NEGLIGENCE – BREACH OF DUTY CASES

THE REASONABLE MAN TEST

THE REASONABLE MAN

***Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781.**

A water company having observed the directions of the Act of Parliament in laying down their pipes, is not responsible for an escape of water from them not caused by their own negligence. -The fact, that their precautions proved insufficient against the effects of a winter of extreme coldness, such as no man could have foreseen, is not sufficient to render them liable for negligence. -Fire-plugs properly constructed having been inserted as safety-valves in these pipes, in pursuance of their Act:- Semble, per Bramwell, B., that the company are not liable for not removing accumulations of ice in the streets over such plugs.

This was an appeal by the defendants against the decision of the judge of the County Court of Birmingham. The case was tried before a jury, and a verdict found for the plaintiff for the amount claimed by the particulars. The particulars of the claim alleged, that the plaintiff sought to recover for damage sustained by the plaintiff by reason of the negligence of the defendants in not keeping their water-pipes and the apparatus connected therewith in proper order.

The case stated that the defendants were incorporated by stat. 7 Geo. 4, c. cix. for the purpose of supplying Birmingham with water. By the 84th section of their Act it was enacted, that the company should, upon the laying down of any main-pipe or other pipe in any street, fix, at the time of laying down such pipe, a proper and sufficient fire-plug in each such street, and should deliver the key or keys of such fire-plug to the persons having the care of the engine-house in or near to the said street, and cause another key to be hung up in the watch-house in or near to the said street. By sect. 87, pipes were to be eighteen inches beneath the surface of the soil. By the 89th section, the mains were at all times to be kept charged with water. The defendants derived no profit from the maintenance of the plugs distinct from the general profits of the whole business, but such maintenance was one of the conditions under which they were permitted to exercise the privileges given by the Act. The main-pipe opposite the house of the plaintiff was more than eighteen inches below the surface. The fire-plug was constructed according to the best known system, and the materials of it were at the time of the accident sound and in good order.

On the 24th of February, a large quantity of water, escaping from the neck of the main, forced its way through the ground into the plaintiff's house. The apparatus had been laid down 25 years, and had worked well during that time. The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, inasmuch as the expansion of the water would force up the plug out of the neck, and the stopper being encrusted with ice would not suffer the plug to ascend. One of the severest frosts on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident. A short time after the accident, the company's turncock removed the ice from the stopper, took out the plug, and replaced it.

The judge left it to the jury to consider whether the company had used proper care to prevent the accident. He thought that, if the defendants had taken out the ice adhering to the plug, the accident would not have happened, and left it to the jury to say whether they ought to have removed the ice. The jury found a verdict for the plaintiff for the sum claimed.

ALDERSON, B. I am of opinion that there was no evidence to be left to the jury. The case turns upon the question, whether the facts proved shew that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable.

MARTIN, B. I think that the direction was not correct, and that there was no evidence for the jury. The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.

BRAMWELL, B. The Act of Parliament directed the defendants to lay down pipes, with plugs in them, as safety-valves, to prevent the bursting of the pipes. The plugs were properly made, and of proper material; but there was an accumulation of ice about this plug, which prevented it from acting properly. The defendants were not bound to keep the plugs clear. It appears to me that the plaintiff was under quite as much obligation to remove the ice and snow which had accumulated, as the defendants. However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.

Verdict to be entered for the defendants.

THE OBJECTIVE STANDARD

Nettleship v Weston [1971] 3 All ER 581, CA

Mrs W wanted to learn to drive. Her husband was quite prepared to allow her to learn in his car. Mrs W asked a friend of theirs, N, if he would give her lessons. N was not a professional instructor. He said that he was willing to teach Mrs W but before doing so wanted to check on the insurance in case there was an accident. Mr and Mrs W assured him that that they had a fully comprehensive insurance which covered him as a passenger in case of accident, and showed him the relevant documents. On the third lesson Mrs W was sitting in the driver's seat controlling the steering wheel and foot pedals. N was assisting her by moving the gear lever and applying the handbrake. Occasionally he assisted with the steering. They approached a road junction and stopped. N instructed Mrs W to move off slowly round the

corner to the left. He took off the hand brake and put the gear lever into first gear. She let in the clutch and the car moved round the corner at walking pace. N told her to straighten out but she did not. She panicked, holding the steering-wheel in a 'vice-like grip'. N took hold of the handbrake with his right hand and tried to straighten out the steering-wheel with his left but just failed to prevent the car mounting the kerb and striking a lamp standard. N claimed damages against Mrs W for the injuries which he suffered in the accident.

