the Regulations extend the requirement to consult to non-union workplaces. They further provide that:

- Employee representatives may be elected by the employees for the specific purpose of consultation or while not having been specifically elected it is appropriate to consult them as where they are members of an existing works council or joint consultative committee. In all cases the employee representatives must be employed by the employer. No method is stipulated in the Regulations which means that *ad hoc* procedures as and when a redundancy situation will arise are acceptable.
- Consultation must begin in good time as distinct from the earliest opportunity as was formerly required and before reaching final conclusions, and in any case.
- Where the employer is proposing to dismiss 100 or more employees at one establishment within 90 days or less, consultation must begin, as before, 90 days *before any notice of dismissal is served*. In cases involving less than 100 but at least 20 employees, consultation must begin at least 30 days before that date. This means that the employer must wait the full 30- or 90-day period before serving notice and not, as before, when the first redundancies took effect. Thus the employee gets the full consultation period plus pay for the notice period plus any redundancy package (see the Collective Redundancies (Amendment) Regulations 2006).
- Appropriate representatives must be given access to employees who are to be made redundant and facilities, e.g. an office and a telephone must be made available to them.

It should of course be borne in mind that fairness towards employees in a redundancy situation is always paramount if the matter goes to a tribunal asserting unfair dismissal. Therefore, individual consultation may be required even where the numbers involved are less than 20 and even though, the numbers being more, there has been consultation with representatives. Thus, in *Mugford* v *Midland Bank plc* [1997] IRLR 208 the EAT, in confirming that a particular employee had not in the circumstances been subject to unfairness, commented that if a person is selected for redundancy, individual consultation may become important in the circumstances of the case, even if the employer (as he had in this case) has conducted detailed consultation with what were in this case union representatives.

It should be noted:

- that consultation must cover employees who have volunteered for redundancy; and
- although consultation does not have to end in agreement, it must always be properly conducted.

It is, perhaps rather obviously, direct discrimination not to consult an employee about redundancy because she is on maternity leave (see *McGuigan* v *T&G Baynes* (1999) 622 IRLB 11), and employees who are on parental leave, paternity leave and adoption leave.

Notice

The employer must start the consultation process by giving written notice to the appropriate representatives stating:

(*a*) the reasons for the proposals;
(*b*) the numbers and descriptions of employees whom it proposes to dismiss as redundant;
(*c*) the total number of employees of that description. In *MSF* v *GEC Ferranti (Defence Systems) Ltd* (1994) 491 IRLB 12 the EAT held that the statutory period for consulting with a trade union over proposed redundancies did not begin when the employer gave the union a notice which contained only a 'best estimate' of the redundancies;

(*d*) the proposed method of selecting the employees to be dismissed;
(*e*) the proposed method of carrying out the dismissal, including the period over which the dismissals are to take effect;
(*f*) the method of calculating any non-statutory redundancy payments.

Consultation must also include consideration of ways to avoid redundancies, to reduce the number to be dismissed and to mitigate the consequences of dismissals. The employer must also, as part of the consultation process, consider any representations by the appropriate representatives.

The above obligations do not apply if the employees whom the employer proposes to dismiss fall into one of several specified categories. The most important of these categories, for practical purposes, are:

(*a*) employees who under their contract ordinarily work outside Great Britain;
(*b*) employees under a contract for a fixed term of three months or less or who have been engaged to carry out a specific task which is not expected to last for more than three months (unless in either case the employment has continued beyond the three months).

The employer must also be able to argue that there were special circumstances which made it not reasonably practicable for it to comply with the requirements. Even then it must do whatever is reasonably practicable. If, for example, the employer is proposing to dismiss 25 employees and cannot give the full 30 days' notice required, it must give as much notice as possible.

The main practical consequence, if the requirements are not complied with, is that the union or any employee representative or any of those made redundant can apply to an employment tribunal for what is known as a 'protective award'. The effect of the award is that a protected period of up to 90 days is specified and individual employees can then apply to have their remuneration paid for that period. The following example illustrates the position.

Example: A firm is proposing to dismiss 25 employees and fails to give notice to the appropriate representatives. The employment tribunal makes a protective award under which the protected period begins on the date when the first dismissal takes effect and runs for 30 days. Employees who are dismissed on that first date can claim remuneration for the whole of the 30-day period. Employees dismissed part-way through the protected period can claim remuneration for the balance of the period (subject in each case to the dismissal being for redundancy and not for some other reason).

