CASES ON EMPLOYERS' LIABILITY

COMPETENT STAFF

Wilsons and Clyde Coal Ltd v English **[1937] 3 All ER 628**

In an action by a miner against his employers for damages for personal injury alleged to be due to the negligence of the employers in that they had failed to provide a reasonably safe system of working the colliery, questions were raised (1) whether the employers were liable at common law for a defective system of working negligently provided or permitted to be carried on by a servant to whom the duty of regulating the system of working had been delegated by the employers, the employers' board of directors being unaware of the defect, and (2) if they were liable, whether the employers were relieved of their liability in view of the prohibition contained in the Coal Mines Act 1911, s2(4), against the owner of a mine taking any part in the technical management of the mine unless he is qualified to be a manager.

It was held by the House of Lords that (1) the employers were not absolved from their duty to take due care in the provision of a reasonably safe system of working by the appointment of a competent person to perform that duty. Although the employers might, and in some events were bound to, appoint someone as their agent in the discharge of their duty, the employers remained responsible. (2) the doctrine of common employment does not apply where it is proved that a defective system of working has been provided. To provide a proper system of working is a paramount duty, and, if it is delegated by a master to another, the master still remains liable.

Lord Wright stated (at p644A) that the whole course of authority consistently recognises a duty which rests on the employer, and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations (at p644A). The obligation is threefold, "the provision of a competent staff of men, adequate material, and a proper system and effective supervision" (at p640C).

Smith v Crossley Bros **(1951) Current Law Year Book (1947-51) 6831**

The plaintiff, an apprentice employed in the defendants' apprentice training school, was seriously injured by a practical joke played upon him by two fellow-apprentices. The Court of Appeal held the defendants not liable to the plaintiff in negligence, because his injury had occurred through an act of wilful misbehaviour which the defendants could not reasonably have foreseen.

Hudson v Ridge Manufacturing **[1957] 2 All ER 229**

The plaintiff, while at work, was injured through a foolish prank played on him by Chadwick, a fellow workman. Over a period of about four years C had been in the habit of indulging in horseplay during his work, at the expense of the plaintiff and the other workmen. The employers knew about C's conduct and had frequently reprimanded him and warned him that someone might one day be hurt, but, although he paid no heed to their reprimands, he was allowed to remain in their employment.

In an action by the plaintiff against the employers, claiming damages for negligence at common law, it was held at Manchester Assizes that the

employers were liable to the plaintiff in damages for breach of their duty at common law to provide competent workmen, because, if a workman, by his habitual conduct, was likely to prove a source of danger to his fellow workmen, it was the employers' duty to remove that source of danger, and the plaintiff's injury was sustained as a result of the employers' failure to take proper steps to put an end to C's horseplay or to remove him from their employment if he persisted in it. *Smith v Crossley Brothers Ltd* ((1951) 95 Sol Jo 655) considered.

***Harrison v Michelin Tyre Co* [1985] 1 All ER 919**

The plaintiff, a tool grinder employed by the defendants, was injured in the course of employment while standing on the duck-board of his machine talking to a fellow employee. The injury occurred when S, another employee, while pushing a truck along a passageway (indicated by chalk lines) in front of the plaintiff, decided to indulge in some horseplay by suddenly turning the truck two inches outside the chalk lines and pushing the edge of it under the plaintiff's duck-board. The duck-board tipped up and the plaintiff fell off it and was injured. He brought an action for damages for personal injuries against the defendants, claiming that S had been acting in the course of his employment, and that therefore they were vicariously liable for his negligence. The defendants denied liability, contending that at the time of the incident S had embarked on a frolic of his own.

It was held in the QBD that for the purposes of vicarious liability, the test whether an employee was acting in the course of his employment was whether a reasonable man would say either that the employee's act was part and parcel of his employment (in the sense of being incidental to it) even though it was unauthorised or prohibited by the employer, in which case the employer was liable, or that it was so divergent from his employment as to be plainly alien to his employment, and wholly distinguishable from it, in which case the employer was not liable. Applying that test, a reasonable man would say that, even though S's act was of a kind which would never have been countenanced by the defendants, it was none the less part and parcel of his employment. Accordingly the defendants were vicariously liable.

***Waters v MPC* (2000) 27 July 2000**

From the speech of Lord Slynn:

The plaintiff was a police officer. She alleged that on 15 February 1988 in her police residential accommodation at Marylebone she was raped and buggered by a fellow officer at a time when they were both off duty. On 3 March 1988 she complained to her reporting Sergeant and thereafter she complained to other officers about what had happened. A writ was issued on 4 February 1994 against the MPC and a statement of claim served on 20 June 1994. She alleged that the MPC was to be treated as her employer and that in breach of his duty to her as such, in breach of contract and of statutory duty and negligently he failed to deal properly with her complaint but "caused and/or permitted officers to maliciously criticise, harass, victimise, threaten, and assault and otherwise oppress her" as set out in the statement of claim. Alternatively she alleged that the respondent was liable vicariously for the acts of officers under his command in the Metropolitan Police.

The principal claim raised in the action was one of negligence—the "employer" failed to exercise due care to look after his "employee". Generically many of the acts alleged can be seen as a form of bullying—the "employer" or those to whom he delegated the responsibilities for running his

organisation should have taken steps to stop it, to protect the "employee" from it. They failed to do so. They made unfair reports and they tried to force her to leave the police.

