C Tony's behaviour was antithesis to the idea that he feared for his life

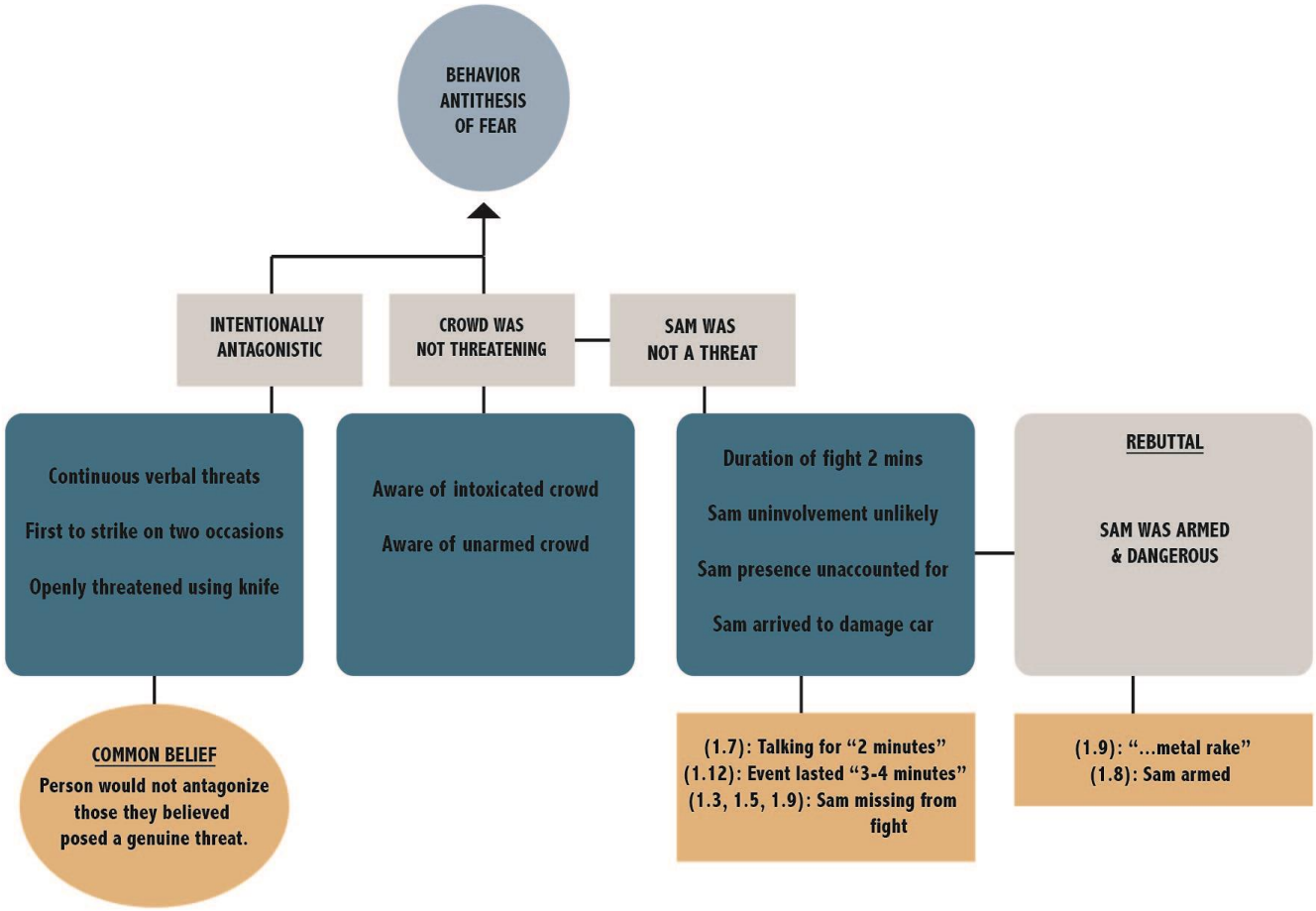


Figure. 2

1 Tony's actions were intentionally antagonistic and not consistent with fear

1. The following conjunctive sub-arguments rely upon the common belief that one would not antagonise people if they genuinely thought those people presented a significant threat to their life.

(a) ***Tony made continual threats towards the members of the neighbourhood***

2. Throughout both encounters, Tony makes continual death threats towards his neighbours. Though countered in one instance by Constable Oliver's report where police were present after the first encounter, there were other instances where these threats may have occurred. Additionally, 1.1, 1.3 and 1.10 claim Tony brandished his knife threateningly at the residents of 4 Boa Street.

