a subsequent judicial decision that retrospectively changed the law on which the parties had relied - has proven controversial. Is this indeed a 'mistake' at all? English law takes the view that it *can be* a mistake of law, not because the claimants misunderstood the law at the time of making the contract, but due to the fact that their understanding of the law turned out to be incorrect in the light of later case-law. This relies on the so-called 'declaratory theory of law', that is, when a judge states what the law is, his or her decision has a retrospective effect.[21] (This contrasts with legislation where change is generally prospective.[22]) At the very least we can say that this variety of mistake of law is 'of the most artificial sort'[23] with the potential to undermine security of transactions.

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[18] EWCA Civ 29 July 2004, http://www.bailii.org/ew/cases/EWCA/Civ/2004/1017.html at para. 10 per Maurice Kay L.J. Affirmed by EWCA Civ 660 3 July 2007 *Graves v. Graves* http://www.bailii.org/ew/cases/EWCA/Civ/2007/660.html at para. 32. The case also shows that the *Kleinwort Benson* rule extends to compromise and consent agreements.

[19] For criticism that even this test does not meet standards of commercial good sense and clarity, see J. MORGAN, 'Common mistake in contract: Rare success and common misapprehensions' 77. *CLJ* (*Cambridge Law Journal*) 2018, p 559.

[20] EWHC (Ch) 24 January 2020 *Elston v King* http://www.bailii.org/ew/cases/EWHC/Ch/2020/55.html, at para. 30, giving guidance as to the interpretation process to be undertaken by court.

[21] See J.M. FINNIS, 'The fairy tale's moral' 115. *LQR* (*Law Quarterly Review*) 1999, p 170. This remains controversial e.g. economic approaches to law suggest that retrospective overruling will increase the complexity and unpredictability of the legal system, making the parties less willing to spend the resources required to create complex contracts, leading to inefficient results: see A. SCHWARTZ and J. WATSON, 'The Law and Economics of Costly Contracting' 20. *J. L. Econ. & Org* (*Journal of Law, Economics and Organization*) 2004, p 20. 2; D. SHEEHAN and T.T. ARVIND, 'Prospective overruling and the fixed-floating charge debate' 122. *LQR* 2006, p 20.

[22] See S. WHITTAKER, 'Precedent in English Law: A View from the Citadel' 14. *ERPL* (*European Review of Private Law*) 2006, p 705 and 3.3 (frustration for supervening illegality) below.

[23] EWHC (Ch) 24 January 2020 *Elston v King* http://www.bailii.org/ew/cases/EWHC/Ch/2020/55.html

Leading unjust enrichment scholar Virgo agrees that such mistakes are artificially created and raise problems in terms of unjust enrichment theory, in that they undermine a key principle that the mistake is to be determined at the time the benefit was transferred to the defendant.[24] This point also divided the Court in *Kleinwort Benson*; the minority arguing that there should be no restitution where there had been a change in the law or a departure from the settled view of the law and where, therefore, the payor had not *at the time of payment* been mistaken as to the law. The majority disagreed – such changes had retrospective effect.

In *Deutsche Morgan Grenfell v. Inland Revenue*,[25] Lord Hoffmann acknowledged the doctrinal debate that had followed *Kleinwort Benson* and, in particular, the view of leading unjust enrichment academic, Peter Birks, that such cases did not involve mistakes, but rather the inability to predict what a future court was going to say.[26] Lord Hoffmann nevertheless asserted that where a judicial decision changes the law retrospectively, it has immediate practical consequences: 'perhaps it would make objectors feel better if one said that because the law was now deemed to have been different at the relevant date, he was *deemed* to have made a mistake. But the reasoning is based upon practical considerations of fairness and not abstract juridical correctitude.' [27]

This position, conceptually problematic as it is, has raised most concern in relation to its potential to undermine the finality of settlement agreements. Bodey J. commented in *Brennan v. Bolt Burdon* that:

> Once the position is (a) that a common mistake of law may vitiate a contract and (b) that the law may be changed retrospectively by judicial declaration of the law (conceptually creating a common mistake subsequent to the date of the contract, which was not a mistake judged according to the law as declared at the time of the contract) then an inevitable tension arises between, on the one hand, allowing the contract in question to be re-opened on the basis of the artifice of the common mistake of law and, on the other hand, adhering to the fundamental principle of contract law that parties should be held to their agreements.[28]

It is legitimate to question whether Lord Hoffmann's response is convincing. What might be fair to claimants is not necessarily fair for defendants and third parties who have relied on the legality of the agreement over, possibly, a long period of time. Reversal, however, at this stage would be problematic requiring a Supreme Court willing to overturn authority dating back to 1998 or a legislature willing to intervene. Neither is likely to occur. The response of the English courts has therefore been pragmatic, accepting *Kleinwort Benson* but adopting a cautious approach. It will thus be exceptional for a mistake of law to render a settlement agreement void.[29] Indeed, it has been argued that the only situation where one can say with

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at para 21 per Marcus Smith J.

[24] G. VIRGO, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd edn 2015) at pp 183-6.

[25] UKHL 25 October 2006 *Deutsche Morgan Grenfell Group Plc v. Inland Revenue*, http://www.bailii.org/uk/cases/UKHL/2006/49.html.

[26] BIRKS, 'Mistakes of Law' (n 4) at pp 223-4. See also J. BEATSON, 'Unlawful Statutes and Mistake of Law: Is there a Smile on the Face of Schrödinger's Cat?' in A. Burrows and A. Rodger (eds), *Mapping* the *Law*: *Essays in Memory of Peter Birks* (Oxford: Oxford University Press 2006) pp 163-180.

[27] UKHL 25 October 2006 *Deutsche Morgan Grenfell Group Plc v. Inland Revenue*, http://www.bailii.org/uk/cases/UKHL/2006/49.html at para. 23 (emphasis in text).

[28] EWCA Civ 29 July 2004, http://www.bailii.org/ew/cases/EWCA/Civ/2004/1017.html at para. 28.