If an employer knows that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he does nothing to supervise or prevent such acts, when it is in his power to do so, it is clearly arguable that he may be in breach of his duty to that employee. He may also be in breach of that duty if he can foresee that such acts may happen and if they do, that physical or mental harm may be caused to an individual. Lord Slynn accepted (Evans LJ in the Court of Appeal was prepared to assume without deciding) that if this sort of sexual assault is alleged (whether it happened or not) and the officer persists in making complaints about it, it is arguable that it can be foreseen that some retaliatory steps may be taken against the woman and that she may suffer harm as a result. Even if this is not necessarily foreseeable at the beginning it may become foreseeable or indeed obvious to those in charge at various levels who are carrying out the Commissioner's responsibilities that there is a risk of harm and that some protective steps should be taken.

The Courts have recognised the need for an employer to take care of his employees quite apart from statutory requirements (*Spring v. Guardian Assurance plc* [1994] I.C.R. 596 at 628E. As to ill treatment or bullying see *Wigan Borough Council v. Davies* [1979] I.C.R. 411 at p. 419 (a claim in contract); *Wetherall (Bond Street W1) Ltd v. Lynn* [1978] 1 W.L.R. 200 (a constructive dismissal case); *Veness v. Dyson Bell & Co* [The Times, 25 May 1965] where Widgery J refused to strike out a claim that "[the plaintiff] was so bullied and belittled by her colleagues that she came to the verge of a nervous breakdown and had to resign".

The main claim against the MPC for breach of personal duty (although the acts were done by those engaged in performing his duty) should not be struck out.

***Veness v Dyson, Bell & Co* [1965] Current Law Year Book 2691**

The plaintiff claimed damages against her former employers, alleging that persecution and bullying by fellow-employees had brought her to the verge of a nervous breakdown; she contended that the defendants should have provided reasonable conditions whereby she could fulfil her duties, should have taken reasonable steps to protect her from undue interference by her colleagues, and had failed to exercise due care and skill in maintaining proper discipline. It was held by Widgery J (1) that these allegations should not be struck out; but (2) that a further allegation that one of the defendants' partners had been rude to her was, as a cause of action, misconceived, and should be struck out.

***Wetherall (Bond St) v Lynn* [1978] Current Law Year Book 901**

In deciding whether or not an employee has been constructively dismissed within the meaning of para. 5(2)(c) of Sched. 1 to the Trade Union and Labour Relations Act 1974, and whether he had repudiated the contract of employment by showing an intention not to be bound by its terms.

After working for W as an assistant area manager for one year, L was transferred to head office to be retail stock controller. Three months later, following a dispute over a holiday and criticisms of his work by a director of the company, L received an official warning letter from that director accusing

him of negligence and inefficiency. He was absent from work for 17 weeks suffering from a nervous breakdown, during which period he made repeated requests for an interview with the director concerned, all of which were refused. He then resigned from the company, and complained to an industrial tribunal that he had been constructively dismissed by W and that the dismissal was unfair. The tribunal held that W had acted unreasonably, and that L was entitled to terminate his contract within the meaning of para.5(2)(c). W appealed.

It was held by the Employment Appeal Tribunal, dismissing the appeal, that in the circumstances it was clear that W had repudiated the contract and that he had been constructively dismissed; since W had acted unreasonably within the meaning of para.6(8), the dismissal was unfair.

***Wigan Borough Council v Davies* [1979] Current Law Year Book 840**

An employer has an obligation to provide reasonable support to ensure that an employee can work without undue harassment from fellow employees; the burden of proving that such support was given rests upon the employer.

The employee was unpopular with fellow employees at an old people's home since she failed to support their industrial action against the warden. The employers tried unsuccessfully to find her employment elsewhere and she agreed to remain at the home after her employers' assurance that they would give all reasonable support so as to enable her to work without disruption. Nothing was apparently done to remove the fellow-employees' continued hostility towards the employee who in due course left. An industrial tribunal found that she had been unfairly dismissed.

It was held by the Employment Appeal Tribunal, dismissing the employers' appeal, the burden had been upon the employers to establish that they had taken all reasonable steps; and that the tribunal had been entitled to conclude upon the evidence that the burden of proof had not been discharged.

SAFE PLACE OF WORK

***Davidson v Handley Page Ltd* [1945] 1 All ER 235**

The plaintiff was employed by the defendants to work in one of their workshops, in which there was a row of vats containing a liquid called suds and used for oiling the lathes. The liquid was frequently spilled while being carried to the lathes, thus rendering the floor slippery. In order to remedy this danger, labourers were employed to clean the floor from time to time, or to put sawdust on it. Above the row of vats was a water tap and beneath was a loose wooden board, called a duck-board, which was used for reaching the vats or the tap. While going to the tap in order to wash a teacup for her own use the plaintiff slipped on the duckboard and suffered personal injuries. At the time of the accident suds had been splashed over the duck-board and no sawdust had been put on it. The plaintiff brought an action claiming damages for personal injuries, but the county court judge held that, although the defendants had failed in their duty of providing a safe system of work, the plaintiff was not entitled to recover since, at the time of the accident, she was engaged in an activity not directly connected with her work. Before the Court of Appeal, the defendants also raised the defence of *volenti non fit injuria*, stating that two water taps were available and that, in selecting the one in a dangerous place, the plaintiff had voluntarily accepted the risk.

It was held by the Court of Appeal (1) the obligation of the employer to provide safe appliances extends to cover all acts normally and reasonably incidental to the daily work, and, therefore, extended to the plaintiff's case. (2) the defence of *volenti non fit injuria* was not open to the defendants since it had not been put forward in the county court.