Moreover, 1.3, 1.5 and 1.7 reveal Tony's lack of fear through his engagement in the

pre-murder arguments. This is tied closely to the assertion that he did not perceive the crowd to be a significant threat.

(b) ***Tony made the first move in both physical confrontations***

3. In both encounters, eye-witness reports (1.1, 1.3, 1.5) suggest that Tony attacked first. The notion that Tony is afraid for his life is inconsistent with his action of sparking a potentially life-threatening conflict when striking Sam.

2 Tony perceived the crowd as unlikely to threaten his life

(a) ***Crowd Intoxication***

4. According to Elisa's statement, she could see bottles in the hands of the crowd gathering outside 8 Boa Street. It is therefore likely that Tony too was aware that they were holding bottles and had been drinking, especially given he was closer in proximity to the crowd that Elisa.

(b) ***Unarmed crowd***

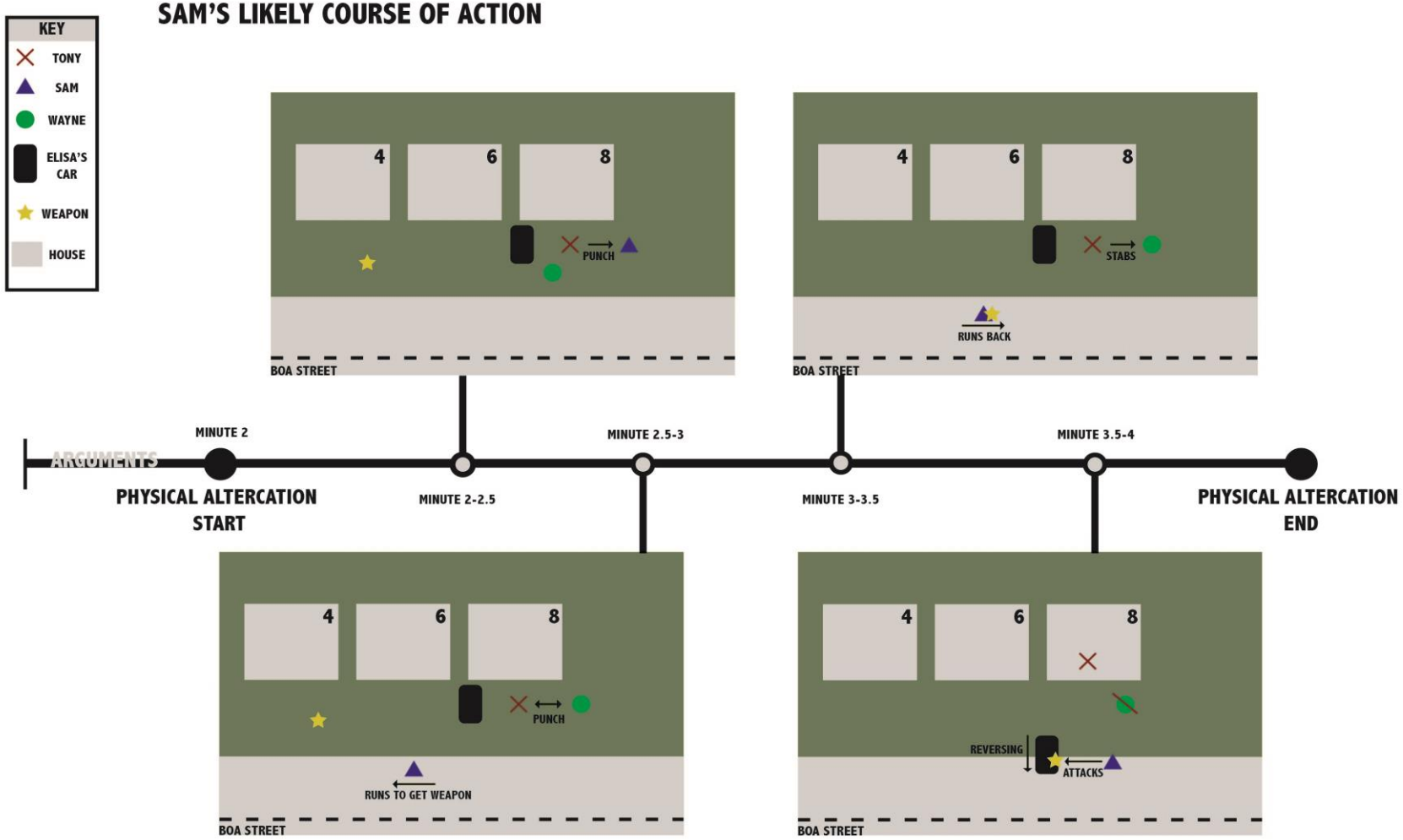
5. Most of the eyewitness reports establish that none in the crowd had any weapons. In particular, Wayne appears unarmed and unable to present a life-threat to Tony.