Notifying the Secretary of State

The employer's other obligation is to notify the Department of Trade and Industry of proposed redundancies. The obligation is to give written notice to the Department:

(*a*) at least 90 days before the first dismissal notice is given, in the case of 100 or more redundancies;
(*b*) at least 30 days before the first dismissal notice is given, in the case of 20 or more redundancies.

The notice must be in a prescribed form available from local offices and the employer must give a copy to the relevant appropriate representatives.

If there are special circumstances which make it not reasonably practicable for the employer to comply with the requirements, it must do everything that is reasonably practicable. If the special circumstances prevent the full required notice being given, it must give as much notice as possible.

Failing to comply with the above requirements means that the employer can be prosecuted and fined.

Redundancy consultation and the Information and Consultation of Employees Regulations 2004

These Regulations (SI 2004/3426) require consultation and information to be undertaken or given to employees on an ongoing basis about issues affecting the business in which they work. From 6 April 2005 the Regulations have applied to employers with at least 150 employees. From 6 April 2007 they will apply to undertakings employing at least 100 employees and from 6 April 2008 to those with at least 50 employees.

The Department of Trade and Industry has issued guidance in terms of how these consultations fit in with the redundancy consultation provisions. The guidance states that the ICE Regulations are in addition to the redundancy consultation provisions and makes the following points:

- An employer who proposes to make collective redundancies must comply with the redundancy provisions even though it has established separate consultation arrangements as regards representatives under the ICE Regulations. Thus, if a trade union is recognised in regard to a collective redundancy situation, the employer must consult with the redundancy representatives even where there is a separate group of employees for consultation put in place as a result of ICE consultations.
- Where there is a separate group of employee representatives for ICE consultations, the employer will only be required to consult the ICE representative in a redundancy if the employer has agreed to do so under a 'negotiated agreement' under the ICE Regulations.
- Otherwise an employer need not consult on redundancy provisions with ICE representatives if it informs those representatives that the redundancy consultation provisions have been triggered and that consultation will take place under the redundancy provisions.

The guidance document is available at **http://www.dti.gov.uk/er**.

The role of ACAS

ACAS has now taken on redundancy pay entitlement as an issue on which it has a duty to conciliate. The Employment Rights (Dispute Resolution) Act 1998 confers a duty on ACAS to conciliate if a person puts an application to an employment tribunal concerning entitlement to redundancy pay.

Collective agreements on redundancy

The Secretary of State may, on the application of the employer and the unions involved, make an order modifying the requirements of redundancy pay legislation if he is satisfied that there is a collective agreement which makes satisfactory alternative arrangements for dealing with redundancy. The provisions of the agreement must be 'on the whole at least as favourable' as the statutory provisions, and must include, in particular, arrangements allowing an employee to go to an independent arbitration or to make a complaint to an employment tribunal.

Written statement of reasons for dismissal

At common law an employer is not required to give his employee any reasons for dismissal. However, s 92 of the ERA provides that where an employee is dismissed, with or without notice, or by failure to renew a contract for a fixed term, he must be provided by his employer on request, within 14 days of that request, with a written statement giving particulars of the reasons for his dismissal. This provision applies only to employees who have been continuously employed for a period of one year, though there is no service requirement in pregnancy dismissals. The written statement is admissible in evidence in any proceedings relating to the dismissal and if an employer refuses to give a written statement the employee may complain to an employment tribunal. If the tribunal upholds the complaint, it may make a declaration as to what it finds the employer's reasons were for dismissing the employee and must make an award of two weeks' pay without limit as to amount to the employee.

Other methods of terminating the contract of employment

These have already been considered in Chapter 17 and reference might usefully be made at this point to that chapter in terms of what is said about discharge of contract by notice, by agreement and by passage of time.

Employee's breach of contract

An employer may sue his employees for damages for breach of the contract of service by the employee. Such claims are potentially available, for example, for damage to the employer's property, as where machinery is damaged by negligent operation, as was the case in *Baster* v *London and County Printing Works* [1899] 1 QB 901, or for refusal to work resulting in damage by lost production, as was the case in *National Coal Board* v *Galley* [1958] 1 All ER 91. Such claims are rare and impractical because of the fact that the employee will not, in most cases, be able to meet the claim, and also, perhaps more importantly, because they lead to industrial unrest. In these circumstances we do not pursue the matter further here.