Held - (i) N had a good cause of action in negligence against Mrs W for the following reasons-

(a) (per Lord Denning MR and Megaw LJ) the driver of a motor car owed a duty of care to persons on or near the highway to drive with the degree of skill and care to be expected of a competent and experienced driver (see p 586 b and c and p 594 f, post); likewise, unless the defence of volenti non fit injuria was available, the driver, however inexperienced and whatever his disabilities, owed the same standard of care to any passenger in the car, including an instructor, for to hold otherwise would lead to varying standards applicable to different drivers and hence to endless confusion and injustice; accordingly Mrs W was prima facie in breach of her duty of care to N (see p 587 a and f and p 594 f, post); dictum of Dixon J in *Insurance Comr v Joyce* (1948) 77 CLR at 56, 57 disapproved; furthermore a driver was not entitled to claim the defence of volenti merely on the ground that his passenger knew of the risk of injury or was willing to take that risk; it must be shown that the passenger accepted for himself the risk of injury arising from the driver's lack of skill and experience; in the present case there was no evidence that N accepted the risk of injury; on the contrary, his enquiry concerning the comprehensiveness of Mr W's insurance policy was a positive indication that he had not done so (see p 587 h, p 588 b and p 595 c and d, post);

(b) (per Salmon LJ) although in general a driver owed to a passenger in his car the same duty as he did to the general public, ie to drive with reasonable care and skill, measured by the standard of competence usually achieved by the ordinary driver, there might be special facts creating a special relationship which displaced this standard or even negatived any duty, although the onus would be on the driver to establish such facts (see p 589 f, post); *Insurance Comr v Joyce* (1948) 77 CLR 39 approved; in most cases, such as the present, involving a learner-driver and instructor, the instructor knew that the driver had practically no driving experience or skill and that he would therefore almost certainly make mistakes which could well cause the instructor injury; accordingly the relationship was usually such that the beginner did not owe the instructor a duty to drive with the skill and competence to be expected of an experienced driver for he knew that the driver did not possess such skill and competence; alternatively it could be said that the instructor voluntarily agreed to run the risk of injury in such circumstances (see p 590 e to g, post); accordingly, on the facts of the present case, Mrs W would not have been liable to N but for the fact that before N undertook to give her driving instruction he sought the assurance about W's insurance policy; this fact completely disposed of any possible defence of volenti; and moreover the assurance became an integral part of the relationship between the parties and altered its nature in such a way that it became one under which Mrs W did in fact accept responsibility for any injury which N might suffer as a result of any failure on her part to exercise the ordinary driver's standards of reasonable care and skill (see p 591 f and j, post).

(ii) (Megaw LJ dissenting) However N was only entitled to recover half the agreed damages in view of his own contributory negligence for at the time he was partly in control of the car and if he had acted more quickly to apply the hand brake the accident would have been avoided; (per Lord Denning MR) a learner-driver and instructor were both concerned in the driving and were both in control of the car; in the absence of any evidence

enabling the court to draw a distinction between them, they should be regarded as equally to blame for an accident that would not have occurred with a careful driver; the result was that the one who was injured could obtain damages from the other but his damages were reduced by one-half owing to the contributory negligence on his part (see p 588 e to h, p 589 a and b and p 592 C, post).

Per Lord Denning MR. For the defence of volenti to be available the plaintff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the failure of the defendant to measure up to the standard of care that the law requires of him (see p 587 j, post); *Dann v Hamilton* [1939] 1 All ER 59, *Slater v Clay Cross Co Ltd* [1956] 2 All ER 625 and dictum of Diplock LJ in *Wooldridge v Sumner* [1962] 2 All ER at 990 applied.
Per Megaw LJ. Although the mere fact that the passenger in a car knows that there is a risk of injury because the driver suffers from some physical disability is not enough to make the doctrine of volenti applicable, different considerations may exist where the passenger has accepted a lift from a driver whom he knows to be likely, through drink or drugs, to drive unsafely. There may in such cases be an element of aiding and abetting a criminal offence; or, if the facts fall short of aiding and abetting, the passenger's mere assent to benefit from the commission of a criminal offence may involve questions of turpis causa (see p 594 j to p 595 b, post); *Dann v Hamilton* [1939] 1 All ER 59 doubted.
Per Salmon LJ. Although the mere fact that the driver of a car has lost a limb or an eye or is deaf does not affect the duty which he owes a passenger to drive safely, the position is entirely different when, to the knowledge of the passenger, the driver is so drunk as to be incapable of driving safely, for the special relationship which the passenger has created by accepting a lift in such circumstances cannot entitle him to expect the driver to discharge a duty of care or skill which ex hypothesi the passenger knows the driver is incapable of discharging; accordingly no duty is owed by the driver to the passenger in such circumstances to drive safely and therefore no question of volenti can arise. Alternatively, if a duty is owed to drive safely, the passenger by accepting a lift has clearly assumed the risk of the driver failing to discharge that duty (see p 589 g to p 590 a, post); *Dann v Hamilton* [1939] 1 All ER 59 disapproved.