[29] H. BEALE (ed), *Chitty on Contracts* (edn 2018), at para. 6-053. See D. COLLINS, 'Settlement agreements, legal information and the mistake of law rule in contract' 61. *NILQ (Northern Ireland Law Quarterly*) 2010, p 1 and EWCA Civ 7 February 2007 *Kyle Bay Ltd (t/a Astons Nightclub) v. Underwriters* http://www.bailii.org/ew/cases/EWCA/Civ/2007/57.html.

confidence that the contractual agreement will be void for mistake of law is where performance of the contract itself is illegal.[30]

3.2 Misrepresentation of law

Similar issues have arisen in relation to misrepresentations of law. Until *Kleinwort Benson*, only an unambiguous false statement of *fact* would give rise to a remedy for misrepresentation. As Mellish L.J. remarked in *Beattie v. Lord Ebury* in 1872, 'the rule in this Court is that a person cannot be made liable for making a misrepresentation unless it is a misrepresentation in point of fact, and not merely in point of law … it is as much the business of the Plaintiff as of the [defendants] to know what the law was'.[31] A further complication is that abstract statements of law are, in any event, generally regarded as statements of opinion, which are not actionable as misrepresentation.[32]

In *Pankhania v. Hackney London Borough Council*,[33] the English High Court confirmed that the overturning of the mistake of law bar in *Kleinwort Benson* would also apply in relation to misrepresentation. In the case itself, Pankhania had purchased commercial property, part of which was being used by National Car Parks (NCP) as a car park. Although the seller was aware of the likelihood that NCP held the land under a tenancy protected by statute, the sales documentation drawn up for an auction sale of the premises had been careful to refer to the land in terms that suggested that only a licence agreement existed which was terminable on three months' notice. Pankhania sought damages for misrepresentation of the legal status of the person present on the land. The court found that this was a clear misrepresentation of law which had induced Pankhania to purchase the land in reliance on this statement, rendering the defendants liable. The judge held that the rule against misrepresentations of law had been a historical offshoot of the 'mistake of law' rule and the two were thus logically interdependent. On this basis, the 'survival of the "misrepresentation of law" rule following the demise of the "mistake of law" rule would be no more than a quixotic anachronism.'[34]

The case for intervening when one party takes advantage of the legal ignorance of the other to induce them by misrepresentation to enter a contract is, in any event, strong. The defendant has actively misled the claimant. Cartwright argues that intervention for misrepresentation of law is far more persuasive than for mistake - the reasons often given for refusing relief on the grounds of a mistake of law, for example, that it would be easy to claim a mistaken belief in the law and hard to disprove it, have much less weight when the mistake was the result of an active misrepresentation by the other party.[35] *Chitty on Contracts* warns, however, that, despite *Pankhania*, a claim for misrepresentation will continue to fail where it is apparent that all that is being offered is an opinion without implication that the speaker has reasonable grounds for

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[30] J. CARTWRIGHT, *Misrepresentation, Mistake and Non-disclosure* at para. 15-24.
[31] EWCA in Chancery 29 July 1872 (1872) LR 7 Ch. App. p (777) at 802-803.
[32] Privy Council (New Zealand) 20 July 1926 *Bisset v. Wilkinson* [1927[A.C. 177. See, however, EWCA Civ 20 March 1979 *André et Cie SA v. Etablissements Michel Blanc & Fils* [1979] 2 Lloyd's Report 427: misrepresentation as to foreign law is one of fact. Intentional/fraudulent misrepresentations of law are also treated as statements of fact.
[33] EWHC (Ch) 2 August 2002 http://www.bailii.org/ew/cases/EWHC/Ch/2002/2441.html. This is a first instance decision but generally regarded as being correctly decided.
[34] Ibid., at para. 57 per Rex Tedd Q.C.
[35] J. CARTWRIGHT, *Misrepresentation, Mistake and Non-disclosure* at para.3–30.

that opinion.[36] The underlying question remains: was the statement (whether of fact or law) one that should be actionable because it was made in circumstances where the representee was reasonably entitled to rely on it? [37]

3.3 Frustration for supervening illegality

So far, this section has examined situations where the parties have entered a transaction under a mistaken assumption as to the law or in reliance on a misrepresentation of the law by one party to the contract. Following *Kleinwort Benson*, this will extend to situations where the claimant is *deemed* to be operating under a mistake of law due to a subsequent judicial decision that has retrospectively changed the legal position which the parties had assumed to exist at the time the contract was made. A parallel situation may be identified: where primary or secondary legislation subsequently changes the legal position which the parties assumed to exist at the time the contract was made. However, legislative change to the law is generally prospective.[38] The issue is, therefore, not one of mistake, but frustration, that is, whether the contract should be discharged due to a change of circumstances that occurs *after* the contract has been validly formed. The test is as stated in leading English contract law practitioners' text, *Chitty on Contracts:*

> A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.[39]

Generally, the bar is set high, as one might expect in a system that values security of transactions so highly. In the leading case of *Davis Contractors Ltd v. Fareham Urban District Council*,[40] a post-war shortage of labour and materials that increased the cost of the work from the contractual price of £85,836 to over £110,000 did not suffice. The Court held that 'it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.' [41] Chung describes the approach as 'hands-off' and contrasts it with other European states.[42] McKendrick has also noted a tendency in English law to favour a contractual solution such as encouraging the parties to insert *force majeure*, hardship or intervenor clauses in preference to intervention by the courts.[43] Chung agrees, commenting that the emphasis in current law in providing certainty means that contracting parties are incentivised to rely on self-help solutions such as *force majeure* clauses. The common law assumption, therefore, is that the parties themselves

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[36] H. BEALE (ed), *Chitty on Contracts* (edn 2018), at para. 7-017. See Court of Appeal 27 Oct 1884 *Smith v. Land and House Property Corporation* (1884) LR 28 Ch D 7.
[37] J. CARTWRIGHT, *Misrepresentation, Mistake and Non-disclosure* at para.3–41.
[38] Retrospective legislation is rare in the UK, but there are examples of legislation that seeks to validate activities which have no statutory basis or to correct practices which have been found to be illegal.
[39] H. BEALE (ed), *Chitty on Contracts* (edn 2018), at para. 23-001. The leading texts are: G.H. TREITEL, *Frustration and Force Majeure* (London: Sweet and Maxwell, 3rd edn 2014); E. MCKENDRICK (ed), *Force Majeure and Frustration of Contract* (London: Lloyd's of London Press, 2nd edn 1995).
[40] UKHL 19 April 1956, *http://www.bailii.org/uk/cases/UKHL/1956/3.html* = [1956] A.C. 696.
[41] Ibid, at p 729 per Lord Radcliffe.
[42] G. CHUNG, 'A comparative analysis of the frustration rule: Possibility of reconciliation between Hong Kong-English 'Hands-off approach' and German 'Interventionist mechanism'' 25. *ERPL* 2017, p 109.
[43] E. MCKENDRICK, *Contract Law* (London: Palgrave Macmillan, 13th edn 2019) at para. 14.9.

