

# The Principles of Justice: Equality, Fairness & Access

A collection of case studies



Victoria**Law**  
Foundation

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## About Victoria Law Foundation

Victoria Law Foundation supports better justice through research, education and grants. We are a not-for-profit organisation funded by the Legal Services Board Public Purpose Fund. Our education programs work with the general community and students. We connect people with the foundations of our justice system and institutions through events such as Law Week and Law Talks for VCE students. Wherever possible, publications are made available at no cost to schools and community organisations.

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ISBN 978 1 876045 43 2

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## About these materials

The resource is intended for VCE students. It may also be suitable for use at other year levels, with relevant tasks adapted to suit students' abilities.

*The Principles of Justice: Equality, Fairness & Access* is a series of criminal and civil trial case studies. It is intended for classroom use and is accompanied by questions for student reflection. It aims to help students critically analyse the Victorian justice system and its ability to achieve the principles of justice: Equality, fairness and access.

Using these materials will enable students to apply their knowledge of the principles of justice onto a factual scenario, determine the justice system's ability to achieve these principles and identify certain reforms that could be made.

## Curriculum links

### 2018-2022 VCE Legal Studies Study Design

#### Unit 1: Guilt and Liability

- Area of Study 1: Legal Foundations

*The principles of justice*

#### Unit 2: Sanctions, Remedies and Rights

- Area of Study 1: Sanctions

*The principles of justice in the context of criminal law*

- Area of Study 2: Remedies

*The principles of justice in the context of civil law*

#### Unit 3: Rights and Justice

- Area of Study 1: The Victorian Criminal Justice System

*Evaluating the extent to which the principles of justice were achieved in recent criminal cases*

- Area of Study 2: The Victorian Civil Justice System

*Evaluating the extent to which the principles of justice were achieved in recent civil cases*

This resource will help students gain an understanding of:

- Principles of justice: fairness, equality and access
- Factors affecting the ability of the criminal and civil justice systems to achieve the principles of justice in relation to costs, time and cultural differences
- Responsibilities of key personnel in a criminal trial
- The rights of victims in the criminal justice system
- Reforms and recommendations to assist in the achievement of the principles of justice
- Criminal offences
- Areas of civil law

## **Using the materials**

Students are recommended to familiarise themselves with the principles of justice and the ways in which these might be affected by different factors. Throughout each scenario, students are invited to identify and reflect on the facts of the case which demonstrate an ability of the justice system to achieve or fail to achieve the principles of justice.

Students should be encouraged to take a critical look at the facts and determine whether a recent reform has occurred to help tackle the problem or whether a future recommended reform could resolve the issue.



# The principles of justice

The three principles that our justice system seeks to reflect are: equality, fairness and access.

## Equality

Equality is defined in the dictionary as 'the state of being equal, especially in status, rights, or opportunities.' When reflected in the law, this means that everyone who comes before the courts is treated the same – regardless of sex, gender, race, religion or culture. Laws should apply to everyone equally and not provide exceptions or discriminately affect people based on their characteristics.

Equality is distinct from fairness. Equality treats everybody the same regardless of their circumstances. In contrast, fairness includes treating people differently depending on their situation and characteristics. These two legal principles must therefore be balanced against each other.

## Fairness

Fairness is defined in the dictionary as 'impartial and just treatment or behaviour without favouritism or discrimination.' When reflected in the law, this means that one party is not allowed an unequal advantage over the other party. It means that severe penalties are given for severe crimes, and lesser penalties for lesser crimes. It also means that everybody is given an opportunity to present their case fairly and without discrimination, with strict adherence to rules of evidence and procedure.

Fairness holds that if people are treated differently before the courts, such as receiving different sentences, it should be from the application of laws and legal principles. Different treatment should not stem from personal characteristics or attributes.

## Access

Access means that everyone in the legal system is able to use the resources, procedures and institutions available throughout the legal system. For laws, this means that they are freely known and people can access the laws themselves. Within the trial process, this means people affected by the legal system can access help and advice related to their case and circumstances.

