Graham Virgo:

Good afternoon, everybody. My name is Graham Virgo and this is Janet O’Sullivan and we're going to run the next session on legal problems. Now, you’ve heard, we hope just now, a little bit about what it's like to study law at Cambridge, how we have lectures in rooms like this but we also have the supervision system, the small group teaching where students are given work to do in preparation and then come together in small groups to discuss what they've read with an expert in the subject and with two or three other students. What we're going to try and do in this session is to replicate the supervision experience for you. We have got a number of problems and we'll show them on the PowerPoint, but you've also we think got a copy of questions as well. Good, so you can make notes on that as you wish. We may not have time to go through all of the problems and, if so, on your way back home you may want to discuss problems with whoever you've come with or maybe when you get home if you're bored one evening, have a discussion about these problems and try and work out what the answer is.

So, the aim of the session, as I say, is to give you an idea of what a supervision is like and try and illustrate for you what we mean when we say when you study law at Cambridge we are in part teaching you to think like lawyers and what exactly does that mean to think like a lawyer? You can interpret that in all sorts of different ways but, for the purpose of dealing with these legal problems, it means first looking at the facts of the problem and working out what the issues are, then working out what the relevant law is and interpreting it, then applying the law to the problem to come with an answer and then you get a little bit more academic perhaps and start thinking about whether you are happy with that answer. Is the result we’ve reached a fair result? Is it just? If not, why not? If not, what can we do to change the law and improve it? That’s what we’re going to try and do with you this afternoon.

Now, for this session to work, we are relying on audience participation and we're not going to be mean and pick on anybody, just if you want to participate put up your hand and we will then choose you, but we would encourage all of you to participate. If you are here in an accompanying capacity, feel free to participate as well. We ran this session this morning and we got some very enthusiastic participation from people who aren’t necessarily thinking about applying to read law at university, that is fine. You can all participate. Some of you may know a bit of law already and you may want to use that when we go through these problems. Most of you won’t. You’ll have no idea what the law is. We will help you and give you a bit of law, but don’t worry if you hear other people talking about some rather technical stuff that they already know. We are not expecting any knowledge and, crucially as well, you can within reason say
whatever you want. There isn’t a right or a wrong answer to these problems. That’s not quite true. If you disagree with what Janet O’Sullivan and I say, you are by definition wrong. We are always right, but you may want to disagree with us because you will see quite often there are different interpretations of the law and the scenario and what we consider the right result to be, and the real point is making sure you have strong convincing arguments to back up whatever point of view you are adopting. So that’s all I want to say by way of introduction. Let’s go straight on to the first problem.

Now, this is a problem based on a real case, a case that went all the way up to the Supreme Court late last year, so that’s the top court in the country. I’ve changed the facts a bit and simplified them a bit, but this is essentially what the justices in the Supreme Court had to consider. Now, when you’re thinking about law, you can have all sorts of different issues and different perspectives and Janet O’Sullivan, in her problems a little bit later, are going to raise some very different sorts of issues. The issue in this problem, which I’ll read out in a minute, is essentially about how we should interpret a particular word and quite often with law you have to think very carefully about the meaning of particular words and that will affect the result you come to.

So this problem, Emma is a professional gambler with an exceptional memory. One evening, she went to a casino to play baccarat. This is a card game which involves betting on which of two hands has the highest score. Now baccarat is a bit more complicated than that but for these purposes that’s how you play it. Whilst she was playing, Emma was able to detect small differences in the pattern on the back of some of the cards and so could work out without seeing the value of the cards whether it would be high or low. Emma never touched any of the cards but she told Sam, the dealer, that she was very superstitious and she wanted him to shuffle the pack in a particular way. That way she would know when one of the cards with a difference in the pattern was included in the hand and so could work out whether the hand was high or low. Over the course of the evening, she won five million pounds. The manager of the casino was watching Emma carefully and accused her of cheating. She denied this, saying that she was simply using her memory skills and all reasonable people would say that she had not cheated. So the issue is whether Emma has acted dishonestly so she should be convicted of a crime. In this country, we do have a crime of cheating and, to be guilty of that crime, you have to be dishonest and dishonesty is a word we use a lot in the criminal law, the crime of theft and the crime of fraud depend on dishonesty, so does the crime of cheating. So the issue and the word we need to focus on is dishonesty. Do you think Emma acted dishonestly? Any thoughts on that? Yes?