6. ***Rebuttal*: Sam was armed and dangerous***

This argument refers to the Figure 2 and 3. In summation:

Elisa and Imogen's statement's (1.8, 1.9) reveal that Sam was armed which raises a major objection to the argument that Tony did not perceive himself to be in mortal danger. If Sam was armed when Tony moved to strike him, it follows that he would fear for his life after seeing Sam with a weapon. This conflict threatens the main factual proposition of Tony's fearful mind. However, drawing from witness testimony, Figure 3 shows Sam would not have been present at the fight.

TIMELINE DIAGRAM SHOWING SAM'S LIKELY COURSE OF ACTION



Day 2 Seminar 4 — Hearsay Evidence

Hearsay — testing the source of the evidence and its reliability.

'The objection to hearsay evidence is that it is unreliable – the declarant is not subject to cross-examination and his or her truthfulness and powers of memory, recall, perception and narration cannot be tested.' — McHugh J in ***Pollit***

Hearsay rule depends upon the purpose for which the evidence is being used.
Statutory provision s59
(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
(2) Such a fact is in this Part referred to as an asserted fact.
(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

"previous representation" means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.
"representation" includes:
(a) an express or implied representation (whether oral or in writing), or
(b) a representation to be inferred from conduct, or
(c) a representation not intended by its maker to be communicated to or seen by another person, or
(d) a representation that for any reason is not communicated.

All conduct and statements and everything it conveys. Record of something that happened. Really broad concept.

E.G. Queen v Rose → representation by an absence of conduct → inactivity.
D → she had been seen with someone else. No-one put their hand up.

Subramaniam → D wearing a suicide belt. He's saying that rebels threatened him and forced him to wear it.

- Representation is: 'you must wear the belt'.
- Statement is being used to prove that he was compelled to wear it against his will. (fearful state of mind → duress)
- If the out of court representation and the statement trying to be proved are the same = hearsay.
    - The representation and what it is used prove cannot be the same.
        - I.e. 'I am Genghis Khan' → will challenged on insanity grounds. The representation is that he is a person. The asserted fact is that he is GK but what it is used to prove is that he is insane (not that he is actually GK). Therefore, the use of the item of evidence is different, therefore it can be used and is not hearsay.
- In this case, the representation was used to show that he was afraid and not of sound mind, not relying on the actual content of what they were saying. Therefore it was not hearsay.

Implied Assertions:
R v Hannes [2000] NSWCCA 503, Spigelman CJ at [361]:
'It is arguable that the word 'intended' in s 59(1) goes beyond the specific fact subjectivity averted to by the author as being asserted by the words used. It may encompass any fact which is a necessary assumption underlying the fact that the assertor does subjectively advert to.'

After ***Hannes***, s 59 amended – sub-s (2A) inserted:
"For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which it was made".

s.66A Evidence Act 2008
Exception: contemporaneous statements about a person's health etc

"The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind."

In Michael Peterson CASE:

- Witness x = MP and KP were in a loving relationship
- Then the witness says they hated each other.
- The words are used not to prove either statement, only that the witness does not have credibility.

Hearsay elements:

- previous representation which refers to representation outside of court.
- Page 90 of uniform evidence → whether the representation itself is being used to prove the truth of its contents. OR whether there is a distinction between the representation and what it is being used to prove.
- Intended assertion → intention to prove a certain asserted fact.

Exceptions to the Hearsay Rule: s66A

1. Mental State (person's health) → "The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind."

Baker (p98) → All the statements out of court concerning her fear of her husband. These statements were used to prove her state of mind. Can use it to prove intention and contemporaneous state of mind but be careful with its use (use the other exclusions). Only use s66A in narrow circumstances in the exam (try to engage with all the content for the exam).