are best placed to guard against future contingencies by inserting contractual terms and conditions tailored to their specific needs.[44]

Nevertheless, a subsequent change in the law or in the legal position affecting a contract is a well-recognised head of frustration.[45] This category includes legislative intervention and the exercise by the Government of prerogative or administrative powers.[46] Supervening illegality will arise where the Government has exercised its statutory authority to forbid, whether temporarily or permanently, the performance of a contract.[47] The key issue is whether the illegality of performance is merely temporary or partial: if so, the contract will not be frustrated. If it affects the performance of the contract in a substantial or fundamental way, frustration arises. In *Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.*,[48] therefore, a contract for the sale and purchase of timber, with an option to purchase the timber-yard if the contract was terminated on notice by either party, became illegal after the start of WWII but, in 1941, one party still tried to give notice to terminate the contract and exercise their option to purchase the yard. It was held that the Government Order of 1939 prevented operation of the agreement and thus acted to frustrate the contract.[49]

Such cases are not treated as matters of legal ignorance, but rather a failure by the parties to predict (unforeseeable) prospective legislative change.[50] They do not deal with a mistaken understanding of the law. The willingness of the courts to intervene should therefore not be characterised as a response to legal ignorance, but rather as an application of the principle that discharging a contract for frustration in these circumstances will encourage parties to obey the law. The courts will not permit an express provision in a contract to exclude frustration for supervening illegality as this would be against public policy.[51] While, then, the courts, as in the mistake of law cases, are reluctant to destabilise existing transactions, here the public policy imperative of respecting the law overcomes any security of transactions arguments. As Treitel rightly observed, what matters in these cases is 'the public interest that the law is observed'.[52]

4. Legal ignorance in tort law

The question of legal ignorance has also arisen in the common law of tort. The starting point is that there is no defence as such of 'ignorance of the law'. We see this clearly in relation to intentional torts that protect the person, land and goods of the claimant. It is irrelevant,

[44] CHUNG (n 42) at p 141.
[45] H. BEALE (ed), *Chitty on Contracts* (edn 2018) at para. 23-022.
[46] See Court of Queen's Bench 20 Jan 1869 *Baily v. De Crespigny* (1869) L.R. 4 Q.B. 180. See also EWHC (Ch) 6 July 2010 *Hildron Finance Ltd v Sunley Holdings Ltd*. *http://www.bailii.org/ew/cases/EWHC/Ch/2010/1681.html*.
[47] See e.g. UKHL 2 26 November 1917 *Metropolitan Water Board v. Dick, Kerr & Co. Ltd*, http://www.bailii.org/uk/cases/UKHL/1917/2.html: 1914 contract to build a reservoir deemed frustrated when the contractors were obliged to cease work by order of the Ministry of Munitions in 1916, regardless of a clause in the contract providing that if the contractors should be impeded or obstructed by any cause the engineer should have power to grant an extension of time.
[48] UKHL 19 May 1944, http://www.bailii.org/uk/cases/UKHL/1944/1944_SC_HL_35.html.
[49] Contrast UKHL 25 Jan 1945 *Cricklewood Property and Investment Trust Ltd. v. Leightons Investment Trust Ltd.* [1945] A.C. 221*:* temporary, war-time restrictions may not frustrate a long-term lease.
[50] It is a condition of frustration that the frustrating event must not be foreseeable or self-induced: see E. MCKENDRICK, *Contract Law* (edn 2019) at paras. 14.15-14.16.
[51] UKHL 25 Jan 1918 *Ertel Bieber & Co v Rio Tinto Co. Ltd.* [1918] A.C. 260.
[52] G.H. TREITEL, *Frustration and Force Majeure* (edn 2014), paras. 8-002-8-003.

therefore, in an action for battery that the surgeon mistakenly believed that, at law, the patient's failure to respond to his question prior to the operation amounted to consent.[53] Equally, in relation to trespass to land and goods, it is irrelevant that you were unaware that your actions would infringe the rights of another, provided you are acting of your own volition. In *Basely v. Clarkson*,[54] where a defendant had mistakenly mowed down some grass unaware that legally the land belonged to the claimant, the court still found that trespass to land had taken place. The same rule applies to those mistakenly taking possession of personal property: 'the liability ... is founded upon what has been regarded as a salutary rule for the protection of property, namely that persons deal with the property in chattels or exercise acts of ownership over them at their peril'.[55] As Oliphant has commented, this amounts virtually to strict liability for these torts.[56] Here, the importance placed on protecting victims against intentional harm means that ignorance of the law cannot be regarded as a valid defence.

Similarly, in relation to negligence (the most popular common law tort), legal ignorance provides no defence. In determining fault-based liability, the standard of care is objective – the defendant's conduct is adjudged according to the standard of the 'reasonable person' or, if one prefers, 'the man on the [London] Underground'.[57]

> [The test] eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence.[58]

Importantly, the reasonable person is deemed to know the law. On this basis, it will not matter whether the defendant actually knows whether his or her conduct is lawful or not. The motorist, then, who drives above the speed limit in the mistaken belief that she is within the legal speed limit (or simply cannot remember what it is) will be deemed to be driving negligently if she causes an accident. Equally, a landowner who cuts down a tree which has been set alight by lightning and leaves it to burn itself out in the mistaken belief that this is the best approach will be liable for subsequent harm because the law determines that a reasonable landowner would have eliminated the foreseeable risk of the fire rekindling by dousing the smouldering sections of the tree with water.[59] Not knowing, or even being able to meet, the standard of the reasonable person in English law is no excuse to an action for negligence.