## Factors affecting the ability of the criminal justice system to achieve the principles of justice

### Costs factors

The fairness, equality and access of the justice system may all be affected by costs factors. The cost of legal representation, even rising VCAT costs for civil disputes, often mean that people on lower incomes are unable to afford the cost of a lawyer, barring them from having their case heard in the best possible light before the court. The lack of legal aid availability is also a significant barrier in providing people with proper representation. Where legal aid is unavailable, people who choose to self-represent in court also face many barriers which come from the complex procedures and requirements of the court.

### Time factors

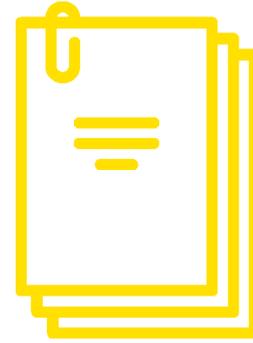
Delays in the justice system may prevent principles of justice from being achieved. The various pre-trial procedures of the court may prolong the time spent waiting by the victim's family, as well as the period of time an accused is held in remand waiting for their trial if they are not granted bail. Court delays may also extend the total time of the trial, which may greatly affect everyone involved.

In civil law, court delays arising from, for example, backlogs and preparing and gathering evidence and VCAT waiting times, all affect the legal system's ability to adequately achieve the principles of justice.

### Cultural factors

Cultural factors may significantly affect the ability of the court to achieve principles of justice. Aspects of certain cultures such as Aboriginal or Torres Strait Islander people may unfairly disadvantage them during the trial process. For example, within some Indigenous cultures it is a cultural taboo to speak the name of a dead person. This may disadvantage an accused during cross-examination in a criminal trial. Over time, these factors may result in systemic inequality throughout the justice system such as a disproportionate percentage of prisoners within the prison system.

For civil cases, the achievement of the principles of justice is hindered by barriers to communication preventing a person from understanding the methods and bodies of dispute resolution, as well as limited services in remote and rural locations.



# Criminal Law

## Story one: Betty

Betty, an Aboriginal woman, lives alone at home. Betty has an extensive history of abuse from her ex-husband Shaun. Shaun has, on numerous occasions, physically and sexually abused Betty. Recently, Shaun has moved out and Betty now lives at home by herself.

On the night of 11th July 2016, while Betty is sleeping, Shaun enters the home with an old key. As he enters the house, he drunkenly shouts numerous verbal threats at Betty. Betty is woken up by this and grabs a knife from her bedside table. When Shaun enters Betty's room, Betty stabs him to death.

Betty is charged with murder. Betty lacks close family and friends and is held in remand until her trial. The delays in preparing the case result in her losing her job at the local supermarket.

During police questioning, Betty is intimidated by the questions and has difficulty describing the series of events leading to Shaun's death. At a committal proceeding in the Magistrates' Court, the prosecution is able to build a prima facie case for a charge of murder against Betty.

The trial is to be held in the Trial Division of the Supreme Court of Victoria. The Koori Court is not available for Betty.

Before the trial, Betty receives some legal assistance from a community legal centre. However, the lawyer who is in charge of Betty's defence has not been trained properly in communication with Indigenous offenders. As a result, her lawyer is unable to extract the full story of what happened in 2016.

During the trial, Betty is shy and has trouble answering questions. Neither she nor her lawyer call her up to deliver any of her own evidence.

The jury delivers the verdict and finds her guilty of murder. The judge sentences Betty to 20 years imprisonment. Betty appeals to the Victorian Supreme Court of Appeal, where the appeal is currently waiting to be held.

### Questions:

1. Outline the roles of the different parties in the courtroom of a criminal trial (prosecution, defence, judge, jury, accused, witness).
2. Outline the principles of justice which the legal system aims to achieve.
3. Analyse the ability of the criminal justice system to achieve the principles of justice in Betty's scenario.
4. Highlight any recent reforms which have been made and suggest any potential reforms that might occur.

## Did you know?

This fictional scenario was based off a real-life case: *R v Kina* [1993] QCA 480.

In this case, an Aboriginal woman was charged with murder after stabbing her de facto partner to death with a knife on the 20th of January 1988. Her partner was physically, sexually and psychologically abusive towards her. On the day of his death, the partner was about to rape her niece. The woman had picked up the knife with the intention to threaten the partner but had instead stabbed him in the heart when he came towards her.