2. If you have already used the statements for non-hearsay purposes, you can bring it to the jury later on for a hearsay purpose.
    a. E.g. using statements to put off the credibility of a witness. (MP's relationship with his wife) Adducing the representations to disprove the witness' credibility. Later on, the jury can rely on the statements without hearsay excluding the evidence that has already been adduced for another purpose earlier in the trial.
    b. *However, you can only use first-hand hearsay under this exception NOT second hand hearsay

Seminar 7 — Discretionary and Mandatory Exclusion of Evidence

To encourage rational fact-finding and discourage irrational fact-finding.

s.**135** General **discretion** to exclude evidence (not necessarily criminal)

The court ***may*** refuse to admit evidence if its *probative value* is *substantially outweighed* by danger that evidence might:

- Be unfairly prejudicial to a party
- Be misleading or confusing
- Cause or result in undue waste of time.

Probative Value: It's **in the Evidence Act**

'The extent to which the evidence *could rationally* effect the assessment of the probability of the existence of a fact in issue.'

Note: don't consider reliability/credibility in determining probative value: ***IMM v The Queen*** [2016] HCA 14

- High Court says you don't need to consider matters of reliability and credibility…only rational effect. Reliability and credibility are matters for the jury to consider, the judge is not there to consider reliability/credibility (which are interchangeable in the Evidence Act) of evidence. Split 4 to 3 to the NSW approach.
- Something that is preposterous has no probative value (but up to the jury to decide if the evidence would have a rational effect on them).

Substantially outweighed: **Not in the Evidence Act**

The trial judge cannot exercise the discretion unless the danger substantially outweighs the probative value. 'substantially outweighed' means 'well outweighed' or 'considerably outweighed': ***R v Clarke*** [2001] NSWCCA

It must be more than a mere possibility of danger. It must be a 'real' danger: ***R v Lisoff*** [1999] NSWCCA 364.

Palmer : ***Pfennig v R*** (1995) 182 CLR 461, McHugh J:

The use of the term "outweigh" suggests an almost arithmetical computation. But…
… prejudicial effect and probative value are incommensurables. They have no standard of comparison. The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial.
In criminal trials, the prejudicial effect of evidence is not concerned with the cogency of its proof but with the risk that the jury will use the evidence or be affected by it in a way that the law does not permit.

Prejudicial effect concerns the jury in trial whereas probative value concerns rational fact-finding. EXAM must discuss why one is stronger than the other.

Limb 1 of s135 — *Unfairly Prejudicial*

Papakosmas v R (1999) 196 CLR 297

McHugh J: 'Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted. '

- **Unfair** is the key word! All evidence is prejudicial against the defendant. But the distinction is that it is unfair.

R v BD (1997) 94 A Crim R 131

Hunt CJ: 'The prejudice to which [ss 135-137] refers is *not* that the evidence merely tends to establish the Crown case; it means prejudice which is unfair because there is a **real risk** that the evidence will be **misused** by the jury in some unfair way.'

Festa v R (2001) 208 CLR 593

Gleeson CJ : 'unfair prejudice may arise were the jury to use the evidence in a **manner that goes beyond the probative value** that it may properly be given'.

R v Serratore (1999) 48 NSWLR 101

Dunford J: 'All relevant evidence led in the Crown case at trial is prejudicial to the accused, but it is only that of which the probative value is outweighed by the danger of *unfair* prejudice which is excluded; that is, evidence

which has only slight probative value but which carries with it a probability that it be misused by the tribunal of fact in a way logically unconnected with the issues in the case'

Australian Law Reform Commission, *Evidence, Report No 26 (Interim)* (1985), vol 1, par 644:
By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case.
Thus evidence that appeals to the fact finder's sympathies, arouses a sense of horror, provides an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.

- In regards to the MP case, the homosexuality of MP may prejudice the jury in an unfair way since they have a significance prejudice against it. NC is in the bible belt, the jury would likely be made up of orthodox Christian conservatives. Therefore, the evidence would be used or could be construed in a way that goes beyond its normal weight — his homosexuality is only to create a motive and to set the scene. However, to these jury members, it may prejudice them against MP's character in general as an evil man.
- There's a lot of contextual analysis in this.
- Could limit the prejudice by limiting the information (excluding the fact that he is homosexual and say it's just an affair).

Limb Two of s135 — Misleading or confusing
Limb 3 of s135 — undue waste of time
- Prevent parties from very large resources from abusing court processes

s.136 General discretion to limit use of evidence
The court *may* limit the use to be made of evidence if there is a danger that a particular use of the evidence might
(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing.