***Wells v Cooper* [1958] 2 All ER 527, CA**

In the late summer of 1954 a householder, who was an amateur carpenter of some experience, well accustomed to doing small jobs about the house, fitted a new door handle to the outside of the back door of his house with three-quarter inch screws. The door opened inwards from a small unfenced exterior platform about four feet above ground level. On Dec. 4, 1954, when an exceptionally high wind was blowing against the door, the plaintiff, an invitee, who was leaving the house, gave the door a fairly stiff pull in order to shut it. The handle, which during the previous four or five months had remained secure, came away in his hand, causing him to lose his balance, fall off the platform and suffer injury. A reasonably competent carpenter would not necessarily have appreciated, when doing the work, that screws longer than three-quarter inch screws were necessary to secure the handle to the door. In an action by the plaintiff against the householder for negligence causing personal injury,

Held: the defendant had discharged the duty of care which he, as occupier, owed to the plaintiff as invitee, because the fixing of the handle was a trifling domestic replacement well within the competence of the defendant, who

exercised the degree of care and skill to be expected of a reasonably competent carpenter in doing the work; the action, therefore, failed.

Per Curiam: some kinds of work involve such highly specialised skill and knowledge, and create such serious dangers if not properly done, that an ordinary occupier owing a duty of care to others in regard to the safety of the premises would fail in that duty if he undertook such work himself instead of employing experts to do it for him (see p. 529, letters H and I, post).

Dicta of Scott, LJ, in *Haseldine v. Daw & Son, Ltd.* [1941] 3 All E.R. at pp. 168, 169) applied. Appeal dismissed.

UNFORESEEABLE HARM

***Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, CA**

Certain persons were the owners of a racing track for motor cars. The track was oval in shape and measured two miles or more in circumference. It contained a long straight stretch known as the finishing straight, which was over 100 feet wide and was bounded on its outer side by a cement kerb 6 inches in height, beyond which was a strip of grass 4 feet 5 inches in width enclosed within an iron railing 4 feet 6 inches high. Spectators were admitted on payment to view the races, and stands were provided in which they could do this in safety, but many persons preferred to stand along and outside the railing. Among the competing cars in a long distance race on this track two cars were running along the finishing straight at a pace of over 100 miles an hour and were approaching a sharp bend to the left; the car in front and more to the left turned to the right; the other car did the same, but in so doing touched the off side of the first mentioned car, with the strange result that the first mentioned car shot into the air over the kerb and the grass margin and into the railing, killing two spectators and injuring others. The course was opened in 1907. No accident like this had ever happened before.

In an action by one of the injured spectators against the owners of the racing track the jury found that the defendants were negligent in that having invited the public to witness a highly dangerous sport they had failed by notices or otherwise to give warning of, or protection from, the dangers incident thereto, and to keep spectators at a safe distance from the track. Judgment having been given for the plaintiff on these findings: -

Held, that it was the duty of the appellant s to see that the course was as free from danger as reasonable care and skill could make it, but that they were not insurers against accidents which no reasonable diligence could foresee or against dangers inherent in a sport which any reasonable spectator can foresee and of which he takes the risk, and consequently that there was no, evidence to support the verdict of the jury.

***Glasgow Corporation v Muir* [1943] 2 All ER 44, HL**

Members of a church picnic party in King's Park, Glasgow, obtained permission from the manageress employed by the appellants to have their tea in the tea room owing to the unfavourable weather conditions. It was necessary to carry the tea urn through a narrow passage on one side of which was a counter where several children were buying sweets or ices. The urn was being carried through the passage by the church officer and a boy, the boy holding the front handle and the officer the back one, when for some unexplained reason the latter let go his handle and scalding tea escaped from the urn, injuring 6 children. It was contended for the respondents that the

manageress of the tea room should have anticipated that there was a risk of the contents of the urn being spilt and scalding some of the children and that her omission to remove the children from the passage during the transit of the urn constituted a breach of her dutyt to take reasonable care of the children:-

Held : the appellants were not liable in negligence to the respondents. A reasonable person would not have anticipated danger to the children, the invitees of the appellants, from the use of the premises permitted by them.