A. I would say that Emma acted dishonestly. If she had not told Sam that she was superstitious and that she would have to… or that she asked him to shuffle the cards in a different way, but had just stayed to her exceptional memory, I think that probably would not have made her dishonest, but the fact that she lied about being superstitious and then made him change the way he would normally deals the cards makes it.

Okay, so you’re distinguished between her memory and saying, “I’m superstitious” and getting him to shuffle the cards in a particular way. Fine, but he didn’t have to shuffle the cards in a particular way. She didn’t touch them and she basically said, and apparently this happens all the time with gamblers. They have particular practices that they feel they have to adopt just in case, if they didn’t, they lost that time. So when this case was heard, it was accepted that this was fairly common and all she was doing was saying, “I want you to keep shuffling and I’ll tell you when to stop.” Does that make a difference or would you still say that’s dishonest?
I would still say it’s dishonest because at least if we stay on the text and what it says, that she made him shuffle, so that she didn’t have the intention of making herself to see the cards and I think that that intention goes beyond what the gambler would normally do because she knows it’s probably not just her luck, but any fortune that she can get.

Okay, fine, so that is still dishonest. Are there other views on that? Yes.

I want to argue that she’s not dishonest because she’s actually not cheating because her memory is not exactly something you can control, so when she’s asked if she’s cheating, she’s not cheating because it’s something that she does as instinct. It’s not something that she is doing on purpose. So when it comes to this, I’d say she’s not…

She’s just using her natural skills to win five million pounds, okay. I put words in your mouth, but that is the gist of it, okay fine, but you’re saying she hasn’t cheated. Okay, anything else? Yes.

I think the last couple of sentences, saying that she denied it, saying she was simply using her memory skills, actually what she is… she isn’t actually using her memory skills. What she’s doing is looking at the back of the cards, seeing whether they’re high or low, and so I think that could be seen as her being dishonest because she is not saying that she’s remembered what card is what. She’s just saying that she’d seen which was high and low and therefore, because she is being dishonest, could be seen as dishonesty.

Okay, but what if I say she says her skill is that she can remember that, for each of the 52 cards, they won’t all be marked, but for a number of them there was a particular really small mark on the back or some defect in the printing and she can then remember which value went with which?

Yes, again, that would be memory skills but I think in this situation you have to determine what memory skills she was talking about and therefore whether she was being dishonest or not.

Okay, but if it’s just remembering the back of the card and remembering what the front value is, is that dishonest? It’s not, okay, so it depends what we mean by her memory skills. Okay, yes?

Surely it was the job of the card company to produce a set of cards which in every single circumstance would provide a fair game for all and, in fact, it’s not her fault if she had a set of cards that she can distinguish which was higher. Ultimately, it was the card company’s fault.

So you’re blaming the card company, okay, so should the casino sue the card company for defective goods? Maybe, okay, but you’re saying that’s not her fault, it’s somebody else’s fault. Okay, yes.

I think it also depends on what you mean by dishonesty because right now we might be interpreting it as saying she’s consciously lying about something, but it could also mean that she actually took an action to cheat within a scenario, and if we look at the facts of the case, we could argue that actually she will physically act in a way to cheat even though she didn’t touch the cards.
She has not touched the cards at all.

A. She only mentally looked at the cards and, at the same time, she only requested that Sam shuffle the cards in a particular way. Sam could have chosen not to do that.

Okay, so you’re suggesting not dishonest therefore?

A. Yes, I am.

Okay, yes?

A. I would argue that she doesn’t have to touch the cards to manipulate the cards.

So the manipulation is, “I’m superstitious. You keep shuffling until I say stop.”

A. Basically, I would say Sam works for the casino so Sam is a bit dishonest.

Really, so shall we get him as well? Okay, so we’re going to get the card company, we might get Emma, we’ll get Sam. Excellent. Any other views? Yes?