- Evidence can be used many different ways. Prior inconsistent statement used to undermine witness, but opponent might say that it cannot be used for its Hearsay purpose (proving the statement). Here there are two uses so the defence can apply for that use to be limited.

s.**137** Exclusion of **unfairly prejudicial** prosecution evidence in **criminal proceedings**
In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.
Alternatives to exclusion?
- Mandatory exclusion. You don't need to use s135 unless you want to used limb 2 or 3 in s135. This replaced 135.
- Here there is a lower threshold, it is not substantial outweighed, only that it is **outweighed.**
- Page 333 uniform evidence, examples of unfair prejudice: gruesome crime-scene photographs (instinct to punish, provokes real horror, horrendousness of the crime might increase the penalty)
- Emotion in murder is necessary but it is only unfair when it goes so far beyond what is necessary.

In regards to the **MP CASE** — using the evidence of his homosexual affair:
1) 9th December // KP discovers MP is bisexual
    a. KP's previous relationship ended because of infidelity

Day 5 — Opinion Evidence

Witnesses can only give statements about what they have observed, not about their opinion (common law foundation).

S76 — The Opinion Rule

> Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

First question is about how it is relevant. What are you using the evidence to prove? If what you are trying to express in the opinion and the purpose of the opinion is the same, then the opinion rule applies.
Opinion trying to prove = opinion expressed …Therefore, it is opinion evidence.

What is an opinion?

"[Opinion evidence is] **evidence of a conclusion**, usually judgmental or debateable, **reasoned from facts**": ***R v Smith*** (1999) 47 NSWLR 419

'[An opinion is] an inference drawn … from observed and communicable data' : ***Allstate Life Insurance Co. v ANZ Banking Group Ltd*** (No.5) (1996) 64 FCR 73, 75

Is evidence of what a witness would have done in a hypothetical situation evidence of an opinion?\

- It is a conclusion that is come based on an assessment of the facts.
- The opinion rule related to those things drawn from facts and available data. Not a hypothetical situation.
- Not everything is an opinion (everything that a witness brings about a situation inherently involves opinion evidence.)

In example 1: W cannot give evidence as his opinion since what he is trying to say is the same as what he is trying to prove.

Distinguishing Fact and Opinion:

"It is true that even the simplest sensations involve some judgment; when a witness reports that he saw an object of a certain shape and size or at a certain distance, he describes something more than a mere impression on his sense of sight, and his statement implies a theory and explanation of a bare phenomenon. When, however, the judgment is of so simple a kind as to become wholly unconscious, and the interpretation of the appearances as a matter of general agreement, the object of sensation may, for our present purpose, be considered a fact." → ***George Cornewall Lewis***

Dennis:

"For example, a witness is allowed to say that he saw a white car drive across a road junction through a red traffic light. Nothing would be gained, and much confusion would be caused, if we tried to restrict the witness to saying that he saw a white irregularly shaped object change its position in relation to a long thin object with a red glow at the top. For his testimony to have any meaning it is necessary for the witness to organise his visual perceptions by reference to the relevant concepts of a car, a road, driving and traffic light, and to the significance of their conjunction when the light is red. This kind of interpretation and classification of observed phenomena is, in a weak sense, all opinion evidence."

R v Leung and Wong **[1999] NSWCCA 287**

Simpson J:

The line between opinion evidence and evidence of fact is not always clearly defined. Evidence of physical identification illustrates the point. On the one hand such evidence may be characterised as evidence of fact; but, depending on the circumstances, it may more properly be characterised as evidence of opinion. The ordinary observer would regard evidence given by a man identifying his wife of thirty years as evidence of fact; but a witness who identifies a suspect in a police lineup would be perceived as giving evidence more closely allied to opinion evidence. (para. 43)

ALRC Interim Report 26 (1985),vol.1 pp.409-10: **Fact-Opinion: A Continuum**

'The distinction [between fact and opinion] can serve a useful purpose and is, in the end, unavoidable. Evidence at the extreme of the continuum, which most would be prepared to classify as evidence of opinion,

will generally be open to more dispute than material at the opposite end, which most would classify as evidence of fact. For accuracy of fact-finding and to minimise confusion and time-wasting, therefore, it is necessary to exercise some control upon material at the opinion end of the continuum.

Smith v R **[2001] HCA 50, Kirby J:**

For the purposes of s.76 of the Act, it is clear that the distinction between evidence of a 'fact' and of an 'opinion' is one of degree rather than of kind. The difficulty of classification arises from the fact that, in one sense, all evidence is of the opinion of the deponent. Even when the evidence relates to the witness personally, it involves inferences or conclusions drawn from mental impressions of existing phenomena and past experience. However, there is no point complaining about the difficulty of the classification. Categorisation is required by the language of the Act, as indeed it was previously required by the common law.'