Tort law exists then to set normative standards of behaviour.[60] In this light, the common law approach is, logically, that no allowance should be made even for the genuine inability of the

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[53] The law does, however, require an intention to make contact with the claimant and so where a person has no intention of coming into contact with another person but accidentally does so, this will not give rise to the tort: EWHC (QB) 3 Nov 1890 *Stanley v. Powell* [1891] 1 Q.B. 86.

[54] Court of King's Bench 1 Jan 1680, http://www.commonlii.org/uk/cases/EngR/1797/21.pdf.

[55] Court of Exchequer Chamber 13 Jun 1872 *Fowler v Hollins* (1872) LR 7 QB p (616) at 639 per Cleasby B. (innocent conversion).

[56] K. OLIPHANT, 'The structure of the intentional torts' in J.W. Neyers, E. Chamberlain and S.G.A. Pitel (eds), *Emerging Issues in Tort Law* (Oxford: Hart Publishing 2007) at p 514.

[57] UKHL 3 December 1998 *White v. Chief Constable of South Yorkshire*, http://www.bailii.org/uk/cases/UKHL/1998/45.html = [1999] 2 A.C. 455, 495 per Lord Steyn.

[58] UKHL 16 April 1943 *Glasgow Corp v. Muir* http://www.bailii.org/uk/cases/UKHL/1943/1943_SC_HL_3.html = [1943] A.C. 448 at 457 per Lord Macmillan.

[59] See UKPC 13 June 1966 *Goldman v. Hargrave* http://www.bailii.org/uk/cases/UKPC/1966/1966_12.html.

[60] See, for example, EWCA Civ 30 June 1971 *Nettleship v. Weston*, http://www.bailii.org/ew/cases/EWCA/Civ/1971/6.html (standard for learner drivers is set at that of qualified drivers).

defendant to know the law – the reasonable person is deemed to know the law (and should indeed strive to do so). Two recent lines of authority have tested this assumption. The first involves the tort of negligence and the extent to which the courts are prepared to take into account an individual defendant's inability to appreciate the law and the wrongfulness of his or her actions. The second concerns the tort of false imprisonment and raises issues similar to those seen in *Kleinwort Benson* above. Where a public body acting in good faith places a person in custodial detention which is legally authorised according to the law valid at that time, what is the impact of a subsequent judicial decision that determines retrospectively that such detention is illegal?

4.1 Negligence and the capacity to appreciate the unlawful nature of one's actions

In *Dunnage v. Randall*,[61] the claimant's uncle had set himself on fire with petrol in his home during a dispute with his nephew. The claimant suffered serious burns to his face and body in trying to put out the fire, while his uncle died at the scene. The uncle was posthumously diagnosed as suffering from florid paranoid schizophrenia. His nephew brought a claim against his uncle for negligence. While such a claim might seem, at first glance, surprising given the relationship between the parties, the reality was that the uncle had household insurance which provided cover for accidental bodily injury to any person. The nephew, seriously injured, was therefore trying to obtain compensation which would be payable under the household insurance policy. His claim, however, was opposed by the insurance company, exercising its rights to subrogation in this case. The question for the Court of Appeal was whether, in the light of previous authority which had suggested that liability in negligence would not arise unless the disability suffered by the defendant was something of which he was (or should have been) aware,[62] the uncle could be said to have negligently caused the nephew's injury.

The Court of Appeal took a firm line. Only defendants whose medical incapacity has the effect of *entirely eliminating any fault or responsibility* for the injury can be excused from liability in the tort of negligence.[63] A defendant who is merely impaired by medical problems, whether physical or mental, would therefore be liable for his actions if he caused injury by failing to exercise reasonable care.[64] Here, it was not enough that the defendant was acting irrationally, driven by his delusions, he was still aware of the nature and quality of his actions and his disease did not excuse him from needing to take the care of a reasonable man. The Court openly acknowledged that this was a matter of legal policy:

> The objective standard of care reflects the policy of the law. It is not a question of the law discriminating unfairly against people with physical or mental illness. The law takes the view as a matter of policy that everyone should owe the same duty of care for the protection of innocent victims.[65]

For the tort of negligence, therefore, the personal characteristics of the defendant, including ignorance of the law, are not taken into account in establishing the standard of care required at law. This is regardless of the fact that legal ignorance may be triggered by mental illness. Honoré argues that this creates a form of strict liability on the minority of wrongdoers who

[61] EWCA Civ 2 July 2015, *http://www.bailii.org/ew/cases/EWCA/Civ/2015/673.html*.
[62] EWCA CIv 26 March 1997 *Mansfield v. Weetabix Ltd* [1998] 1 W.L.R. 1263.
[63] For example, actions done in a state of automatism or while sleepwalking.
[64] *Dunnage v. Randall* (n 61) at para 131 per Vos L.J.
[65] *Dunnage v. Randall* (n 61) at para 153 per Arden L.J.

cannot attain the standard set by law.[66] For Spencer, this is entirely sensible – otherwise the courts would have to undertake long and expensive inquiries into the knowledge of each particular defendant.[67] Public policy in tort requires the setting of standards, even if it may lead to the occasional unfair result. For defendants, then, legal ignorance provides no defence.

4.2 False imprisonment and retrospective changes to the law

Further support for this position may be found in my second example concerning false imprisonment claims against prison governors. Here the question arises whether there is a valid claim for false imprisonment where the governor, acting in good faith, had calculated the length of the prisoner's sentence on the basis of the law as he or she understood it to be at the time, but that law was rendered incorrect by a subsequent judicial decision. Due to the declaratory theory of law, the later decision applies retrospectively and, in the cases litigated, indicated that the prisoner should have been released at an earlier date. Prison authorities may only detain prisoners if they have lawful authority to do so. If they do not have lawful authority, then the tort of false imprisonment is committed. It is no defence that the defendant had the honest and reasonable belief that he or she had the necessary authority to detain the claimant if, legally, no such authority existed.[68] The courts have again taken a strict line. In the leading case of *R v. Governor of Brockhill Prison, Ex p. Evans (No.2),*[69] the prison governor was held liable for the unauthorised detention of a prisoner when the sentence, calculated by the governor on the law as then understood, was subsequently found to be incorrect. Liability is strict; the absence of bad faith or even negligence on behalf of the prison governor irrelevant.