A. I imagine she’s changed the nature of the game so then it’s no longer gambling with obviously getting him to shuffle in a particular way so obviously he’s shuffling them so that she can tell where the patterns are and the moment you change the nature of gambling so that it’s no longer a game of chance, that’s cheating.

Okay, so you’re saying gambling is a game of chance and, because she’s using her memory skills, she’s cheating?

A. Yes, because she eliminates the element of chance, so it’s no-longer gambling.

Okay, right. Let’s have one more view. Yes.

A. It’s because she’s a professional and professional people have skills, like a lawyer could be confident in court, you could argue she’s a gambler and she’s particularly confident in her memory.

So does that mean we would expect a higher standard of behaviour for her as a professional than if it was me gambling?

A. Yes.

So if I’d happened to do this, I’m fine, but she is guilty, which may be a valid distinction. Okay, I do want to ask one more question. We’ve been skirting around the notion of dishonesty and that’s what this is about. When we assess dishonesty, should we assess it, do you think, by reference to what the defendant thinks, Emma thinks and she says, “In my view, all reasonable people would say this is honest,” or should we assess it by reference to what the jury think or what reasonable people would think, what we call an external objective standard? So is it a matter for the defendant to say, “I don’t think it’s dishonest,” or should it be for an external objective standard?
A. I would say definitely an external objective but Sam is not involved directly in the scenario, especially if she is going to want to defend herself and therefore not to be charged and therefore she doesn’t want to be convicted of a crime, but anyone who’s external and has an objective standard, like the jury should, and they should have an objective point of view.

So it should be for the jury to say we think this is dishonest or honest?

A. Yes.

It’s a jury decision. Okay, on that point I’m going to give you the answer in a minute, but I want to have a vote of this, just by a show of hands, who first thinks Emma is dishonest and should be convicted of cheating and punished? Who thinks she should be convicted? Okay, we’re not going to count up. Who thinks she’s acted honestly and should not be convicted? That’s pretty close. I think that is 50:50, so some of you are right, some of you are wrong according to the Supreme Court. Now, as I say, this was decided last year essentially this case and the Supreme Court said a number of things. They certainly said that the act of saying you are superstitious when you’re not and manipulating the dealer was dishonest, but they also said that even if Emma had not done that, if she had just relied on her exceptional memory skills, that would be dishonest as well. Emma is guilty of cheating. Dishonesty, they said in light of what you’ve just said, is an objective test. It’s not for you as an individual to define it, it’s for the jury to define it and, in that case, it was actually for all the judges to define it. They said it was dishonest and actually you up there, when you said she was changing the rules of gambling and gambling is a game of chance, that is exactly what the Supreme Court said, that if you rely on your skill to subvert the game of chance, then you are dishonest. So what’s the lesson? I think the main lesson is don’t go gambling because it could really work out against you. Now, we could spend ages now, if weren’t a supervision, talking about the implications of this, are we happy with the definition of dishonesty, etc? But you can see how a relatively simple case raises some big issues, particularly is it appropriate to prosecute somebody, convict them and punish then when in this room we were really split 50,50. Any of you could have been on the jury and, if I was in the position of Emma in the dock, it would really depend on luck as to which of you were on my jury. So that raises all sorts of things about jury trial as well.

Okay, I’m going to leave that one there and hand over for a different one.

Janet O’Sullivan:

Thank you. Right, I think I know how to press this. Yes, a much shorter problem, which I’ll start by reading through and then we’ll talk about. So Mr and Mrs Smith who have six children already decide that they do not want anymore children and so Mr Smith decides to have a vasectomy, so a male sterilisation operation. Unfortunately, the vasectomy operation is performed incompetently by Dr Lanham and does not work. Sure enough, Mrs Smith becomes pregnant again shortly afterwards and gives birth to a baby girl. Can we press here? I’m going to add an adjective there, gives birth to a healthy baby girl. Can Mrs Smith and her husband… there was some question this morning about whether this was a new husband, so let’s make it simple. The same Mr Smith and Mrs Smith recover damages from Dr Lanham. So first thing to note is that we’re not talking about whether anybody can be punished, prosecuted, convicted of an offence or anything like that, we’re into the civil law people tend to sue each other for some sort of civil remedy and, in this case, financial compensation. I didn’t do this this morning, but I’ll start with
a show of hands because that seems to work rather well. Put your hand up if you think the couple should be able to recover compensation. Okay, and put your hand up if you think they shouldn’t. Again, I would say maybe slightly under, so more of you think they should than shouldn’t, so that’s quite interesting. I’ll tell you in due course what the law says. This is based on a real case, facts are changed slightly, but based on a real case from a few years ago. So the first thing to note is we’ll assume that this is an NHS medical treatment. Can anybody think why, as a matter of legal rules, that might make a difference? What if it was a private doctor? Yes?

A. Because by being NHS I’m assuming it’s free and if it was paid then there would be a contract.

Good. That’s absolutely right, so there’s no contract when you use the NHS so we’re not into the territory of the law of contract. I doubt that would make any difference to the answer, actually, but nonetheless we need to anchor ourselves in the right bit of law. So we’re in the law of tort and, more specifically, the tort of negligence. Now, what I thought I’d do is give you… this is a very unusual, very controversial set of facts for invoking the law of negligence. I thought if I very quickly give you a simple set of facts, a straightforward set of facts, we’ll see if this differs or resembles the standard set of facts. So a standard set of facts might be that I’m driving incompetently, indeed, I’m driving very negligently. I’m driving at 90 miles an hour in a 30 miles an hour zone, not paying attention. I mount the pavement and I knock you over and your leg is broken and you suffer terrible pain and suffering and you can’t walk for several weeks so you lose wages. You can no longer play football or whatever it might be that you like to do. So in that situation, you have a fairly standard claim in negligence. Actually, in the real world, it would all be pursued via insurance and the court would never get involved but underlying that is liability insurance, is liability in the tort of negligence. So let’s just see how that simple set of facts maps on to what you need to show in order to sue for negligence.

These elements are rather artificial for aid of parcelling things up into manageable intellectual ideas so, to do that, you start by asking whether the driver owed the victim a duty of care, and the answer is very straightforwardly yes. Drivers owe pedestrians a duty of care. We won’t go any further into what that might mean. Was the duty breached? Did the driver drive negligently? Yes, 90 miles an hour in a 30 miles an hour zone, definitely. Then did that breach of duty, did that negligence cause damage? You’ve got two ideas in one there, the idea of causation. Well, I think we can be pretty certain that legs don’t spontaneously shatter if they’re not hit by a car, so you can be pretty certain that it was the Defendant’s negligent driving that caused the broken leg and a broken leg is fairly obviously damage for the purposes of the law of negligence, personal injury is fairly standard damage. Okay, so can anyone think of any respects in which that pattern perhaps doesn’t quite work in the case of Mr and Mrs Smith? Yes.

A. Does it come down to whether the couple were aware of the failure because, if they weren’t aware they’d failed, then… sorry, if they were aware and it hadn’t been successful, then the damage wasn’t necessarily caused by his negligence. It was caused by them.

So that’s a good point actually. If they’d been told… because let’s not get… when someone has a vasectomy, they do a test some weeks later to see if it’s worked and, if they were told it hasn’t worked but they ignored that and carried on and the baby was conceived, then I think there would be quite a convincing case that it was their failure to take sensible precautions that
caused the birth, and let’s assume that they’d been told it had worked fine and therefore, if it wasn’t for the negligence of the doctor, this baby wouldn’t have been conceived, that’s a good point. Yes.

A. I don’t think the doctor has responsibility on them having children or not because the operation was to sterilise or was it to stop them from having children so the doctor would have a responsibility on that.