[EDITORIAL NOTE. Cases dealing with the duty of the occupier of promises towards an invitee have usually arisen out of some defect in the repair or condition of the premises. Here the point arises out of the use which the occupier has permitted a third party to make of the premises. The same test has to be applied in each case and the test is whether such foresight as a reasonable man would exercise has been exercised by the occupier. The test is an impersonal one and eliminates the personal equation. The reasonable man is free from both over-confidence and over-apprehension. The standard by which the scope of the duty must be determined is what the hypothetical reasonable man would have foreseen. It is helpful to have a case which is not complicated by questions of whether the injured parties are invitees, licensees or mere trespassers and where the duty can be discussed and stated free from any such complication.]

Roe v Minister of Health **[1954] 2 All ER 131, CA**

On Oct. 13, 1947, each of the plaintiffs underwent a surgical operation at the Chesterfield and North Derbyshire Royal Hospital. Before the operation in each case a spinal anaesthetic consisting of Nupercaine, injected by means of a lumbar puncture, was administered to the patient by the second defendant, a specialist anaesthetist. The Nupercaine was contained in glass ampoules which were, prior to use, immersed in a phenol solution. After the operations the plaintiffs developed spastic paraplegia which resulted in permanent paralysis from the waist downwards. In an action for damages for personal injuries against the Ministry of Health, as successor in title to the trustees of the hospital, and the anaesthetist, the court found that the injuries to the plaintiffs were caused by the Nupercaine becoming contaminated by the phenol which had percolated into the Nupercaine through molecular flaws or invisible cracks in the ampoules, and that at the date of the operations the risk of percolation through molecular flaws in the glass was not appreciated by competent anaesthetists in general.

HELD: having regard to the standard of knowledge to be imputed to competent anaesthetists in 1947, the anaesthetist could not be found to be guilty of negligence in failing to appreciate the risk of the phenol percolating through molecular flaws in the glass ampoules and, a fortiori, there was no evidence of negligence on the part of any member of the nursing staff.

Per curiam: The anaesthetist was the servant or agent of the hospital authorities who were, therefore, responsible for his acts.

Gold v. Essex County Council [1942] 2 All E.R. 237) and *Cassidy v. Ministry of Health* [1951] 1 All E.R. 574), considered.

Since the plaintiffs had been unable to establish negligence on the part of any of the defendants they were precluded from recovering damages.

FACTORS TO BE WEIGHED IN ESTABLISHING BREACH

MAGNITUTE OF HARM

Bolton v Stone **[1951] 1 All ER 1078, HL**

During a cricket match a batsman hit a ball which struck and injured the respondent who was standing on a highway adjoining the ground. The ball was hit out of the ground at a point at which there was a protective fence rising to seventeen feet above the cricket pitch. The distance from the striker to the fence was some seventy-eight yards and that to the place where the respondent was hit about one hundred yards. The ground had been occupied and used as a cricket ground for about ninety years, and there was evidence that on some six occasions in a period of over thirty years a ball had been hit into the highway, but no one bad been injured. The respondent claimed damages for negligence from the appellants, as occupiers of the ground.

HELD: for an act to be negligent there must be, not only a reasonable possibility of its happening, but also of injury being caused thereby; on the facts, the risk of injury to a person on the highway resulting from the hitting of a ball out of the ground was so small that the probability of such an injury would not be anticipated by a reasonable man; and, therefore, the appellants were not liable to the respondent.

Decision of the Court of Appeal ([1949] 2 All E.R. 851), reversed.