The same rule applies where, subsequently, there is found to have been a breach of the principles of public law rendering the detention unlawful. Where, however, the claimant could have been detained if the defendant had appreciated what the law required, the courts have refused all bar nominal damages. In *Lumba*,[70] therefore, the claimants had been detained pending deportation under an unpublished policy. This was later found to be unlawful under principles of public law and the Supreme Court held that the claimants had been falsely imprisoned by virtue of an unlawful exercise of the Secretary of State's power to detain. Nevertheless, on the basis that if the Secretary of State had applied the published policy the claimants would still have been detained, the Court held that the claimants had suffered no loss or damage. On this basis, they were entitled only to nominal damages to reflect the fact that they had been the victim of a tort.[71] As explained in a later case, '[l]ying behind the decision in *Lumba* therefore is the principle that although procedural failings are lamentable and render detention unlawful, they do not, of themselves, merit substantial damages.'[72]

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[66] In such cases, he comments that it is more a matter of bad luck than fault, but nevertheless the law holds the parties responsible for their actions in the collective interest: T. HONORE, *Responsibility and Fault* (Oxford: Hart Publishing 1999) at pp 22-24.

[67] J.R. SPENCER, '*Dunnage v. Randall*: Liability - personal injury – negligence' *JPI Law (Journal of Personal Injury Law*) 2015, p C200-C204.

[68] M. JONES (ed), *Clerk and Lindsell on Torts* (London: Sweet and Maxwell, 23rd edn 2020) at para 14-26.

[69] UKHL 27th July 2000, *http://www.bailii.org/uk/cases/UKHL/2000/48.html* = [2001] 2 A.C. 19.

[70] UKSC 23 March 2011 *R (Lumba) v. Secretary of State for the Home Department,* http://www.bailii.org/uk/cases/UKSC/2011/12.html.

[71] For criticism that this ruling undermines the vindicatory policy of the law, see J.N.E. VARUHAS, 'The concept of 'vindication' in the law of torts: Rights, interests and damages' 34. *OJLS (Oxford Journal of Legal Studies)* 2014, p (253) at 279-282.

[72] EWCA 11 December 2018 *Parker v The Chief Constable of Essex Police,* https://www.bailii.org/ew/cases/EWCA/Civ/2018/2788.html at para.104 per Sir Brian Leveson P.

Lord Slynn in *Ex p. Evans* ably encapsulated the dilemma before the courts in this kind of case:

> If the claim is looked at from the governor's point of view liability seems unreasonable; what more could he have done? If looked at from the applicant's point of view she was, it is accepted, kept in prison unlawfully for 59 days and she should be compensated. Which is to prevail? Despite sympathy for the governor's position it seems to me that the result is clear. … [The prisoner] was merely thought to be lawfully detained. That is not a sufficient justification for the tort of false imprisonment even if based on rulings of the court. Although in form it is the governor, it is in reality the State which must compensate her for her unlawful detention.[73]

Cane argues that it is the very nature of the tort of false imprisonment which is relevant here: it is a tort which focuses on the rights of the claimant, not the conduct of the defendant.[74] On this basis, despite the apparent unfairness to the defendant, the normative standards of the law are maintained.

There are, however, two exceptions to the *Ex p. Evans* rule. The first is that no liability arises when the mistake of law is made by the *court*. In *Ex p. Evans*, the governor had calculated the period of detention himself according to the rules then applicable; the court order sentencing Evans had not specified the release date. In *Quinland v. Governor of Swaleside Prison*,[75] however, where the sentence had been miscalculated by the judge with the result that the claimant served an extra six weeks in prison, the Court of Appeal held that the detention under a judicial warrant of commitment was legally justified until set aside. Provided an individual is in custody under an order of the court, the governor is not liable for false imprisonment since he will have had no option but to obey the warrant.[76] There is also authority that where the detention was based on rules laid down in subordinate legislation, then it is not false imprisonment, even if, as in *Percy v. Hall*,[77] the byelaw in question turned out to be invalid. The police should be able to rely on legislation, even if it is later found to be unenforceable.

The above examples demonstrate that legal ignorance is not something the common law of tort accepts as a valid defence. The minor exceptions outlined above arise where the public interest in protecting the administration of justice is deemed to justify a denial of liability. The decision in *Lumba* represents an interesting, and arguably questionable, middle ground. Despite the importance placed on protecting the right to individual liberty, a 'technical' interference with this right, that could otherwise have been justified, is deemed to merit merely nominal damages.[78]

5. Legal ignorance and statutes of limitation

This final section will examine to what extent legal ignorance can be relied upon to circumvent the expiration of statutory limitation periods. It is inevitable that any system of private law

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[73] [2001] 2 A.C. (19) at p 26 per Lord Slynn.
[74] P. CANE, 'The temporal element in law' 117. *LQR* 2001, p (5) at 6.
[75] EWCA Civ 19 February 2002 http://www.bailii.org/ew/cases/EWCA/Civ/2002/174.html.
[76] Note that the action was against the prisoner governor and not the judge. Judges are immune from claims in negligence: EWCA Civ 30 Jul 1974 *Sirros v. Moore* [1975] Q.B. 118.
[77] EWCA Civ 10 May 1996, http://www.bailii.org/ew/cases/EWCA/Civ/1996/1348.html, albeit obiter. Cane speculates (n 74 at 10) that the distinction between illegal byelaws and judge-made rules of law is that it is 'in the public interest' that byelaws should be 'presumed valid' until held invalid, whereas judge-made rules of law are liable to be overturned and so provisional in a sense that secondary legislation is not.
[78] Although costs will usually follow the event signifying that the defendant will usually have to meet the claimant's litigation costs; a not insignificant benefit to the claimant.

will impose periods of limitation (or prescription) to avoid stale claims, encourage claimants to bring claims promptly and ensure an end to litigation. The State also has an interest in ensuring that trials are heard at a time when there is sufficient reliable evidence and in promoting legal certainty for the benefit not only of potential defendants, but also third parties.[79] The UK Limitation Act 1980 sets strict time limits for claims in contract, tort and unjust enrichment. Under section 5 of the Act, the time limit for ordinary contracts is that of 6 years from the date on which the cause of action accrued.[80] This extends to claims in unjust enrichment (unless they are equitable claims). The 6 year period is also the general time limit for tort claims.[81] For claims that consist of or include damages for personal injuries or death, however, be they contract or tort, section 11 provides that the claim must be brought within 3 years from the date the action accrued or the date of knowledge (if later) of the injured person. The harshness of this short time limit is, however, tempered by a discretion, under section 33 of the Act, to disapply the time limit if it appears equitable to the court to allow the case to proceed. Section 32 also provides that where the claimant is bringing a claim for fraud or mistake or alleges that the defendant has deliberately concealed a fact relevant to the claim, time will not run until the claimant has, or could with reasonable diligence have, discovered the fraud, concealment or mistake.