The employment contract and shop workers

The Sunday Trading Act 1994, which came into force on 26 August 1994, repeals previous restrictions on Sunday trading. Recognising the impact of this on shop workers, the ERA 1996, Part IV provides them with new and important rights. These rights are:

- not to be dismissed or made redundant for refusing to work on Sunday; and
- not to suffer a detriment for the same reason.

These rights extend to all shop workers in England and Wales if they are asked to do shop work on a Sunday. They are not available to Sunday-only workers.

The ERA 1996 defines a shop worker as an employee who is required or may be required by contract to work in or about a shop on a day when the shop is open to serve customers. However, the worker need not actually serve customers and the provisions extend beyond sales assistants and check-out operators to clerical workers doing work related to the shop, managers and supervisors, cleaners, storepersons, shelf fillers, lift attendants and security staff. Even those employed by outside contractors (but not self-employed) could be covered as also could van drivers based at the store who deliver goods to customers.

A shop is defined as including any premises where any retail or business is carried on. This does not include the sale of meals, refreshments or intoxicating liquor for consumption on the premises, e.g. public houses, cafés and restaurants, nor places preparing meals or refreshments to order for immediate consumption off the premises, e.g. take-aways.

The ERA 1996 defines two categories of shop workers:

- protected shop workers, i.e. those employed as such when the Act came into force, and those taking up employment afterwards whose contracts do not require Sunday working;
- opted-out workers, i.e. those who are employed after commencement of the Act under contracts which require them to work on Sundays but who opt out of this by giving three months' notice to the employer (see below).

Protected workers will have the right immediately regardless as to whether they have previously agreed to a contract requiring them to work on a Sunday. No procedures are involved. They can simply decide that they no longer wish to work on Sundays. Protected workers are able to give up their right to refuse to work on Sundays but only if:

- the employer is given a written 'opting-in notice' which must be signed and dated and state expressly that they do not object to Sunday working or actually wish to work on Sundays; and
- then enter into an express agreement with the employer to work on Sunday or on a particular Sunday.

Opted-out workers, i.e. those engaged after commencement of the Act or who have opted in to Sunday working, have the right to opt out. To do this they must give the employer a signed and dated written notice stating that they object to Sunday work. They then have to serve a three-month notice period. During this time they are still obliged to do Sunday work and if they refuse will lose statutory protection under the ERA 1996. However, they cannot be dismissed or made to suffer some other detriment merely because they have been given an opting-out notice. After the period of three months has expired, the worker has a right not to do Sunday work.

The ERA 1996 provides that dismissal or redundancy of protected and opted-out workers will be regarded as unfair dismissal if the reason or principal reason was that the worker(s) concerned have refused or proposed to refuse to work on Sundays.

The ERA 1996 gives protected and opted-out workers the right not to be subjected to any other detriment, e.g. non-payment of seniority bonuses, for refusing to work on a Sunday. These rights apply regardless of age, length of service or hours of work.

Employer's explanatory statement. The ERA 1996 provides that employers are required to give every shop worker who enters into a contractual agreement to work on Sundays after the new Act comes into force a written explanatory statement setting out their right to opt out. If an employer does not issue such a statement within two months of the worker entering into such a contractual agreement, the opt-out period is reduced from three months to one.

The ERA 1996 gives a prescribed form of statement to be given to employees.

STATUTORY RIGHTS IN RELATION TO SUNDAY SHOPWORK

You have become employed as a shop worker and are or can be required under your contract of employment to do the Sunday work your contract provides for.

However, if you wish, you can give a notice, as described in the next paragraph, to your employer and you will then have the right not to work in or about a shop which is open once three months have passed from the date on which you gave the notice.

Your notice must—

be in writing;
be signed and dated by you;
say that you object to Sunday working.

For three months after you give the notice, your employer can still require you to do all the Sunday work your contract provides for. After the three-month period has ended, you have the right to complain to an employment tribunal if, because of your refusal to work on Sundays on which the shop is open, your employer—

dismisses you, or
does something else detrimental to you, for example failing to promote you.