Miller v Jackson **[1977] 3 All ER 338, CA**

From 1905 onwards cricket was played by a village cricket club on a small ground which accordingly became an important centre of village life during the summer months and provided pleasure and relaxation for many, whether as spectators or players. In 1972 a housing estate was built on a field adjoining the ground. In June 1972, at the height of the cricket season, the plaintiffs, Mr and Mrs M, bought one of the houses on the edge of the ground. Their garden was only 102 feet from the centre of the pitch, but there was a six foot high concrete wall dividing the ground from the garden. Between 1972 and 1974 several cricket balls landed in the garden and four hit the house, damaging brickwork and tiles. The plaintiffs complained to the cricket club. As a result, at the beginning of the 1975 cricket season, the club erected a galvanised chain-link fence on top of the wall at the end of the plaintiffs' garden, bringing the total height of the wall to 14 feet nine inches. It could not with safety be made any higher because there was a danger of its being affected by the wind. The club also told the batsmen to try and drive the cricket balls low for four and not to hit them up in the air for six. That year the season lasted for 20 weeks and the ground was used for matches for a total of 145 hours, of which 110 were at weekends; five balls landed in the plaintiffs' garden, one of which just missed breaking the window of a room in which their young son was sitting. Mrs M became so upset about the incursions of the cricket balls that she and her husband took to going out when the cricket ground was being used. The club offered to supply and fit a safety net over the plaintiffs' garden when cricket was in progress, to remedy any damage and to pay any expenses, and to fit unbreakable glass in the windows and provide shutters and safeguards for them. The plaintiffs rejected all those offers. Instead they brought an action against the club claiming damages for negligence and nuisance and an injunction to restrain the club from playing cricket on the ground without first taking adequate steps to prevent balls being struck out of the ground on to the plaintiffs' property. At the trial of the action the club conceded that, as long as cricket was played on the ground, there was no way in which it could stop balls

going into the plaintiffs' premises occasionally, and that the plaintiffs were likely to suffer in the future, as they had done in the past, from broken tiles and brickwork. The club denied that its use of the cricket ground involved an unreasonable interference with the plaintffs' enjoyment of their own property and contended that it had taken, or offered to take, all reasonable steps to protect the plaintiffs and their property from harm. The judge found in favour of the plaintiffs and granted the injunction. The club appealed.

Held - (i) (per Geoffrey Lane and Cumming-Bruce LJ) The club were liable in negligence for there was a foreseeable risk of injury to the plaintiffs and their property from the cricket balls and the club could not prevent accidents from happening as it could not reasonably expect the plaintiffs to consent to living behind shutters and staying out of their garden on summer weekends on account of the cricket (see p 347 e to j, p 348 c and p 349 h, post).

(ii) (Lord Denning MR dissenting) From 1972 onwards the club's activities on the cricket ground amounted to an actionable nuisance and it was no defence that the plaintiffs had been the authors of their own misfortune by buying a house so close to the club's ground that they would inevitably be affected by the cricket (see p 348 f and p 349 c d and h, post); *Sturges v Bridgman* (1879) 11 Ch D 852 applied.

(iii) (Geoffrey Lane LJ dissenting) It was not an appropriate case for the grant of an injunction since the court had to weigh the interests of the public at large against those of the individual and on balance the interest of the inhabitants of the village as a whole in preserving the cricket ground for their recreation and enjoyment should prevail over the private interest of the plaintiffs, who must have realised when they bought their house that balls would sometimes be hit on to their property from the adjoining cricket ground. It followed that the appeal would be allowed and the injunction set aside (see p 345 b to g, p 350 c g and h and p 351 b to d, post).

Haley v London Electricity Board **[1964] 3 All ER 185, HL**

The appellant, a blind man, while walking along a pavement in a residential area in Woolwich on his way to work (as he had done for six years) tripped over an obstacle placed by servants of London Electricity Board near the end of a trench which they were excavating in the pavement under statutory authority; the appellant fell and was injured. The obstacle, a punner hammer some five feet long, was resting across the pavement, with its handle at one end two feet above the ground on railings on the inside of the pavement, while the other end lay on the pavement about a foot from the outer edge, so that the hammer was at an angle of thirty degrees to the pavement. It had been placed there by the board's servants to protect pedestrians from the trench and to deflect them into the road. The appellant was alone and had approached with reasonable care, waving his white stick in front of him to detect objects in his way and also feeling the railings with it, but the stick missed the hammer and his leg caught it about four and a half inches above his ankle causing him to be catapulted over onto the pavement. The hammer gave adequate warning of the trench for normally sighted persons. In an action for damages on the ground of the board's negligence there was evidence that about one in five hundred people were blind; that in Woolwich there were 258 registered blind; that the Post Office took account of the blind in guarding their excavations, using for the purpose a light fence some two feet high, and that more than once the appellant had detected such fences with his stick.