This section will examine to what extent sections 32 and 33 of the 1980 Act make allowances for claimants who, due to ignorance of the law, fall foul of the limitation periods in contract, tort and unjust enrichment. Both provisions make statutory provision for 'fairness' despite the arguments against stale claims.

5.1 Personal injury claims: Sections 11, 14 and 33, Limitation Act 1980

Section 11 provides that:

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
(4) Except where subsection (5) below applies,[82] the period applicable is three years from—
(a) the date on which the cause of action accrued; or
(b) the date of knowledge (if later) of the person injured.

The date of knowledge, mentioned above, is defined by section 14.[83] Section 14(1) provides that the 'date of knowledge' refers to the date on which the claimant first had knowledge of the following facts—

(a)that the injury in question was significant; and
(b)that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
(c)the identity of the defendant; and

[79] H. BEALE (ed). *Chitty on Contracts* (edn 2018*)* at para. 28-001.
[80] But 12 years if the contract was created by deed: section 8, Limitation Act 1980.
[81] Section 2 Limitation Act 1980. Special provisions exist for defamation (section 4A) and defective products (section 11A).
[82] Section 11(5) deals with claims where the person injured dies before the end of the limitation period and the time limits then applicable to claims by the deceased's estate.
[83] For guidance, see UKSC 14 March 2012 *AB v. Ministry of Defence*, http://www.bailii.org/uk/cases/UKSC/2012/9.html and UKHL 30 January 2008 *A v. Hoare*, http://www.bailii.org/uk/cases/UKHL/2008/6.html.

(d)if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

It is irrelevant that the claimant was actually unaware that, as a matter of law, the acts or omissions in question gave him or her a right to sue.[84] Section 14(2) provides that the injury is 'significant' if the claimant should reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy judgment. After some debate,[85] this has been found to set an impersonal standard—in the words of Lord Hoffmann in *A v. Hoare*:

> … you ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.[86]

Section 14(3) provides for constructive knowledge, which includes knowledge which the claimant might reasonably be expected to acquire from facts observable or ascertainable by the claimant, or from facts ascertainable with the help of medical or other professional advice it is reasonable to expect the claimant to seek. The majority of the House of Lords in *Adams v. Bracknell Forest B.C.* held that this would be a mainly objective test: what would a reasonable person, placed in the situation in which the claimant was placed, have said or done?[87] This may, however, take account of the effect of the injury on the claimant, for example, if it renders the claimant blind, the court will not assume that the claimant should have acquired knowledge by seeing something, or if it causes cerebral palsy, the level of disability of the claimant.[88]

More subjective matters, such as the victim's character or intelligence, would not be considered under section 14, but would be relevant, however, in determining whether, under section 33, the court should exercise its discretion to disapply the time limit.[89] In *Albonetti v. Wirral MBC*,[90] Mr Albonetti alleged that he had suffered sexual abuse between the ages of 15 and 16, but had not recognised the psychological consequences of that abuse until 30 years later. The Court of Appeal took the view that a person who had been raped must know that he or she had suffered not only a grave wrong, but also a significant injury for the purposes of the Limitation

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[84] Section 14(1).

[85] See EWCA Civ 1 Feb 1977 *McCafferty v. Receiver for the Metropolitan Police District* [1977] 1 W.L.R. 1073, which is no longer good authority.

[86] UKHL 30 January 2008 http://www.bailii.org/uk/cases/UKHL/2008/6.html at para.34.

[87] UKHL 17 June 2004, http://www.bailii.org/uk/cases/UKHL/2004/29.html. Constructive knowledge may arise when claimant given reasonable opportunity to acquire information but declines to do so: EWCA Civ 12 December 2008 *Pierce v. Doncaster M.B.C.*, http://www.bailii.org/ew/cases/EWCA/Civ/2008/1416.html. See A. MCGEE, 'Triggering the date of knowledge in personal injury' 31. *PN (Journal of Professional Negligence* 2015, p 95.

[88] EWCA Civ 5 March 2010 *Whiston v. London S.H.A*, http://www.bailii.org/ew/cases/EWCA/Civ/2010/195.html. See also EWCA Civ 31 October 2014 *Platt v. B.R.B. (Residuary) Ltd.*, http://www.bailii.org/ew/cases/EWCA/Civ/2014/1401.html *:* it was reasonable to expect a person who was suffering from hearing loss to ask his specialist whether the history of noise exposure which they had discussed had caused or contributed to his symptoms.

[89] Notably section 33(3)(a): 'In acting under this section the court shall have regard to all the circumstances of the case and in particular to the length of, and the reasons for, the delay on the part of the plaintiff.' For a recent summary of the general principles to be applied by judges when exercising their discretion under section 33, see EWCA Civ 1 December 2017 *Greater Manchester Police v Carroll*, http://www.bailii.org/ew/cases/EWCA/Civ/2017/1992.html at para.42 per Sir Terence Etherton M.R.

[90] EWCA Civ 4 Jul 2008 [2008] EWCA Civ 783.