During the trial procedure, the woman did not give or call any evidence. She was reluctant to reveal important and sensitive information unless she was questioned in a traditional, non-direct way. This resulted in many details of the incident not coming to the court or jury's attention, such as the fact that the violent partner was going to rape the woman's niece.

The trial jury took 50 minutes to reach a guilty verdict of murder after listening to evidence which lasted three hours. The woman was originally sentenced to life imprisonment. The woman had spent five years in jail before people realised that she had a clear defence to murder. The violence she had suffered at the hands of her partner meant that she had a defence of provocation.

Her conviction at the original trial was a miscarriage of justice and her conviction was quashed. In the Court of Appeal judgment, the judges noted that none of the woman's lawyers had any training or instructions concerning communication with Indigenous people. As a result of this and other cultural, psychological and personal factors – the woman had been wrongfully found guilty of murder and imprisoned.

This case is a clear example of the different cultural factors which restrict the ability of the criminal justice system to achieve the principles of justice. It demonstrates how traditional aspects of Aboriginal culture can disadvantage people during the criminal trial procedure and inhibit fairness, equality and access.

## Story two: Peter

Peter is a 21-year-old university student from Melbourne.

One Saturday night in March 2013, he decides to go with a few friends to a pub for a drink. They have quite a few drinks each and are reasonably drunk by 12 midnight. As Peter goes outside for a cigarette, he notices that one of his friends is arguing with a stranger. Their argument is getting more and more heated so Peter attempts to intervene, stepping between the two parties. As Peter attempts to lead his friend away, his head is punched from behind by the stranger and his head hits the pavement. As a result, Peter suffers from serious brain damage and loses part of his motor functions.

The stranger is Paul. Paul is charged with recklessly causing serious injury to another person. He is held in remand until his trial.

Since the incident, Peter has suffered significant mental trauma when thinking back to that night. Peter also feels frustration that he has not been involved in any part of the criminal proceedings, as the Director of Public Prosecutions has not updated Peter on the progress of the trial. Peter is also frustrated at the length of time it will take before the courts hear the case. Although the offence occurred in March 2013, the trial date has been set in July 2015 because of court delays. Peter and his family are frustrated at this delay.

When the trial comes, Peter is called to give evidence. The defence barrister for Paul asks many humiliating and upsetting questions during cross-examination, which Peter finds highly distressful. Paul is eventually found guilty. However, Peter feels that his voice has not been properly heard throughout the trial process and that the experience as a whole has been degrading, upsetting and confusing.

### Questions:

1. What is the role of victims within an adversarial criminal justice system?
2. What are the issues that victims face within the criminal justice system?
3. How does the VLRC contribute to law reform in Victoria? Highlight a recent recommendation that would affect Peter's situation.
4. If Peter had died from the punch, would Paul be charged with a different offence? Analyse a recent reform which considers 'one-punch' murders in Victoria.

## Did you know?

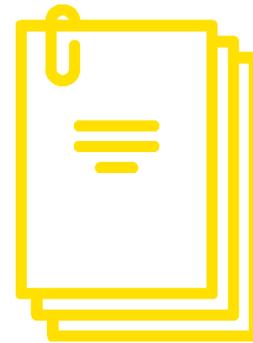
This scenario is partly based off the case of *DPP v Closter [2014] VSC 484*.

This case occurred on New Year's Eve 2012 in Rye. The accused, Dylan Closter, had initiated the violent encounter after confronting the victim's group when they bumped into each other on the footpath. The accused, Dylan Closter, had punched the victim, David Cassai. This resulted in the victim hitting his head upon the pavement, fracturing his skull and eventually leading to his death.

Dylan Closter was sentenced to nine years and three months in prison, with a minimum term of six years. This case attracted a large degree of media attention and public outcry because of the perception that Dylan Closter's sentence was too lenient. This case provided further fuel to the political debate as to how the criminal law should respond to these types of attacks.

David Cassai's mother, Caterina Politi, began a campaign called 'STOP. One Punch Can Kill' after the death of her son. This organisation aimed to raise awareness about the devastation of one-punch attacks and also lobbied the Victorian Government at the time to introduce harsher laws for one-punch attacks leading to death.