Held: the duty of care owed by persons excavating a highway, in guarding the excavation made by them, extended to all persons whose use of the highway was reasonably likely and thus reasonably foreseeable, not excluding the blind or infirm, and the use of a city pavement such as this by a

blind person was reasonably foreseeable; on the facts, the punner hammer was not an adequate or sufficient warning for a blind person who was taking the usual precautions by use of his stick, and accordingly the appellant was entitled to recover damages at common law for negligence (see p. 189, letter F, p. 187, letter H, p. 190, letter B, p. 193, letter C, p. 194, letters B and C., p. 197, letter G, p. 196, letter E, p. 198, letters F and H, and p. 200, letter A, post).

Dictum of Lord Sumner in *Glasgow Corpn. v. Taylor* ([1921] All E.R. Rep. at p. 13) and principle, laid down by Lord Atkin in *Donoghue (or M'Alister v. Stevenson* ([1932] All E.R. Rep. at p. 11) applied. *Pritchard v. Post Office* ((1950), 114 J.P. 370) distinguished and criticised. *M'Kibbin v. City of Glasgow Corpn.*, (1920 S.C. 590) considered.

Per Curiam: in considering whether precautions over road obstructions are adequate to discharge the duty of care not to endanger road users it is to be assumed that a blind person, going unaccompanied in places where he may reasonably be expected so to go, will take reasonable care, to protect himself, as, e.g., by using a stick to detect obstruction (see p. 188, letter E, p. 190, letter H, p. 193, letter F, p. 197, letter F, and p. 199, letter B, post).

Decision of the Court of Appeal ([1963] 3 All ER 1003) reversed.

***Paris v Stepney Borough Council* [1951] 1 All ER 42, HL**

If, to the knowledge of his employer, a workman is suffering from a disability which, though it does not increase the risk of an accident occurring while he is at work, does increase the risk of serious injury if an accident should befall him, that special risk of injury is a relevant consideration in determining what precautions the employer should take in fulfilment of his duty to take reasonable care for the safety of each individual workman.

The appellant was employed as a fitter in the garage of the respondent borough council. To the knowledge of the respondents, he had the use of only one eye. While he was using a hammer to remove a bolt on a vehicle, a chip of metal flew off and entered his good eye, so injuring it that be became totally blind. The respondents did not provide goggles for the appellant to wear, and there was evidence that it was not the ordinary practice for employers to supply goggles to men employed in garages on the maintenance and repair of vehicles.

HELD: (i) the condition of the appellant's eyes, the knowledge of the respondents, the likelihood of an accident happening, and the gravity of the consequences if an accident should occur, were relevant facts to be taken into account in determining the question whether or not the respondents took reasonable precautions for the appellant's safety.

(ii) (Lord Simonds and Lord Morton of Henryton dissenting) in the circumstances the respondents owed a special duty of care to the appellant, and, whether or not goggles should have been supplied to two-eyed workmen engaged in the same work as the appellant, they should have been provided for the appellant, and the respondents' failure to provide them rendered them liable in negligence.

Decision of the Court of Appeal ([1949] 2 All E.R. 843), reversed.

DEFENDANT'S PURPOSE

Daborn v Bath Tramways Motor Co and Trevor Smithey **[1946] 2 All ER 333, CA**

On April 5, 1943, D was driving an ambulance with a left-hand drive and with one driving mirror on the left-hand side attached to the windscreen. The ambulance was completely shut in at the back so that D was unable to see anything close behind her. On the back of the ambulance a large warning notice was painted: "Caution – Left hand drive – No signals." Unaware of the fact that a motor omnibus was close behind her and that its driver was trying to overtake her, D, wishing to turn into a lane on the off-side of the road, started to edge from the near side of the road towards the right and made a signal with her left hand that she was going to turn right. As she was turning to the right, a collision occurred between the ambulance and the motor bus, and D sustained severe injuries. In an action for damages for negligence brought by D against the driver of the motor bus and his employers, it was contended by the defendants that D was guilty of negligence in that she had omitted to make certain that there was no vehicle behind her before turning to the right :-

HELD : (i) upon the facts of the case, the driver of the motor omnibus was guilty of negligence.

(ii) there was no negligence on the part of D, because she had given the correct hand signals before staring to turn and there was a warning notice on the back of the ambulance that it was a left-hand drive vehicle and that no signals could be given.

(iii) (per Asquith LJ) in considering whether reasonable care had been observed, it was necessary to balance the risk against the consequences of not assuming that risk. In view of (a) the necessity in time of national emergency of employing all available transport resources, and (b) the inherent limitations of the ambulance in question, D had done all that she could reasonably do in the circumstances.