Lord Greene MR stated (at p236H): "It was suggested that this duck-board ought to be regarded as a part of the premises, and it was said that in respect of the condition of the premises themselves, as distinct from plant and appliances, the measure of the employer's duty is less than it is in respect of the actual plant and appliances themselves. I very much doubt the correctness of that proposition but it is not necessary to investigate it, for the simple reason that the particular article with which we have to deal was, I think, clearly an appliance provided for the purpose of enabling a person to reach a point which, without it, he would not have been able to reach. It was fulfilling precisely the same function as a ladder or a pair of steps fulfils when the heights which have to be dealt with are greater than they are here."

***Latimer v AEC Ltd* [1953] 2 All ER 449**

Owing to an exceptionally heavy storm of rain, a factory was flooded with surface water which became mixed with an oily liquid used as a cooling agent for the machines which was normally collected in channels in the floor. When the water drained away from the floor, which was level and structurally perfect, it left an oily film on the surface which was slippery. The defendants spread sawdust on the floor, but owing to the unprecedented force of the storm and the consequently large area to be covered, there was insufficient sawdust to cover the whole floor. In the course of his duty the plaintiff slipped on a portion of the floor not covered with sawdust, fell, and was injured.

It was held by the House of Lords, inter alia, that on the facts the defendants had taken every step which an ordinarily prudent employer would have taken in the circumstances to secure the safety of the plaintiff, and so they were not liable to the plaintiff for negligence at common law.

***Wilson v Tyneside Window Cleaning Co* [1958] 2 All ER 265**

A master's duty to his servant to take reasonable care so to carry out his operations as not to subject his servant unnecessary (see *Smith v Baker & Sons* [1891] AC at p362) is one single duty applicable in all circumstances, though it may be convenient to divide it into categories (as was done by Lord Wright in *Wilsons & Clyde Coal v English* [1937] 3 All ER at p640) when dealing with a particular case. So viewed, the question whether the master was in control of the premises, or whether the premises were those of a stranger, becomes merely one of the ingredients, albeit an important one, in considering the question of fact whether, in all the circumstances, the master took reasonable care.

A skilled and experienced window cleaner, who knew that he should not trust the handles on windows without first testing them, was frequently sent by his employers to clean the windows of a particular customer. The employers did not inspect the customer's premises each time when they sent the window cleaners there, nor did they specifically warn the window cleaner of particular dangers; but they did instruct him to leave uncleaned any window which presented unusual difficulty and which he was in doubt whether he could clean safely, to report the fact to them and to ask for further instructions. There was no evidence of any practice in the trade either of

inspecting premises for safety before work or of repeatedly warning workmen of the dangers. While cleaning the outside of a kitchen window, the woodwork of which appeared to the window cleaner to be rotten, of which he knew the sash to be stiff and of which one of the two handles was missing, the window cleaner attempted to pull the window down by the remaining handle. The handle came away in his hand, causing him to lose his balance, fall and sustain severe injuries.

In an action by the window cleaner against the employers for alleged negligence exposing him to unnecessary risk, it was held by the Court of Appeal that the employers had taken reasonable care not to subject the plaintiff to unnecessary risk, because the danger was an apparent danger, the plaintiff was very experienced at the work, and they had instructed him not to clean windows which it might not be safe to clean; the employers, therefore, were not liable.

***Cook v Square D Ltd* [1992] ICR 262**

The plaintiff, an electronics engineer, worked for a company based in the UK. He was sent on an assignment to complete the commissioning of a computer control system in Saudi Arabia. His work there was carried out in a control room housing the computers. The area had a specially constructed floor, each tile being removable so that access could be obtained to the wires and cables beneath. The employee, having almost completed his work on the system, was instructing others on the use of the system, when he slipped as a result of a raised tile that had been left unguarded and injured his knee.

It was held by the Court of Appeal that the employers had a duty, that could not be delegated, to take all reasonable care to ensure the safety of the employee whilst he was working overseas; that to hold the employers responsible for the daily events on a site in Saudi Arabia, owned and managed by reliable companies, lacked reality and that the circumstances clearly established that the employers had not delegated their responsibility and that the accident to the employee had not been caused by any breach of duty on their part.

Per Farquharson LJ. It may be that in some cases where, for example, a number of employees are going to work on a foreign site or where one or two employees are called on to work there for a considerable period of time that an employer may be required to inspect the site and satisfy himself that the occupiers were conscious of their obligations concerning the safety of people working there.

Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004)

Maintenance of workplace, and of equipment, devices and systems

5 (1) The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.

(2) Where appropriate, the equipment, devices and systems to which this regulation applies shall be subject to a suitable system of maintenance.

(3) The equipment, devices and systems to which this regulation applies are-

(a) equipment and devices a fault in which is liable to result in a failure to comply with any of these Regulations; and
(b) mechanical ventilation systems provided pursuant to regulation 6 (whether or not they include equipment or devices within sub-paragraph (a) of this paragraph).

ADEQUATE PLANT AND EQUIPMENT

Toronto Power Co v Paskwan **[1915] AC 734**

The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

The plaintiff's husband, while in the employment of the defendants, was killed by the falling of a block from a travelling crane used in their power-house. The block fell owing to the overwinding of a drum which hoisted a chain to which the block was attached. The jury found, inter alia, that the accident was due to the negligence of the defendants, through their master mechanic, in failing to install proper safety appliances and to employ a competent signalman. The judge entered judgment for $6000, which was affirmed by the Supreme Court of Ontario. The defendants appealed. The Privy Council dismissed the appeal.

Cummings (or McWilliams) v Sir William Arrol & Co **[1962] 1 All ER 623**

A steel erector fell seventy feet from a steel tower in the building of which he was assisting. He was killed by the fall and his widow and administratrix claimed damages from his employers for negligence and from the occupiers of the shipyard in which the tower was being built for breach of statutory duty under the Factories Act 1937, s26(2), in failing to provide a safety belt for use by the steel erector. If a safety belt had been worn by the deceased he would not have been killed by the fall. The deceased was an experienced steel erector, and on the evidence it was highly probable that he would not have worn a safety belt if one had been provided.