The Victorian Government did respond to these calls in 2014 and amended manslaughter within the *Crimes Act 1958 (VIC)* and introduced a minimum non-parole period for one-punch attacks in the *Sentencing Act 1991 (VIC)*.



# Civil Law

## Story three: The Wilsons

The Wilsons are a wealthy family, living on a five-acre property, which is located in an idyllic spot. Nearby, the Mitchell River flows into Lake King and the picturesque silt jetties are accompanied by many native animals and birds.

Their neighbours, the Buchanans, live on the adjacent five-acre property. The Wilsons and Buchanans have always had a strained relationship, characterised by many arguments and disputes over a number of years.

The relationship was brought to breaking point, however, when the Buchanans decided to install a large speaker system which actually acted as a device to produce an electronic bird call. The purpose of this was to ward off a large group of birds, who kept defecating on the Buchanan's property. Over the years, the Buchanans had tried different methods to keep the birds away, but the electronic bird call had been the most successful for them.

The Wilsons were extremely unhappy with the installation of the device. Each morning, the serenity was stripped away by squawking, high-pitched, squealing and screeching sounds. Due to the sounds, they experienced dizziness, muscle twitches and sleep deprivation. The sounds had been so etched into their brains that the electronic bird call could be heard by the Wilsons when it was not even on.

As a result, the Wilsons decided to pursue court action against the Buchanans, arguing that the noise amounted to a nuisance and claimed damages in relation to loss of quiet enjoyment and injuries, consisting of distress, insomnia, anxiety and an exacerbation of Mrs Wilson's symptoms of multiple sclerosis. Both the Wilsons and Buchanans sought expert legal representation.

Presided over by an impartial, independent judge who balanced the neighbours' respective property rights, the case was not successful for the Wilsons. The court found the electronic device did not amount to a nuisance. In fact, the court stated that Mrs Wilson had exaggerated her symptoms and the Wilsons' annoyance about the situation was linked more to other disputes between the neighbours over the years, rather than the electronic bird call sounds. Evidence was also heard that the Wilsons had put a radio on full volume and between stations, in order to create a static noise that would infuriate the Buchanans and act as "retribution".

The Wilsons noted that they were generally dissatisfied with the length of time it had taken to reach a decision.

### Questions:

1. Outline the principles of justice which the civil legal system aims to achieve.
2. Discuss the law of nuisance, making sure you address rights protected, elements of nuisance and possible defences that the Buchanans could have used.
3. What damages would have been suitable in this scenario, had the Wilsons been successful in their legal action?
4. Explain a recent or recommended reform which could have assisted in the achievement of the principles of justice in this scenario.

## Did you know?

This fictional scenario is partly based off *Courtney & Jackson v Howell* (2016) VMC 11.

Megan Jackson, and her partner Thomas Courtney live in East Gippsland on a five-acre property. However, the peace and tranquillity were disturbed due to a legal battle with their neighbours, Peter and Sally Howell, who live on the adjacent five-acre property.

The two neighbours had been fighting for 4 years and finally made it to a Victorian court.

The cause of this? Each morning, the serenity is stripped away by a "squawking, high-pitched, squealing [and] screeching" electronic bird call, which comes from the Howell's property. The four-speaker electronic device was installed by the Howells to ward off a large group of defecating swallows.

Jackson and Courtney argued that the device's noise amounted to a nuisance and claimed damages in relation to loss of quiet enjoyment and injuries, consisting of distress, insomnia, anxiety and an exacerbation of Jackson's symptoms of multiple sclerosis.

Specifically, Jackson told the court that she experienced dizziness, muscle twitches and also suffered from sleep deprivation.

However, the court's decision ruled against Jackson and Courtney, finding that the electronic device did not actually amount to a nuisance. The court found that Jackson had ultimately exaggerated her symptoms to the court and had also found that the annoyance experienced by Jackson was linked more so to a separate dispute with the Howells about the cost of sealing a shared road, rather than the electronic bird device.

Additionally, the court also found Peter Howell to be a credible witness, establishing that he had in fact attempted to use different methods to ward off the swallows before the installation of the electronic device and was willing, and prepared, to appease his neighbours – without success.