Watt v Hertfordshire County Council **[1954] 2 All ER 368, CA**

London Transport Executive lent a jack to the defendants' fire station to be on call in case of need, but it was in fact rarely used. It stood on four wheels, two of which were castored, and it weighed between two and three hundredweight. Only one vehicle at the station was specially fitted to carry it. While that vehicle was properly out on other service, the station received an emergency call to an accident in which a woman had been trapped under a heavy vehicle two or three hundred yards away. The officer in charge ordered the jack to be loaded on a lorry, which was the only other vehicle there capable of carrying it and on which there was no means of securing it. On the way to the scene of the accident with a number of firemen employed by the defendants and the jack, the driver of the lorry had to brake suddenly and the jack moved inside the lorry and injured one of the firemen.

HELD: the defendants were under no duty to have a vehicle specially fitted to carry the jack available at all times; the risk taken was such as would normally be undertaken by a member of the fire service and was not unduly great in relation to the end to be achieved; and, therefore, the defendants were not liable for damages for negligence to the fireman.

Decision of Barry, J. ([1954] 1 All E.R. 141), affirmed.

PRACTICABILITY OF PRECAUTIONS

***Latimer v AEC Ltd* [1952] 1 All ER 1302, HL**

Owing to a downpour of rain of an unprecedented character and through no want of reasonable care on the part of the occupiers, a factory was flooded and oil from a cooling mixture pumped to machines through channels in the floor became mixed with water. As the water receded, the floor, which was level and structurally perfect, was left in a wet and oily and slippery state, and could not be entirely cleared at once. In the course of his duty a workman slipped on a floor and was injured.

HELD: (i) the occupiers were not in breach of their duty to see that the floor was "properly maintained" under s. 25 (1) of the Factories Act, 1937, since "maintained", as defined in s. 152 (1), meant maintained in good repair and did not mean kept free from danger through slipperiness.
(ii) it would not have been reasonable for the occupiers to have closed the factory on account of the danger caused by a slippery floor, and, therefore, they had not been negligent in permitting the plaintiff to work in the factory and were not liable in damages at common law.

Decision of Pilcher, J. ([1952] 1 All E.R. 443), reversed on the second point.

GENERAL PRACTICE

***Gray v Stead* [1999] 2 Lloyd's Rep 559, CA**

Mr. Alan Gray was employed as a fisherman on board the motor fishing vessel Progress which was owned by the defendant, Mr. Keith Stead. At all material times *Progress* which was manned solely by Mr. Stead and Mr. Gray. On July 26, 1994 at about 2215 *Progress* sailed from Hartlepool on a fishing trip of a routine nature. The fishing grounds were about 18 miles to the north of Hartlepool and about eight miles east of South Shields. The vessel shot her gear at about 0345 to 0350. It was then just breaking daylight and in accordance with normal practice it was agreed that Mr. Gray should be on watch first. This involved him being in the wheelhouse. At all material times visibility, wind and sea conditions were good. The system of fishing involved *Progress* proceeding on automatic pilot at about three knots over the ground, turning to starboard gently in manual steering and then on reaching the return leg and settling on the new course, proceeding again on automatic pilot. After shooting the gear Mr. Gray stood the first watch. At about 0415 Mr. Stead turned in. At about 0635 he felt the boat jolt slightly indicating that she had come fast on her gear. He went into the wheelhouse and discovered that Mr. Gray was not there. He looked at the Decca navigator and could see immediately that *Progress* was approximately three to four miles south of where she should have been and on a south easterly rather than west south westerly heading. The steering was in manual. At about 0830 the body of Mr. Gray was found floating face down. A postmortem examination and inquest held on Oct. 11, 1994 found that the cause of death was accidental drowning.

It was common ground that how and why and where on *Progress* Mr. Gray fell into the sea would forever remain a mystery and it also became clear that had Mr. Gray been wearing a single chamber inflatable lifejacket he probably would have survived. It was common ground that it was not in 1994 nor nowadays the practice for single chamber inflatable lifejackets to be kept on small fishing vessels such as *Progress*. The defendant asserted in evidence that no fisherman in practice ever wore such lifejackets and there was no evidence to contradict him.

The plaintiff, as the widow of and administratrix of the estate of Mr. Alan Gray brought an action for damages the principal issue being whether *Progress* should have been furnished with a single chamber inflatable lifejacket by Mr. Stead and whether Mr. Stead should have instructed Mr. Gray on the importance of wearing it whenever he went on deck alone. The plaintiff contended that the risk of a seaman such as Mr. Gray falling overboard unobserved (with a virtual certainty of drowning) when alone on deck was such that Mr. Stead ought to have applied his mind to it and concluded that the single chamber inflatable lifejacket was the solution and so instructed Mr. Gray. Quantum was agreed at £61,000 subject to liability.