It was held by the House of Lords that assuming that the employers and the occupiers of the site were in breach of their respective duties in not providing a safety belt, nevertheless they were not liable in damages because their breach of duty was not the cause of the damage suffered since (a) on the evidence the deceased would not have worn a safety belt if it had been provided, and (b) there was no duty on the employers to instruct or exhort the deceased to wear a safety belt.

Parkinson v Lyle Shipping Co **[1964] 2 Lloyd's Rep 79**

Personal injuries were sustained by the plaintiff donkeyman greaser when "blow-back" occurred while he was lighting a Scotch boiler in the defendants' motor vessel *Cape Rodney*. A claim was made by the plaintiff, alleging that the defendants failed to maintain the boiler in working condition. It was contended by the defendants that the plaintiff failed to adopt the correct procedure for lighting the boiler. The opinion given by the plaintiff's expert witness was that if the plaintiff did what he said, the air

check controls were faulty. Evidence was given by the ship's officers that, after the accident, the air check controls were working properly.

It was held in the QBD that the plaintiff was himself negligent in standing in front of the furnace when lighting it; that the air check controls were not faulty; that, although there must have been oil in the furnace, if the plaintiff had opened the air check controls vapour would have been removed; that the plaintiff did not open the air check controls; and that, therefore, the plaintiff's claim failed.

***Leach v British Oxygen Co* (1965) Current Law Year Book 2725**

The plaintiff, an employee of the defendants who was experienced in the task of breaking up calcium chloride, used the wrong tool for the job; as a result an explosion occurred and the plaintiff was injured. The plaintiff contended that the defendants were negligent in not warning or reminding him to use the correct tool. It was held by the Court of Appeal that the plaintiff's conduct was not a "momentary aberration" but an act of folly, against which the defendants were not bound to guard him, so that they had not been negligent.

SAFE SYSTEM OF WORKING

***Speed v Thomas Swift & Co* [1943] 1 All ER 539**

The defendants employed the plaintiff who received injuries while engaged in assisting in the unloading of a cargo from a ship. The starboard rail was broken and it was not protected or removed during the operations. Moreover, the port winch was defective and the danger arising from these matters was increased by the presence of dunnage lying on the deck. Owing to a hook catching the rail, either the rail or part of the cargo fell upon the plaintiff who was working in a barge alongside the ship. The defendants contended that they had provided a safe system of working and that the accident was due to the failure of a fellow-servant of the plaintiff to carry out the system properly and, therefore, they were exonerated from liability by the doctrine of common employment.

It was held by the Court of Appeal that the employers had failed to provide a safe system of working, and the accident was due to that failure and not to the failure of a servant to carry out a proper system. The employers were, therefore, liable in damages.

***General Cleaning Contractors v Christmas* [1952] 2 All ER 1110**

The plaintiff, a window cleaner, was employed by the defendants, a firm of contractors, to clean the windows of a club. While, following the practice usually adopted by employees of the defendants, he was standing on the sill of one of the windows to clean the outside of the window and was holding one sash of the window for support, the other sash came down on his fingers, causing him to let go and fall to the ground, suffering injury.

On a claim by him against the defendants for damages, it was held by the House of Lords that even assuming that other systems of carrying out the work, eg, by the use of safety belts or ladders, were impracticable, the defendants were still under an obligation to ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the defendants

had not discharged their duty in this respect towards the plaintiff; and, therefore, they were liable to him in respect of his injury.

Per Lord Reid. Where a practice of ignoring an obvious danger has grown up it is not reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required.

Petch v Customs and Excise Commissioners **[1993] ICR 789**

The plaintiff, who joined the Civil Service in 1961 as a clerical officer, was highly regarded by his superior officers and by 1973 had risen to the rank of assistant secretary. In 1974, while working in the defendants' department, he had a mental breakdown. In 1975, after his return to work, he was transferred as assistant secretary to the DHSS. In 1983 he fell ill again but was able to return to work until 1986, when he was retired from the Civil Service on medical grounds. In an action by the plaintiff for, inter alia, damages against the defendants for negligence, the judge held that, although the plaintiff would not have suffered the breakdown in 1974 if he had not been subjected to heavy pressure at work, the defendants were not negligent in failing to take steps which would have prevented the plaintiff's illness.

It was held by the Court of Appeal, inter alia, that as it had not been shown on the evidence that the defendants' senior management were aware, or ought to have been aware, in 1974 that the plaintiff was showing signs of impending breakdown or that his workload carried a real risk of breakdown and had not acted negligently following his return to work, the defendants had not been in breach of their admitted duty to take reasonable care to ensure that the duties allocated to the plaintiff did not damage his health.

Walker v Northumberland County Council **[1995] 1 All ER 737**

The plaintiff was employed by the defendant local authority as an area social services officer from 1970 until December 1987. He was responsible for managing four teams of social services fieldworkers in an area which had a high proportion of child care problems. In 1986 the plaintiff suffered a nervous breakdown because of the stress and pressures of work and was off work for three months. Before he returned to work he discussed his position with his superior who agreed that some assistance should be provided to lessen the burden of the plaintiff's work. In the event, when the plaintiff returned to work only very limited assistance was provided and he found that he had to clear the backlog of paperwork that had built up during his absence while the pending child care cases in his area were increasing at a considerable rate. Six months later he suffered a second mental breakdown and was forced to stop work permanently. In February 1988 he was dismissed by the local authority on the grounds of permanent ill health. He brought an action against the local authority claiming damages for breach of its duty of care, as his employer, to take reasonable steps to avoid exposing him to a health-endangering workload.