The court also heard further evidence that Courtney had put a radio on full volume and between stations, in an attempt to infuriate the Howells with static noise.

## Story four: Brian

Brian is a renowned stage actor, known for his brilliant performances spanning across 30 years, many of which were part of Star Theatre's shows. During the production of the theatre's most recent show, a young actress called Claudia was hired to play the part opposite to Brian's character. Several other young actresses were also cast in the hit stage show.

Brian and Claudia rehearsed for countless hours together, performed a number of shows together and of course spent time together during the post-show celebrations with the rest of the cast. By all accounts, Brian and Claudia had a great working relationship. Brian was universally known for his kind, generous nature and, of course, fantastic work ethic, ultimately allowing him to score many acting gigs over a long, illustrious career.

A year later, Brian was accused of engaging in inappropriate behaviour of a sexual nature, including sexual assault and inappropriately touching an actress during the production.

The accusations surfaced in a front-page article in the *Daily Report*, which Claudia had reached out to. The next day, the other young actresses also cast in the hit stage show, also reached out to the *Daily Report*, stating that they were speaking out in support of Claudia. Soon after, another article about Brian and these claims was published in the *Daily Report*.

Brian decided to sue the publisher of the *Daily Report*, as well as the main writer of the articles. Brian alleged that the articles conveyed a number of defamatory imputations, ultimately resulting in bringing him into hatred, ridicule and contempt and both his character and status as an actor being gravely injured.

Both Brian and the publisher of the *Daily Report* were able to afford appropriate legal representation. The parties were represented by expert counsel and experienced no cultural or language barriers. The trial itself was conducted before an independent judge, who ensured that the rules of evidence and procedure were adhered to, and was concluded in a timely manner.

The court ordered the defendants to pay to Brian \$850,000 plus \$42,302 in interest in non-economic or general damages. Following an agreement between the parties, the court awarded Brian a further \$1.98 million for past and future economic loss. Although quite comfortable financially, Brian was generally dissatisfied with the total costs involved of getting his case heard and decided within the legal system.

However, the reporter of the *Daily Report* lodged an appeal, arguing that the conduct of the proceedings gave rise to an apprehension of bias. A final decision has not yet been decided.

### Questions:

1. Analyse the extent to which the principles of justice were achieved in Brian's scenario.
2. Discuss the nature of the avenue of appeal taken in this case. In your answer discuss how appeals aim to achieve the principles of justice.
3. Explain a recent or recommended reform which could have assisted in the achievement of the principles of justice in this scenario.

## Did you know?

This fictional scenario is partly based off the case of *Rush v Nationwide News* (2019) FCA 357.

On 30th November 2017, the *Telegraph* published a story about actor Geoffrey Rush detailing that he had allegedly engaged in "inappropriate behaviour" during production of his stage show, *King Lear*.

The following day on the 1st December 2017, the news source claimed that two other actors had spoken out in support of the actress who had accused Rush and that the stage company believed the claims and would not work with Rush again.

Ultimately, the two publications linked the accusations made against Rush to other cases where movie executives, actors and 'show business' personalities had been accused of similar behaviour.

Rush sued both the publisher of the *Telegraph*, Nationwide News Pty Limited, and the writer of the publications, Jonathon Moran, claiming that the publications conveyed numerous defamatory imputations. He alleged that the material had brought him into "hatred, ridicule and contempt", that his character and status as an actor had been "gravely injured" and that he had "suffered hurt and embarrassment" and would continue to do so.

Rush claimed damages, including aggravated damages, and economic loss running into the millions of dollars.

In this case, the court ordered the defendants to pay the plaintiff \$850,000 plus \$42,302 in interest in non-economic or general damages. Following an agreement between the parties, the court awarded the plaintiff a further \$1.98 million for past and future economic loss.

This case is an example of how the three principles of justice were adequately achieved. For example, the trial was fair as it was conducted before an independent judge with rules of evidence and procedure being adhered to. Equality was achieved as both parties were represented by expert counsel and there were no cultural or language barriers. Finally, both parties had access to the court and professional counsel.

For a more in-depth rundown of the Geoffrey Rush case, please see Victoria Law Foundation's resource titled 'Defamation in Action - Geoffrey Rush case study'.