Once you have the rights described, you can surrender them only by giving your employer a further notice, signed and dated by you, saying that you wish to work on a Sunday or that you do not object to Sunday working and then agreeing with your employer to work on Sundays or on a particular Sunday.

Other important provisions are as follows:

- an employer is not obliged to compensate the employee for loss of Sunday work, either in terms of extra hours or remuneration;
- a provision in an agreement between a shop worker and his or her employer cannot generally exclude the provisions of the ERA 1996;
- the dismissal of an employee for asserting a statutory right contained in the ERA 1996 is to be regarded as being automatically unfair.

Betting offices

Betting offices and bookmaking establishments are allowed to do business on Sundays and the ERA protects workers against unfair dismissal or victimisation if they object to working on a Sunday. The provisions are largely the same as those in the case of shopworkers and appear in Part IV of the ERA 1996. They apply to workers regardless of age, hours of work or length of service.

Part 3

THE LAW OF TORTS

20

THE LAW OF TORTS: GENERAL PRINCIPLES

It is difficult to give a satisfactory definition of a tort. According to Professor Winfield (who was a distinguished author of a major text on the subject and whose definition has been accepted by our courts in many decided cases), 'tortious liability arises from a duty primarily fixed by law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages'.

The nature of a tort

It is a matter of dispute whether there should be a law of tort or a law of torts: there are two schools of thought. One maintains that there should be a law of tort, i.e. that all harm should be actionable in the absence of just cause or excuse. If there was merely a law of specific torts, then no new torts could be created by the courts and the categories of tortious liability would be closed. It is urged that under the flexibility of case law new torts have come into being, and in no case has an action been refused simply because it was novel. This is called the *general principle of liability theory*. The other view is that there should be a law of torts – that there should be only specific torts and unless the damage suffered can be brought under a known or recognised head of liability, there should be no remedy. This view is supported by modern cases where an attempt has been made, unsuccessfully, to establish a purported tort of eviction and a tort of perjury.

In *Khorasandjian* v *Bush* [1993] 3 All ER 669 the Court of Appeal granted an injunction to restrain the making of unwanted telephone calls and this might be regarded as a recognition of a new tort of harassment. However, the case is clearly founded on a breach of the rules of private nuisance and an expansion of that tort rather than the creation of a new one. Thus the courts have refused to create new torts even when given the opportunity. This is particularly unfortunate in the case of perjury. Perjury is not merely an offence against the state, as it has been traditionally regarded by the courts. It can cause an individual great loss or hardship and many feel that the victim should have a civil remedy in damages.

In addition, there is a danger in modern society of a serious invasion of privacy resulting from the increasing availability and use of electronic and other devices as a means of surreptitious surveillance and the accumulation of personal information about individuals in data banks, computers and credit registers. However, the common law of tort does now appear to be capable of extending to a remedy for invasion of privacy as such. This results from the ruling in *Douglas and Others* v *Hello! Ltd* (2005) (see below).

On the general issue of privacy we have, of course, to bear in mind the Human Rights Act 1998 which applies the European Convention on Human Rights in the UK. Article 8 provides that everyone has a right to respect for private, family and home life. Public bodies may only interfere with such rights for reasons of national security, public safety, economic wellbeing or as otherwise necessary in a democratic society. The Article was discussed in *R* v *Broadcasting Standards Commission, ex parte BBC* (1999) *The Times*, 14 September where the BBC had filmed secretly the sales transactions of Dixons for its 'watchdog' programme following the store's convictions for the sale of second-hand goods as new. No irregularities were uncovered. The High Court held that while the ECHR applied to human individuals, it did not apply to companies, so Dixons' complaint of infringement of its privacy to the Commission failed.

In addition, the Data Protection Act 1998 deals with information stored on computers. The details of the Act are beyond the scope of a book of this nature but the job of safeguarding the privacy of the individual in terms, e.g., of the information kept on him and the uses to which it is put falls under the Act to the Information Commissioner who is appointed by the Crown. The Commissioner supervises a central register on which all data users must enter details of data banks and their purposes. The Commissioner and 'data subjects', the latter through the courts, have access to records on computers. Following an EC Directive on the subject, the government obtained the enactment of the Data Protection Act 1998 which repeals the former legislation, i.e. the Data Protection Act 1984, and extends the controls in line with the Directive, e.g., by applying data control to certain types of manually produced data. The 1984 Act applied only to automatically processed data.