It was held in the QBD that where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of the stress and pressures of his workload, the employer was under a duty of care, as part of the duty to provide a safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform. On the facts, prior to the 1986 illness, it was not reasonably foreseeable to the local authority that the

plaintiff's workload would give rise to a material risk of mental illness. However, as to the second illness, the local authority ought to have foreseen that if the plaintiff was again exposed to the same workload there was a risk that he would suffer another nervous breakdown which would probably end his career as an area manager. The local authority ought therefore to have provided additional assistance to reduce the plaintiff's workload even at the expense of some disruption of other social work and, in choosing to continue to employ the plaintiff without providing effective help, it had acted unreasonably and in breach of its duty of care. It followed that the local authority was liable in negligence for the plaintiff's second nervous breakdown and that accordingly there would be judgment for the plaintiff with damages to be assessed.

Johnstone v Bloomsbury Health Authority **[1991] 2 All ER 293**

The plaintiff was employed by the defendant health authority as a junior hospital doctor under a contract of employment which required him, by para 4(b), to work 40 hours per week and to 'be available' for overtime of a further 48 hours per week on average. The plaintiff brought an action against the authority alleging breach of the authority's duty as his employer to take all reasonable care for his safety and well-being and seeking a declaration that the plaintiff could not lawfully be required by the defendant to work under his contract of employment for so many hours in excess of his standard working week as would foreseeably injure his health. The plaintiff alleged that he had been required to work intolerable hours with such deprivation of sleep that his health had been damaged and the safety of his patients put at risk and that he suffered from stress and depression, had been physically sick from exhaustion and had felt suicidal. The plaintiff also sought declarations that his contract was contrary to s2(1)(a) of the Unfair Contract Terms Act 1977, which provided that a term of a contract could not exclude or restrict a person's liability for death or personal injury resulting from negligence, and that the contract was void on the grounds of public policy. It was held by the Court of Appeal:

(1) (Leggatt LJ dissenting) Although the defendant health authority was entitled under para 4(b) of the contract of employment by which junior hospital doctors were employed, to require the plaintiff to work overtime of up to 48 hours average per week at its discretion, the health authority had to exercise that power in such a way as not to injure the plaintiff and accordingly it could not require the plaintiff to work so much overtime in any week that his health might reasonably be damaged. It followed that if the pleaded facts were established the health authority would be in breach of duty. Accordingly, the main claim should not be struck out and the health authority's appeal would be dismissed.

(2) Since it was arguable that the health authority's claim that there was no cause of action could only succeed on the premise that para 4(b) of the contract of employment by which junior hospital doctors were employed was to be construed as a plea of volenti non fit injuria or express assumption of risk by the plaintiff or because it operated to limit or restrict the ambit and scope of the duty of care owed by the authority and since it was also arguable that if that were the case para 4(b) would be contrary to s2(1) of the 1977 Act, the claim based on the 1977 Act should not have been struck out.

(3) However, the claim based on public policy would inevitably involve argument and adjudication on non-justiciable issues more appropriate to public debate, such as the capacity and management of the national health service and public funding, and accordingly the claim based on public policy had been rightly struck out.

Per Sir Nicholas Browne-Wilkinson V-C and Leggatt LJ (Stuart-Smith LJ dissenting). An implied contractual duty in a contract of employment such as the implied duty imposed on an employer to take reasonable care for the health and safety of his employees is subject to any express terms in the contract of employment requiring an absolute duty on the part of employees to work certain specified hours.

White v Chief Constable of the South Yorkshire Police **[1999] 1 All ER 1**

A number of police officers sued their employer, the defendant chief constable, for damages in negligence for post-traumatic stress disorder suffered in the aftermath of a disaster at a major football match. The officers were on duty at the time and became involved in the aftermath of the disaster: two helped carry the dead and injured at the stadium; two tried unsuccessfully to resuscitate injured spectators at the stadium; and one assisted at a mortuary to which the dead were taken. The plaintiffs were subsequently diagnosed as suffering from PTSD brought about by their experiences in dealing with the aftermath of the disaster.

In their action against the chief constable they claimed damages for negligence on the basis (1) that he owed them a duty of care as their de facto employer to take reasonable care not to expose them to unnecessary risk of injury, whether physical or psychiatric, and was vicariously liable for the negligence of the senior officer which had given rise to their psychiatric illness [and (2) that they were to be equated to rescuers rather than mere bystanders, since they had actively rendered assistance and, as rescuers, they were entitled to be treated as primary victims of the disaster and their claim ought not to be subjected to the control mechanisms imposed on claims for psychiatric injury by bystanders].

It was held by the House of Lords, inter alia, (Lord Goff dissenting) an employee who suffered psychiatric injury in the course of his employment had to prove liability under the general rules of negligence, including the rules restricting the recovery of damages for psychiatric injury. Accordingly, if an employee who witnessed an accident at work would otherwise have been unable to sue because as a mere bystander he was only a secondary victim who was not in a sufficiently close relationship with the victim, the mere fact that his relationship with the tortfeasor was that of employee and employer could not make him a primary victim. *Alcock v CC of S. Yorkshire Police* [1991] 4 All ER 907 and *Page v Smith* [1995] 2 All ER 736 applied.