So what is the point of sterilising someone if not to stop them having children? It’s a good point actually. In fact, it’s a very English approach to this, which is to say, not to put words into your mouth, but I think you were saying there might be a bit of a problem with whether this is the right sort of duty here. Doctors owe a duty not to harm their patients but they may not assume responsibility for the size of their family or something, so if he’d caused terrible pain to the victim and damaged his men’s bits for ever after, really skirting close, then sure, that would be this sort of scenario caught by a duty of care. This is very English reasoning and it really troubles me that we say when you’re doing something you owe a duty not to cause this sort of harm but not a duty not to cause another sort of harm because it means that you can’t advise the Defendant what duties they owed until time has passed and you know what harm they’ve caused, so it’s not really meaningful. Therein lies a very big debate, but there’s another bit missing or another bit that’s problematic in the analysis. Let’s go over in the corner. Yes.

A. The idea of damage, actually is the baby girl damaged?

Absolutely, so we’re faced with not a broken leg or spine but the birth of a healthy baby girl. Now, it doesn’t immediately look like damage. It looks like a blessing to lots of people. I bet the parents in the room are thinking, well, the thing about children, I’ve got three, is they’re expensive and actually, in the law of negligence, we do sometimes, not very often, but we do sometimes allow people to sue when the only damage they’ve suffered is purely financial, just the loss of money, so if I give you negligent investment advice and you rely on my advice and lose lots of money, then you probably can sue in negligence and for breach of contract as well concurrently. This is what the Claimants were arguing, “We’ve got a botched operation followed by financial loss. Why not?” It’s at this point that the House of Lords, because before it was called the Supreme Court, it’s called the House of Lords the most senior court, agonised about that outcome.

So you have a set of rules, duty, breach, causation and so on but they’re not in a vacuum or in a dusty book. They have to be nuanced and contextualised in the real world and it’s not just a simple matter of saying this looks like a duty, this looks like a breach because this was the first time this sort of claim had ever reached the senior courts. They had to decide whether to extend that precedent to this new set of facts or whether to distinguish it and, in doing that, they can only really consider values and ideas that are something a little apart from just the application of strict legal principles. They said things like this, there used to be in the Nineteenth Century the man on the Clapham omnibus, the test of how the reasonable person would perceive things. That’s extraordinarily out of date, gendered, the Clapham omnibus doesn’t exist, so they talked about the reasonable person on the London underground so although it’s not gendered anymore, it’s still rather South East London biased. But anyway, they said this hypothetical arbiter of reasonableness would be appalled at the idea that you could treat the birth of a healthy child as damage. They pointed to things like the fact that the Health Service is publicly funded. This money that went to this couple would be taken away from maybe 20 couples who were being denied IVF treatment, all sorts of ethical issues. So the outcome for the couple in
the actual case that this is based on was rather a compromise, as usual, in that Mrs Smith was
given damages for the pain and suffering of having to endure a pregnancy that she didn't want
but they were denied damages for the costs of bringing up a health child, which was the
overwhelming... it's probably 95 percent of the damages that they were claiming.

Now, then what happened, this is what's so wonderful about the law, because all human life is
there and we have this precedent, just a few years later another failed sterilisation, another
botched sterilisation. I'm using very pejorative language and we could have a discussion about
the appropriateness of fault-based liability on the NHS. I have views about this not being
appropriate, but let's go with the flow, the law of negligence applies to the NHS. What came
along a few years later was a case where a female sterilisation operation was performed
genegligently and the woman gave birth to a child that had severe disabilities. It's fascinating facts
because the botching of the sterilisation operation didn't damage an embryo or anything like
that. It wasn't that direct a connection. It's just that, by coincidence, the baby that happened to
be conceived, the next one after the failed operation, happened to have severe disabilities. This
case gets to the Court of Appeal. Then what do they do? They're bound by the precedent in
the previous case, this language of bondage is quite interesting, they're bound by it which
means they have to follow it, but they only have to follow it if it's exactly the same facts as the
case that comes up, and of course identical facts don't occur. What normally happens is that
the new case that comes along has subtly different facts from the precedent and the new court
has to decide whether the difference doesn't really matter and therefore we apply the precedent
or whether the difference is actually crucial and we therefore distinguish the precedent, in other
words, go the other way or carve out a new exception or something like that. This put the Court
of Appeal in one of the most difficult dilemmas you could imagine because, on the one hand,
what message does it send to disabled people if you say, if our law says a healthy child is a
child but a disabled child, that's damage. That's like death or personal injury. That's like a
broke