Act 1980, section 14. In the subsequent claim to disapply the time limit under section 33,[91] the court recognised, however, that the sexual abuse had caused the claimant psychiatric problems which had led to an understandable delay in bringing proceedings. It refused nevertheless to exercise its discretion under s.33, having examined the case as a whole to see if it was fair and just for the action to proceed. A delay of 40 years was deemed far too long to permit a fair trial to take place in the circumstances, particularly where the claim was not against the rapist (now dead), but against his local authority employer for negligence.[92] This may be contrasted with the more generous approach of the court in *Raggett v. Society of Jesus Trust 1929 for Roman Catholic Purposes*.[93] Here, the court disapplied the limitation period under section 33 despite a substantial delay in the claimant bringing a claim against the school for sexual abuse by one of its teachers in the 1970s. Swift J. found on the facts that such delays were not uncommon in child sexual abuse cases where children suppressed memories of abuse until adulthood and the school's ability to defend the claim had not been materially affected. Despite the delay and the heavy burden on the claimant to show that it would be equitable to allow the action to proceed, in circumstances where there was no doubt that Raggett had been the victim of a sustained course of sexual abuse and assaults, a fair trial was still held to be possible. The claimant's evidence was both compelling and cogent. The court emphasised, however, that Raggett would still have to prove that the abuse had caused him injury at trial.

Section 33, therefore, provides some discretion for courts where it remains possible to hold a fair trial despite the claimant's failure to bring his or her claim in time. It should be noted, however, that it is a response to the very short limitation period of three years in personal injury claims in contract and tort and, as seen above, a discretion that courts remain cautious about exercising.

5.2 Section 32, Limitation Act 1980: Postponement of the start of the limitation period
Section 32(1) provides that:

> … 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
> (b)any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; 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, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

The section thus establishes that where the claimant's action is based on a fraudulent misrepresentation or mistake or he is unaware of his rights due to deliberate concealment of facts by the defendant, the limitation period will only start after the claimant has, or with reasonable diligence could have, discovered that this has occurred.[94] 'Reasonable diligence' does not require the claimant to do everything possible or use all the means at his or her disposal to discover the facts, but only to do what an ordinary prudent person, having regard to the circumstances, would do.[95] The aim is clearly that the defendant should not benefit from his or her bad behaviour or, more controversially, a misunderstanding between the parties.

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[91] EWHC (QB) 16 March 2009 [2009] EWHC 832 (QB).
[92] See P. CASE, 'Limitation periods and sexual abuse' 25. *PN* 2009, p 22.
[93] EWHC (QB) 5 May 2009, http://www.bailii.org/ew/cases/EWHC/QB/2009/909.html. See P. CASE, 'Varying substance over form in sexual abuse litigation' 26. *PN* 2010, p 228.
[94] The section does not apply to an action under the Fatal Accidents Act 1976 or to the 10-year long-stop period for actions under Part 1 of the Consumer Protection Act 1987: section 32(4A).
[95] EWHC (QB) 27 May 1983 *Peco Arts Inc v. Hazlitt Gallery Ltd* [1983] 1 W.L.R. 1315, 1323.

Section 32(1)(a) is, however, of limited scope and only covers cases where the cause of action requires proof of fraud. It does not extend to negligent misrepresentation. Section 32(1)(b) deals with deliberate concealment of any fact relevant to the claimant's right of action. In *Kitchen v. R.A.F. Association*,[96] for example, a firm of solicitors was found to have deliberately failed to inform their client that an *ex gratia* payment had been offered by an alleged tortfeasor on the basis that it would have revealed their past negligence. More recent claims have focussed on bad work concealed by builders and allegations with respect to professional negligence. In *Cave v. Robinson Jarvis & Rolf*,[97] the House of Lords accepted that deliberate concealment would require the defendant to be aware of the breach of duty and to conceal or fail to disclose the wrongdoing in circumstances where it is unlikely to be discovered for some time.[98] Active steps to conceal the breach are not required. An unwitting (even if negligent) concealment will not, however, suffice. Section 32(1)(c) deals with mistake. Here, the period of limitation shall not begin to run until the claimant has discovered the mistake or could with reasonable diligence have discovered it. *Kleinwort Benson Ltd v. Lincoln City Council*[99] (discussed above) establishes that a mistake of law now fits within this section. It only applies, however, where the mistake is the essential ingredient of the cause of action.[100]

The real debate in *Kleinwort Benson* was in fact one of limitation. Kleinwort Benson had brought proceedings for sums paid to four local authorities under interest rate swap agreements which had later been declared unenforceable by the House of Lords. While it had recovered sums paid less than 6 years prior to the start of proceedings,[101] it now sought to claim back payments made outside that period on the basis that the payments had been made in the mistaken belief that they were lawfully due. To trigger section 32(1)(c), therefore, Kleinwort needed the court to find that an actionable mistake. By recognising mistake of law, the House of Lords allowed these claims to proceed, as permitted by s.32 of the Limitation Act 1980.

Lord Goff did express concern, however, that the effect of section 32(1)(c) in cases of mistake of law such as those found in *Kleinwort Benson* might be to extend the claimant's right to sue for an indefinite period of time and that this particular consequence might not have been fully appreciated at the time when the provision was enacted. He argued, however, that it was for Parliament to intervene if necessary: 'On the section as it stands, however, I can see no answer to the submission of the bank that their claims in the present case, founded upon a mistake of law, fall within the subsection.'[102] Parliament has intervened, but only to a limited extent reflecting the State's own priorities. Following *Kleinwort Benson* and the later case of *Deutsche Morgan Grenfell v I.R.C.*, new legislation was introduced for mistakes of law relating

[96] EWCA Civ 1 Apr 1958 [1958] 1 W.L.R. 563 (decided under the statutory predecessor of s.32).
[97] UKHL 25 April, 2002, http://www.bailii.org/uk/cases/UKHL/2002/18.html.
[98] See, for example, EWCA Civ 18 February 2004 *Williams v. Fanshaw Porter & Hazelhurst*, http://www.bailii.org/ew/cases/EWCA/Civ/2004/157.html.
[99] UKHL 29 October 1998, http://www.bailii.org/uk/cases/UKHL/1998/38.html.
[100] EWCA Civ 31 Mar 1954 *Phillips-Higgins v. Harper* [1954] 1 Q.B. 411. Affirmed in UKSC 23 May 2012 *Test Claimants in the Franked Investment Income Group Litigation v Inland Revenue*, http://www.bailii.org/uk/cases/UKSC/2012/19.html.
[101] See section 5 of the UK Limitation Act 1980.
[102] *Kleinwort Benson v Lincoln CC* [1999] 2 A.C. 349 at p 389. See also G. VIRGO, *The Principles of the Law of Restitution* (edn 2015) at p 185 and S. BESWICK, 'The discoverability of mistakes of law' *LMCLQ (Lloyd's Maritime and Commercial Law Quarterly*) 2019, p 112 who is critical of the reasoning in this case, offering an alternative solution in a later article: 'Discoverability principles and the law's mistakes' 136. *LQR* 2020, p 139.