Thompson and others v Smiths Shiprepairers Ltd **[1984] 1 All ER 881**

The plaintiffs were employed as labourers or fitters in shipbuilding and shiprepairing yards over a long period, stretching from the 1940s (or earlier) to the 1970s. During their employment in the yards the plaintiffs were exposed to excessive noise which by stages progressively impaired their hearing. At all material times the employers knew that noise levels in the yards exposed their workforce to the risk of hearing loss but failed to provide the workforce with any protection against noise until the early 1970s. Up until 1963 there was no official guidance or effective expert advice on the problem of industrial noise and the employers' inertia and indifference to the problem was in line with common practice throughout the industry, which at that time treated industrial noise as an inescapable feature of the industry. In 1963 the Ministry of Labour issued a pamphlet on industrial noise and thereafter expert advice and adequate and reasonable protective devices were available to the employers.

In 1980 and 1981 the plaintiffs brought actions against their employers claiming damages for negligence in failing to provide protection against noise in the yards or to investigate and take advice on noise levels and thus causing the plaintiffs' hearing to be impaired. Although it was impossible to quantify precisely when particular degrees of damage had been caused to the plaintiffs, the evidence clearly established that a substantial part of the damage had occurred before 1963 and that after 1963 the plaintiffs' exposure to noise in the yards had merely aggravated the existing damage and accelerated the progress of the plaintiffs towards hearing disability and handicap. The employers admitted that the plaintiffs had suffered impairment of hearing resulting from exposure to noise in the yards but contended that their failure to provide protection amounted to actionable negligence only in respect of the latter part of the plaintiffs' employment and that therefore they were only liable for the damage which was caused to the plaintiffs during that part of their employment. It was held in the QBD:

(1) The test to be applied in determining the point of time at which an employer's failure to provide protection against industrial noise constituted actionable negligence was what would have been done at any particular time by a reasonable and prudent employer who was properly but not extraordinarily solicitous for his workers' safety in the light of what he knew or ought to have known at the time. Accordingly, an employer was not negligent if at any given time he followed a recognised practice which had been followed throughout the industry as a whole for a substantial period, even though that practice may not have been without mishap, and at that particular time the consequences of a particular type of risk were regarded as an inescapable feature of the industry. Furthermore, the question of whether an employer was negligent in failing to take the initiative in seeking out knowledge about facts which were not obvious was to be judged according to the practice at the time in the industry. In all the circumstances, the employers' failure to provide protection against noise in the yards did not constitute actionable negligence before 1963, although thereafter it did.

(2) Where an employer failed to provide his employee with protection against exposure to industrial noise which caused the employee to suffer progressive impairment of his hearing by stages and where that failure was not a breach of the employer's duty of care at the time the damage was initially caused to the employee but became a breach of duty at a later stage, the employer was only liable for that part of the damage which occurred to the employee during the period when the employer was in breach of duty. It followed that the plaintiffs could not recover the whole of their loss from their employers but were only entitled to recover compensation for the additional detriment they had suffered during the period when the employers were in breach of duty. However, in apportioning the plaintiffs' loss and the damages to which they were entitled the court would make allowances in the plaintiffs' favour to take account of the uncertainties involved in making such an apportionment.

Wilson v Tyneside Window Cleaning Co **[1958] 2 All ER 265**

See above.

Baker v T. Clarke Ltd **[1992] Current Law Year Book 2019**

The plaintiff, a very experienced electrician, was employed by the defendant and was injured when he fell from a mobile scaffold tower which toppled over, the plaintiff having failed to use the available outriggers or lock its

wheels. It was held by the Court of Appeal, that it was not necessary for an employer to tell an experienced, skilled worker about matters of which he was well aware, or of precautions to be adopted, unless there was a reason to believe that he was failing to adopt the proper precautions, or the dangers were insidious. As the plaintiff understood quite well how to make the platform safe, the defendant was not obliged to give constant or repetitive reminders.

Rozario v The Post Office **[1997] Current Law Year Book 2623**

Rozario was injured at work when lifting a box weighing 10.26kg to a height of one metre, and twisting slightly. Rozario had worked for the Post Office for 15 years. He had asked earlier to be moved to light work on account of back trouble, but later asked to be moved back to his prior work and was on that work at the time of the accident. The system of work did not give rise to foreseeable injury.

It was held by the Court of Appeal that it was not necessary that the employers should have supervised Rozario closely, because he was experienced and the job was a simple task. The employer's obligation was to take reasonable care to provide a safe system of work and to see that it was followed. In these circumstances, there was no foreseeable risk and the employers were not under a duty to oversee the employee's method of lifting the box.

McDermid v Nash Dredging Co **[1987] 2 All ER 878**

The defendants employed the plaintiff as a deckhand in the course of dredging operations carried out by the defendants and their parent company. While working on a tug owned by the parent company under the control of a tug-master employed by the parent company he was seriously injured. He brought an action for damages against the defendants. At the trial of the action the judge found, inter alia, that the accident had been caused by the negligence of the tug-master.

It was held by the House of Lords, inter alia, that an employer owed to his employee a duty to exercise reasonable care to ensure that the system of work provided for him was safe and that required (a) the devising of a safe system and (b) the operation of it. The essential characteristic of the duty was that it was personal or non-delegable, ie if it was not performed it was no defence for the employer to show that he had delegated its performance to a person, whether his servant or not, whom he reasonably believed was competent to perform it. In the events which occurred, the defendants had delegated both their duty of devising a safe system of work and its operation to the tug-master, who was negligent in failing to operate that system. It followed, therefore, that the defendants were liable to the plaintiff.

DEFENCES

VOLENTI NON FIT INJURIA

Smith v Baker **[1891] AC 325**

When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control – the danger being created or enhanced by the negligence of the employer – the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not

conclusive to show that he has undertaken the risk so as to make the maxim "Volenti non fit injuria" applicable in case of injury. The question whether he has so undertaken the risk is one of fact and not of law. And this so both at common law and in cases arising under the Employers Liability Act 1880.