Hence, we may conclude that at the present there is no general principle of liability in tort. Nevertheless, if judges have not created new torts, privacy apart they have applied old cases to new situations. This has resulted in an extension of the old torts and there has been a tendency to expand the area of liability, particularly in the field of negligence (see Chapter 21). If this continues, the law may reach a stage approximating to a general liability for wrongful acts, for, as Lord Macmillan said in *Donoghue* v *Stevenson* (1932), 'the categories of negligence are never closed'.

Perera v *Vandiyar*, 1953 – No tort of eviction (**261**)
Hargreaves v *Bretherton*, 1958 – No tort of perjury (**262**)
Roy v *Prior*, 1969 – No tort of perjury reaffirmed (**263**)
Douglas and Others v *Hello! Ltd*, 2005 (**263a**) – Privacy and the law of confidence
Donoghue v *Stevenson*, 1932 – The categories of negligence can be expanded (**264**)

Damage and liability

The law distinguishes between two concepts – (1) *Damnum*, which means the damage suffered, and (2) *Injuria*, which is an injury having legal consequences. Sometimes, but not always, these two go together. For instance, if I negligently drive a car and injure a person, he suffers *damnum* (the hurt) and *injuria* (because he has a right of action to be compensated). There are, however, cases of *damnum sine injuria* (damage suffered without the violation of a legal right), and *injuria sine damno* (the violation of a legal right without damage).

The mere fact that a person has suffered damage does not entitle him to maintain an action in tort. Before an action can succeed, the harm suffered must be caused by an act which is a violation of a right which the law vests in the claimant or injured party. Damage suffered in

the absence of the violation of such legal right is known as *damnum sine injuria*. Furthermore, a person who suffers *damnum* cannot receive compensation on the basis of *injuria* suffered by another. The concept of *damnum sine injuria* is not the same as that concerning whether there is a law of tort or a law of torts because under the concept of *damnum sine injuria* a person may suffer harm and have no claim even though the harm was suffered *as a result of a known tort*.

Best v *Samuel Fox & Co Ltd*, 1952 – No proprietary right in a spouse (**265**)
Electrochrome Ltd v *Welsh Plastics Ltd*, 1968 – Loss but no damage to the claimant's property (**266**)

Malice

The fact that the defendant acts with malice, i.e. with the intention of injuring his neighbour, does not give rise to a cause of action unless a legal right of the claimant is infringed (see 'Motive' below). On the other hand, whenever there is an invasion of a legal right, the person in whom the right is vested may bring an action and recover damages (though these may be nominal) or, what may be more important, obtain an injunction, although he has suffered no actual harm. For example, an action will lie for an unlawful entry on the land of another (trespass) although no actual damage is done. Furthermore, in *Ashby* v *White* (1703) 2 Ld Raym 938, it was held that an elector had a right of action, for a form of nuisance or disturbance of rights, when his vote was wrongly rejected by the returning officer although the candidate for whom he tried to vote was elected. This is known as *injuria sine damno*.

Motive

The law of torts is concerned more with the effects of injurious conduct than with the motives which inspired it. Hence, just as a bad intention will not necessarily make the infliction of damage actionable, so an innocent intention is usually no defence unless a bad intention can be imputed. However, there are circumstances in which malice is important. Thus where a person puts in motion the criminal law against another, this is actionable if malice is shown to be present and is known as the tort of malicious prosecution. Furthermore, the question of malice may be raised when certain *defences* are pleaded. Thus in the law of defamation the defences of qualified privilege and fair comment are allowed only where the defendant has not been malicious. Finally, in regard to the tort of nuisance, certain acts which would not necessarily be a nuisance may be regarded as such if they are exercised unreasonably. Malice is sometimes regarded as evidence of conduct which is unreasonable (see *Christie* v *Davey* (1893) Chapter 21).

Bradford Corporation v *Pickles*, 1895 – Effect of bad intention (**267**)
Wilkinson v *Downton*, 1897 – Effect of innocent intention and imputation of intention (**268**)

Parties in the law of torts

It is now necessary to consider certain categories of persons whose capacity in connection with tortious acts is limited.