On the other hand, this was a very serious disability that caused the young mother to have a
really significantly difficult life and the court was compassionate and could see that she really
was in a sense damaged. The mother was. She loved the child dearly, as did the people in the
previous case, so they cobbled together a compromise, which was to say, "We're bound by the
precedent that she can't recover damages for the cost of bringing up a child but if there are any
additional costs that flow from the child having a disability she can get those," extremely
irrational because, as I said before, the negligence didn't directly cause the disability, it just
caused the child to exist, either it exists or it doesn't, but also this is where I reveal my family
circumstances which is I've got three children, one of whom has Down's Syndrome and she's
the cheapest of the three and it's an awful thing to say, and the parents in the room will
understand, she's unlikely to go to university, whereas the other two will or do and therefore,
just for that alone, it's unlikely to cost as much. So it's a strange decision but it raises so many
wonderful almost moral, ethical, political questions about the allocation of scarce resources
within a publicly funded Health Service, about how we value babies, children, disabled people
and so on. I'll just throw in one last argument that the Health Service tried in this first... I'm
conscious I've gone off supervision mode and into lecture mode, I do apologise, sometimes it's
the only thing you can do.

Anyway, the Health Service or Dr Lanham's barristers tried to argue that Mrs Smith, when she
discovered she was pregnant, ought to have had an abortion and it's a bit like your point, only
rather more brutal, which is that she knew she was pregnant. She found out she was pregnant
presumably fairly early on and she decided to keep this seventh baby. She caused all her losses. It was her unreasonable decision to proceed with the pregnancy, eclipses the responsibility of Dr Lanham. She causes the loss. We could have a whole lecture on what cause means in the law, but happily I think, although she lost on other grounds, they threw out that argument, how could it possibly be unreasonable to decide to proceed, so utterly unreasonable that the buck passes to you to decide to proceed with the life of your own baby, and indeed it would have been difficult to argue that that fell within the legal grounds for a termination because the mother’s health and the baby’s health were unaffected, but you see what a simple set of facts gives rise to. You only have to think about it for more than 30 seconds to see how rich the law is, how it’s not about pulling off a Victorian book from the shelf and learning what’s in it. That’s just the start in a way. You can look up what the law says, then you’ve got to apply it and think about it and consider the principles and values that underpin it. Whereas that was based on a real case, very simple set of facts based on a real case, this is an exam question that I wrote a few years ago that somehow in the last few months has come back into my mind with royal weddings and so I thought I’d give it to you. Let’s just read through quickly. I know we haven’t got very long, but this is much more like the sort of thing you will have to answer in an exam.

The royal wedding of His Royal Highness Prince Rupert to Lady Sophia Sterling was due to take place on 1st August. On 5th March, the department store, Herrods, contracted with Royal Staffordshire Pottery Limited, RSP, so made a contract at that point, for the supply of a thousand limited edition hand painted royal wedding plates, featuring the image of the royal couple and the date of the marriage for a total contract price of £50,000, that’s £50 per plate, of which £10,000 was paid on contracting, ie then on 5th March, the balance payable on delivery of all the plates, 1,000 plates. Delivery was to be no later than 1st May. On 1st April, Buckingham Palace announced that the couple had broken off their engagement and the wedding would not go ahead, so the following day, on 2nd April, Herrods told RSP that in the circumstances it regarded the contract as null and void and demanded the return of its £10,000 prepayment. RSP ignored this communication, completed the remaining plates and delivered them to Herrods on 3rd, notice the slight timing problem on the end, and the question is are RSP entitled to claim the balance of the price? So they’re owed £40,000 for these plates. This is a problem squarely within the law of contract. Now, if you were doing this not in the loony and rather artificial world that we created in exams or in supervisions, but in the real world, maybe some of the accompanying adults will have experienced something like this in their lives, but any thoughts what you’d want to do first before you gave any advice on the law at all? Yes.