The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones and at times swung over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. A stone having fallen from the crane and injured the plaintiff, he sued his employers in the County Court under the Employers Liability Act 1880.

It was held by the House of Lords, reversing the decision of the Court of Appeal (Lord Bramwell dissenting), that the mere fact that the plaintiff undertook and continued in the employment with full knowledge and understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; that the evidence would justify a finding that the plaintiff did not voluntarily undertake the risk of injury; that the maxim "Volenti non fit injuria" did not apply; and that the action was maintainable.

Baker v James Bros **[1921] 2 KB 674**

The plaintiff, a commercial traveller, was employed by the defendants, who were wholesale grocers. His duties were to travel round the district, show samples, take orders and deliver goods, and for that purpose he was supplied by the defendants with a motor-car, the starting gear of which was defective. He complained of this on several occasions to the defendants, who admitted that it was defective, but failed to remedy the defect. While the plaintiff was upon one of his journeys the car stopped, and in trying to restart it, he was severely injured.

In an action brought by the plaintiff to recover damages in respect of personal injury resulting from the negligence of the defendants, it was held at Northampton Assizes, that the plaintiff, notwithstanding his knowledge of the defect in the starting gear, had never undertaken or consented to take upon himself the risks arising from continuing to use the car, that he had sustained the injury owing to the personal negligence of the defendants, and that, not having been guilty of contributory negligence, he was entitled to recover.

Wheeler v New Merton Board Mills **[1933] 2 KB 669**

The defendants installed in their factory as part of the plant with the intention that it should be used by their employees a dangerous machine which was not fenced or guarded as required by the Factory and Workshop Act 1901. Owing to the condition of the machine the plaintiff, a workman in the employment of the defendants, was injured by it in the course of his work. It was found that it was not by the negligence of the defendants but of their foreman that the machine had been allowed to be used in the condition in which it was at the time of the accident.

It was held by the trial judge, following *Baddeley v Granville (Earl)* (1887) 19 QBD 423, that the defence of volenti non fit injuria had no validity against an action based on breach of statutory duty; and further that the plaintiff's injury was caused by the "wilful act" of the defendants within the meaning of s29(1) of the Workmen's Compensation Act 1925, and the defendants were

therefore not protected by that section from liability to the plaintiff independent of the Act. The defendants appealed, and contended that the maxim "volenti non fit injuria" was a defence to the action, and that *Baddeley v Granville (Earl)* was wrongly decided.

It was held by the Court of Appeal, dismissing the appeal, that the defence of volenti non fit injuria was no answer to a claim made by a workman against his employer for injury caused through a breach by the employer of a duty imposed upon him by statute. *Baddeley v Granvill (Earl)*, which had so decided in 1887, had been the law for nearly fifty years, and it was now too late for that Court to interfere with the decision.

Per Slesser LJ: The principles laid down in *Baddeley v Granvill (Earl)* had been approved by the Court of Appeal in *Groves v Wimborne (Lord)* [1898] 2 QB 402. (See Cases on Breach of Statutory Duty)

Imperial Chemical Industries v Shatwell **[1964] All ER 999**

G and J who were brothers, were certificated and experienced shotfirers employed by ICI Ltd. By their employers' rules, and by reg 27(4) of the Quarries (Explosives) Regulations 1959, G and J were required to ensure that no testing of an electric circuit for shotfiring should be done unless all persons in the vicinity had withdrawn to shelter. The statutory duty was imposed on G and J, not on their employers. The risk, which had been explained to G and J, was of premature explosions. On the day of the accident, while a third man had gone to fetch a longer cable so that a shotfiring circuit, which had been made in the course of their employment, could be tested from shelter, G invited J to proceed with him to make a test in the open. G and J were injured by the resulting explosion.

On appeal from an award of damages to G (both negligence and breach of statutory duty by J being found at the trial, and the award being of an amount reduced in respect of G's contributory negligence) in an action by G against the employers as vicariously responsible for J's breach of duty, it was held by the House of Lords that although J's acts were a contributing cause (Viscount Radcliffe dissenting as regards causation) of G's injury, the employers were not liable because –

(1) the employers not being themselves in breach of duty, any liability of theirs would be vicarious liability for the fault of J, and to such liability (whether for negligence or for breach of statutory duty) the principle volenti non fit injuria afforded a defence, where, as here, the facts showed that G and J knew and accepted the risk (albeit a remote risk) of testing in a way that contravened their employers' instructions and the statutory regulations.

(2) (per Viscount Radcliffe) each of them, G and J, emerged from their joint enterprise as author of his own injury, and neither should be regarded as having contributed a separate wrongful act injuring the other.

Per Lord Pearce (Viscount Radcliffe concurring): the defence of volenti non fit injuria should be available where the employer is not himself in breach of statutory duty and is not vicariously in breach of any statutory duty through neglect of some person of superior rank to the plaintiff and whose commands the plaintiff is bound to obey, or who has some special and different duty of care.

[Editorial Note. There was no breach of statutory duty by the employers: the defence of "volens" was admitted against vicarious responsibility only …

The defence is not available to an employer on whom a statutory obligation is imposed as against liability for his own breach of that obligation.]