to taxation, retrospectively abrogating the extended limitation period.[103] Parliament has not intervened more generally, however, and there is no immediate prospect of it doing so. In this light, the Supreme Court in 2020 faced a direct challenge whether mistake of law should, in reality, be covered by s.32(1)(c).[104] For the majority, the cause of action recognised in *Kleinwort Benson* (the 'deemed' mistake) undoubtedly fell within the scope of the language used in section 32(1)(c) if that language was given its ordinary meaning, and the section could not therefore be confined to mistakes of fact. It sought, however, to provide for greater legal certainty by adopting a narrower test of discoverability. The s.32(1)(c) limitation period would start when the claimant discovers, or could with reasonable diligence discover, his mistake in the sense of recognising that a worthwhile claim arises.[105] This, it admitted, would involve a nuanced inquiry, but was to be preferred to the previous mechanical test based on the date on which an authoritative appellate judgment determined the point in issue. Combined with the fact that there had been no noticeable surge of claims for restitution of money paid under mistakes of law since *Kleinwort Benson*[106] (and any claims after a long lapse of time would likely face a defence of change of position), the majority found that amending the discoverability test in this way would provide sufficient legal certainty in this area of law.

Section 32(1)(c), in seeking to intervene in the interests of fairness, as a result of *Kleinwort Benson* has permitted a far greater ability to extend limitation period than was originally intended.[107] The English response has been a mixture of legislation and case-law intervention to achieve a level of legal certainty acceptable to the law. While retrospective legislation is a rare (and controversial)[108] response, it is confined to loss of tax revenue.[109] More general intervention has come from the courts, which have responded to potential instability in the law by adopting a more restrictive interpretation of the law.

6. Understanding legal ignorance in the private law of England and Wales

In engaging in a study of legal ignorance across the spectrum of the private law of England and Wales, this article has shown not only how the law operates, but the policy imperatives

[103] See Finance Act 2004, section 320 (section 32(1)(c) does not apply in relation to a mistake of law relating to taxation in relation to claims brought on or after 8 September 2003) and Finance Act 2007, section 107 (section 32(1)(c) does not apply in relation to a mistake of law relating to taxation in relation to claims brought before 8 September 2003). For a discussion, see G. VIRGO, *The Principles of the Law of Restitution* (edn 2015) at pp 406-409.

[104] UKSC 20 November 2020 *Test Claimants in the Franked Investment Income Group Litigation v Inland Revenue*: http://www.bailii.org/uk/cases/UKSC/2020/47.html.

[105] Ibid., paras. 193 and 209.

[106] With the exception of claims in relation to tax that was unlawful under EU law: see ibid., para.232.

[107] Note, however, section 32(3) that provides that s.32 will not extend the limitation period for actions (a) to recover property or recover its value, or (b) to enforce a charge against any property or set aside a transaction affecting property, in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake took place.

[108] UKSC 23 May 2012 *Test Claimants in the Franked Investment Income Group Litigation v Inland Revenue*, http://www.bailii.org/uk/cases/UKSC/2012/19.html found section 320 and section 107 to breach EU law in relation to their retrospective application which is contrary to the EU law principle of protection of legitimate expectations. See now the amended Finance Act 2007, section 107(5A): 'Subsection (1) also does not have effect in relation to an action … if the consequences of a mistake of law to which the action, or cause of action, relates is the charging of tax contrary to EU law'.

[109] As noted also by the Supreme Court in UKSC 25 July 2018 *Prudential Assurance Co Ltd v Revenue and Customs Commissioners*, http://www.bailii.org/uk/cases/UKSC/2018/39.html paras. 63-65.

underlying the reasoning of the courts. It has also demonstrated the insights that may be gained in examining private law generally, in contrast to the normal stance taken by common lawyers of focussing on one area of private law. In surveying English private law, we can see that the starting point for the common law remains that ignorance of the law is no excuse. Until 1998, the legal position was that a contract could not be vitiated by a mistake of law (nor, by analogy, rendered voidable by a misrepresentation of law). For defendants, the approach continues to be straightforward – you cannot use your ignorance of the law as a defence. This is regardless of your good faith or medical disabilities affecting your judgement. Respect for the law is a dominant theme. As indeed is transactional certainty. Parties should be encouraged to make themselves aware of the law, not excused for their ignorance.

Nevertheless, the House of Lords' decision in *Kleinwort Benson Ltd v. Lincoln City Council*[110] demonstrates that arguments of fairness can prevail, albeit only to a certain degree and in favour of claimants. In this case, the deemed legal ignorance of the claimants, wrongly paying sums due to a mistake of law, led to a remedy for unjust enrichment. The limits, however, should be noted. Unjust enrichment is subject to defences such as change of position and any claim for mistake of law in contract law would be subject to the common law's restrictive test for mistake. Misrepresentation does offer an easier option, reflecting the common law's preference for intervention in the face of actual misconduct by the defendant. Equally, the legislator has been prepared to assist, notably where, as a result of fraud, deliberate concealment or mistake, the claimant has lost his or her claim due to expiration of the relevant limitation period,[111] although the scope of the mistake provision under section 32(1)(c) has been a matter of contention. The limited nature of such protection indicates that the law of England and Wales is generally reluctant to intervene in circumstances of legal ignorance.

A number of conclusions can be reached. First, that the maxim that ignorance of the law is no excuse (*ignorantia juris non excusat*) remains relevant to English private law. Secondly, that this has led to doctrinal debates as the courts struggle to balance fairness with concerns that parties should be encouraged to obey the law and be able to rely on the security of commercial transactions. Finally, that in relation to claimants, courts have been willing to intervene, but at a price. Judicial intervention, while a testimony to the dynamism of common law judicial law-making, does not necessarily lead to settled law, and more than 20 years after the decision in *Kleinwort Benson*, the courts of England and Wales continue to debate its impact on private law.

[110] UKHL 29 October 1998, http://www.bailii.org/uk/cases/UKHL/1998/38.html.
[111] Section 32, Limitation Act 1980.