A. Maybe allow RSP to keep the £10,000 prepayment but not actually allow them to receive the £40,000.

So that’s a solution that some people might think is a fair compromise, but RSP want their £40,000 and Herrods want its £10,000 back, so we’ve got to know what the law says, who wins? A compromise might well be the very best solution but it’s not the way the law operates. There’s a right answer, but how do you work out what that right answer is?

A. Perhaps the first thing to do would be to find out if there’s a written or a verbal contract.

Good, yes, and there’s clearly a contract which is almost certainly written. Why would you need to know whether there’s a contract?

A. Because then you know if there’s acceptance on an offer.
So there’s certainly a contract, all that stuff, offer and acceptance, but why does that matter? Why, yes?

A. I guess with any caveats in the contract.

Good, so almost invariably in the real world, facts like this wouldn’t be a problem because the parties would have had the sense when they agreed the terms of their contract back in March to include terms or provisions that specific what happens if… and actually, over the years, parties get more and more sophisticated about thinking what might go wrong, terrorist attack, hurricanes, war, cancellations of weddings, all sorts of things can go wrong that the parties don’t expect to go wrong but, if they do, they need to know what happens. So if they’ve had any sense at all, they will have put in a provision that deals with this, in which case, the answer lies in the contract, not really in the general law. Let’s assume they were rather blaze companies and they just entered into a very short one page contract, or even verbal, over the phone, which made no mention whatsoever of this. At this point, the contractual regime, and we always start with the contract because freedom of contract is what the law is based on that the parties have agreed, but if they’ve agreed nothing then the question is should the law step in, that sounds like law as a person, but should the law say in these circumstances that contract just becomes null and void? Ought that to be a common outcome or should it be an exceptional outcome? Should there be any role for that sort of intervention by the law, any thoughts? Yes.

A. I think they should… it depends on whether there has been any damage or cost by the company. If there has been some cost then they should recognise the cost and give them some compensation. They cannot say it has finished.

So the law will want to look at what the remedy ought to be at the end of the story and whether there’s any compensation owed one way or the other, but before they can do that we’ve got to decide what the legal position actually is with this contract. It’s very difficult for you to guess.

A. Even if you say the fact that the wedding was cancelled doesn’t make the contract null and void. The fact that the plates were delivered two days after the contract specifically stated would then make it null and void.

So you’ve spotted the fact that, right at the end of this problem, is a twist which is that they don’t comply with the time provision in the contract, and that will cause a problem, although not necessarily to make the contract null and void. It’s more likely to be regarded as a breach of contract. The contract still exists but it’s been breached, but we only get to that point if the contract still exists in order to be breached so the first question to ask is should the law just let these parties escape from this contract completely because of the cancellation of the wedding? This is the point where I say the whole point of making contracts is to get certainty now about what’s going to happen in the future, allocate the risk of things happening in the future. I make this contract on 5th March because I want plates in April. The other party makes a contract on 5th March because they want money on 1st May. So the law needs to be extremely wary about letting parties off their agreement, extremely wary about saying this contract has become null and void. Very occasionally the law does it and it’s a doctrine that goes by the wonderful name of frustration, doctrine and frustration, very, very exceptionally the courts will say there’s been such an extraordinary external change in circumstances that we regard this contract as being frustrated, it just doesn’t work anymore, but that is really rare, so if I made a contract to hire you my hall for an event but unfortunately, by the time the date for performance comes round there’s
been a sinkhole open up and the hall has actually disappeared, it doesn't exist anymore, it's then impossible to rent it out, or it's burnt down or something, in other words it's become impossible to perform the contract.