Ginty v Belmont Building Specialists **[1959] 1 All ER 414**

The plaintiff, an experienced asbestos sheeter, was employed by the first defendant which carried on business as roofing contractors. The plaintiff had been instructed and understood that he was not to work on asbestos roofs without using boards, and he knew that there were statutory regulations on the subject. The plaintiff and his mate were sent to the second defendant's factory to strip the existing asbestos roof on the second defendant's spreading shop and to replace it with new asbestos sheeting. When the plaintiff and his mate arrived at the second defendant's factory, they were taken to the builder's yard, were supplied with a ladder, and were shown the different kinds of boards and were told to help themselves to what they wanted. On July 30, employees of the second defendant noticed that the plaintiff was working on the roof without using boards, and they then took two duckboards from the builder's yard and placed them by the wall of the spreading shop, on the side where the plaintiff was working where they could be seen by him, but they did not tell the plaintiff or his mate that they had done this. On August 3, the plaintiff went on to the roof without using boards, fell through the roof and was seriously injured. It was held in the Queen's Bench Division:

(1) boards had been "provided" within reg 31(3) of the Building (Safety, Health and Welfare) Regulations 1948 and, similarly, means for ensuring the plaintiff's safety had been provided within s26(2) of the Factories Act 1937, and accordingly no breach of duty on the part of the plaintiff's employer under reg 4 and reg 31(3)(a), or on the part of the second defendant, as occupier of the factory, under s26(2) of the Factories Act 1937, was established.

(2) under reg 4 and reg 31(3)(a) of the Regulations of 1948, there was an obligation on the employer not merely to provide the boards but also (vicariously) to use the boards, and there was also an obligation on the plaintiff to use the boards; though the plaintiff, and through him, his employer both were in breach of duty under these regulations, since the boards were not used, yet the plaintiff was not entitled to recover damages against his employer because the fault was the plaintiff's, and there was no fault on the part of his employer which went beyond or was independent of the plaintiff's own omission.

(3) in failing to use the boards which had been "provided" for his use the plaintiff did something likely to endanger himself and was in breach of ss119(1) and (2) of the Factories Act 1937.

Per Curiam: the important and fundamental question in a case like this is the usual question – whose fault was it? – not the question whether there was a delegation of statutory duty.

CONTRIBUTORY NEGLIGENCE

Flower v Ebbw Vale Steel Iron & Coal Ltd **[1936] AC 206, 214**

The plaintiff brought an action for personal injury alleged to have been sustained by a workman through his employers' breach of their statutory duty under s10 of the Factory and Workshop Act 1901, in not securely fencing a machine for rolling metal sheets in their factory. The workman in the course

of his duty was cleaning the machine. To enable this to be done the rollers are set in motion. The safe and simple way to clean them is to take one's stand at the back of the machine and apply emery-cloth or engineers' waste over the iron bar to the upper part of the rollers; for then all the seven rollers are revolving away from the operator. There was some evidence that he had been told to use this method, but it was of a vague and general kind. The employers pleaded that the alleged injury was caused solely by the workman's own negligence in attempting to clean the machine at a wrong part, and omitting to take reasonable care to prevent his left hand from coming into contact with the rollers.

The judge held that the machine was dangerous and that it was not sufficiently fenced; but that the workman had acted in disobedience to his orders without any good reason for so acting, and that his disobedience was the proximate cause of the accident. The judge also held that the defence of contributory negligence was open to the employers. Accordingly he gave judgment for the employers. The workman appealed to the Court of Appeal, which affirmed the judgment of the trial judge.

The House of Lords held that judgment be entered for the employee. The decision of the Court of Appeal was reversed on the ground that the only contributory negligence relied on was disobedience to orders, and that the evidence at the trial was insufficient to prove that the alleged orders were ever given. Consideration was given by Lord Wright (at p214-5) of the circumstances in which contributory negligence may be pleaded as a defence to an action by a workman for personal injuries through a breach by his employers of their duty under s10(1)(c) of the Factory and Workshop Act 1901, to fence securely all dangerous parts of the machinery in their factory.

Staveley Iron & Chemical Co v Jones **[1956] 1 All ER 403**

The plaintiff, who was employed by the defendant company as a core-maker, was at work in the company's foundry on the lifting of a load in an iron pan by an overhead crane. It was the plaintiff's duty to assist the crane-driver to lower the hook as nearly as possible over the centre of the pan, but, as the plaintiff was standing at the side of the pan, his centring could only be approximate. The crane-driver, who was also employed by the defendant company, should have paused, but did not pause, before beginning the lift to see that the load was centred and hanging vertically. The load swung out and the plaintiff was injured. The plaintiff claimed damages for negligence against the defendant company. The company denied negligence and pleaded contributory negligence on the part of the plaintiff.

It was held by the House of Lords that on the facts (a) the crane was negligently handled by the crane-driver, and (b) contributory negligence was not proved against the plaintiff, because it was not shown that his conduct fell below the standard required from a reasonably careful workman assisting in such an operation; and, therefore, the plaintiff was entitled to damages in full against the defendant company.

Per Lord Morton, Lord Porter and Lord Reid: it is not correct that conduct which can amount to negligence if the person injured were a stranger may not amount to negligence if the person injured is a fellow servant.

Per Lord Tucker (Lord Morton, Lord Porter and Lord Cohen agreeing): (i) recent legislation has not altered the standard of care which is required from workmen or employers, and the standard cannot differ whether the workman is being sued personally or his employer is being sued in respect of the workman's acts or omissions in the course of his employment. (ii) accepting

that in cases where alleged breaches of absolute obligations imposed by statute on employers are in question the doctrine that "it is not for every risky thing which a workman in a factory may do in his familiarity with machinery that a plaintiff ought to be held guilty of contributory negligence" applies, yet it is to be doubted whether this doctrine can properly be applied to a simple case of common law negligence where there is no evidence of repetitive work being performed under strain.