The court might say, the law might say that contract is frustrated and therefore null and void, but look at these facts. Has it become impossible to perform this contract? Not at all. Has it become more onerous, more difficult? No. It's just for one party pointless, lost its point, but notice for one party only hasn't lost its point for RSP, that's how they make their money. They make plates and sell them to shops. So for RSP it's very much retained its point. For Herrods it's lost its point. So I would venture to suggest that the court wouldn't regard this contract as null and void despite the cancellation of the wedding. Bad luck, Herrods, you should have put a provision in the contract saying, “We don't have to pay if the wedding’s called off.” So because the contract is still fully effective, it's there, it's not been frustrated, it's there exactly as it always was, then Herrods' communication that effectively sticks two fingers up to this contract and says, “We don't want the plates anymore,” is itself a breach of contract. The law is very complicated, it's not terribly interesting, but RSP you might have expected them at that point to say, “Okay, we hear what you say. You don't want the plates anymore but we're going to sue you for damages,” or something of that kind. They would be entitled to do that, but instead they ignored the communication and produced the plates and actually that's pretty rare. That doesn't happen very often. Normally you need the cooperation of the other party to perform your obligations, but here very unusually they don't, so your point is absolutely right. If they delivered them on 1st May as the contract stipulated, then they could have sued for the price, they could have claimed the price. It adds at least an hour’s worth of lecture to discuss what would happen by virtue of their late delivery, but I'll give you the reason now why I set this question and the reason I set this question goes back into the depths of legal history.

I don't know if any of you know your early twentieth Century British history, but a very trivial bit of it it is, but King Edward the seventh, Queen Victoria's son, was going to be crowned in June 1902 and he developed appendicitis and his coronation was postponed and this affected a lot of contracts and in particular some homeowners, people who had flats that overlooked Pall Mall where the coronation procession was going to go past, they had very unusually, because they were just ordinary homeowners, made contract with people who wanted to rent that flat, just even a room in that flat, like the front room for several hours that afternoon overlooking the coronation procession. When the King's coronation was postponed, 99 percent of the flat owners in that position just made a reasonable adjustment, agreed with the person who wanted to rent that flat, just sat in the lounge or living room, to postpone the contract to the day of the re-arranged coronation, but Mr whoever he was, and I bet he was a rich lawyer who owned a flat, tried to say to the man who had rented the room, “Well, you agreed to rent my front room for £50 on the afternoon on 2nd June, nothing to stop you doing that. There’s nothing going past the window, just an empty street, but hey, £50 please.” The man said, “What are you talking about? This contract's null and void. It's obviously dependent on the coronation happening.” Very, very exceptionally the court held that contract was frustrated even though it wasn't impossible, wasn't onerous or difficult to perform, it was just pointless but I think the difference here is on that occasion, the coronation case, it was pointless for both of them. The owner of the flat would never have let some stranger come and sit there if it wasn’t for the passing by of the coronation, whereas RSP make their money making plates for people, whether the plates are ultimately wanted or no longer wanted.

I'll finish by saying, like most of my contract law colleagues, in a wicked way that's almost certainly treasonous or treacherous or whatever, we were secretly hoping that Harry and
Meghan would call off their wedding just before and there would be all these souvenirs and there'd be people who had booked rooms and the thing would occur again at the beginning of the twenty first Century, but happily for everybody that didn't happen, but it makes a very nice contract question, but again this is not just dry, dusty, financial stuff. This is quite fun and quite real and I hope it's given you a taste at least it might be some quite enjoyable ideas if you study law.

We have a couple of closing…

Graham Virgo:

Yes, so we won’t have time for any more of the problems but you can take those away and look at those problems in your own time. There are two final things I want to say. The first is some of you may have come on this open day thinking, “I’m not sure whether law’s for me. I’m not sure whether Cambridge is for me. How do I know if law and Cambridge are right for me?” Well, if you like these sorts of questions and thinking about the issues and law in this sort of way, and if you’ve enjoyed this sort of discussion, then that’s probably the best test that law and the way we teach law at Cambridge is right for you. Secondly, and I don’t apologise for what I’m about to say, you might still be saying, “Is law the right subject for me? Is there something I could read that might help me to answer that subject?” The answer is, yes, there is. There’s a book. There are various books but there is one particular book called ‘What About Law Studying Law at University’ which both of us contributed to and we have a few so you can see what it looks like. So I’m sorry for telling you about this book, we try and sell as many copies as we can, but it was written for people like you who are trying to find out what law is like at university and we would commend it to you to provide an answer to that and hopefully when you read that book you will see that the study of law is really interesting, it is wide ranging and I hope you can tell from our enthusiasm for law that it’s a brilliant subject to study.

Thank you very much.