Held, by Q.B. (Mr. Geoffrey Brice, Q.C.), that (1) in determining whether the employer had acted reasonably one was entitled to consider the ambit of published guidance and regulations available to him prior to the accident and the practices within the industry; (2)at the date of the accident the legislation relating to the carriage of lifejackets on fishing vessels was contained in s. 3 of the Safety at Sea Act, 1986 and on the regulations made thereunder namely the Fishing Vessels (Life-Saving Appliances) Regulations, 1988 (S.I. 1988 No. 38); there was no dispute that *Progress* carried the lifejackets which complied with these regulations but these lifejackets were bulky and it was not suggested that Mr. Gray should have been instructed to wear one of these lifejackets as opposed to the single chamber inflatable lifejacket; (3) it was accepted that Mr. Stead as the employer of Mr. Gray owed him a general duty to exercise reasonable care as regards his safety and that a fisherman going out on deck alone was vulnerable; (4) there was a duty on each employer of a fisherman on an inshore trawler to apply his mind to the safety of such a fisherman and not simply to follow convention and practice without further thought; so far as the use of the single chamber inflatable lifejacket was concerned, this the defendant did not do; the danger of falling overboard and drowning in the case of a fisherman such as Mr. Gray on watch alone (but who was expected at times to go on deck), was small but sufficient for a prudent employer to conclude that notwithstanding existing practice on other trawlers an instruction to wear a lifejacket such as a single chamber inflatable lifejacket would minimize if not wholly eliminate the risk of such an accident; (5) if, as appeared to be the case, there was a general practice of not having and wearing lifejackets of any type on small trawlers when on deck such practice was unsafe; the defendant failed to exercise the duty of reasonable care in respect of the safety of Mr. Gray; that failure caused his death by drowning and the plaintiff was entitled to judgment in the sum of £61,000 (including interest).

The defendant appealed, the principal issue being whether in 1994 the standard of care required of an employer to his employee fishermen extended to a duty to provide him with a single chamber inflatable lifejacket and a duty to instruct him to wear it whenever alone on deck.

Held, by C.A. (Lord Bingham of Cornhill, C.J., Otton and Robert Walker, L.JJ.), that (1) there was no statute or statutory regulation requiring employers to provide buoyancy aids on trawlers; it was clear that fishermen in practice never wore buoyancy aids at the time of the accident; and the evidence confirmed that this was a general and recognized practice among fishermen even when working on deck; in 1994 there was nothing to indicate that the practice was "clearly bad" or "folly" in the sense of creating a potential liability in negligence at any time before 1994 and the reasonable and prudent employer, weighing up the risks and potential consequences was entitled to follow or permit the practice; there was evidence that the defendant did take positive thought for the safety of his workers (*see* p. 564, col. 2; p. 565, col. 1);

(2) applying the correct standard of care the proper conclusion was that the duty of care of the reasonable and prudent employer in 1994 did not require the provision of single chamber lifejackets and a system of work such that they were worn at all times when on deck; there was no justification for imposing on Mr. Stead a more stringent duty than the responsible authorities, after research and testing, were prepared to recommend; Mr. Stead had no reason to expect Mr. Gray to be working on deck nor was there any evidence that he was doing so at the time he went overboard; the appeal would be allowed on this ground alone (*see* p. 565, col. 2);

(3) the learned Judge correctly found that if Mr. Gray had been wearing a buoyancy aid when he fell overboard he probably would have survived; but the learned Judge could not reasonably have found that if a lifejacket had been provided and if the instructions to wear it at all times when on deck were given Mr. Gray would have departed from the practice of all fishermen and put on a lifejacket for such a short period of time; it was inherently unlikely that in the circumstances Mr. Gray would have worn a lifejacket; the vessel was found to be in manual steering suggesting that he was anticipating being away for a short period only and returning before it was time to put the steering back into automatic at the completion of the turn; the appeal would be allowed on this ground also and the judgment in favour of the plaintiff set aside (*see* p. 565, col. 2; p. 566, cols. 1 and 2).

SPECIAL STANDARDS APPROPRIATE TO PROFESSIONALS

***Bolam v Friern Hospital* [1957] 2 All ER 118, QBD**

In 1954 the plaintiff, who was suffering from mental illness, was advised by a consultant attached to the defendants' hospital to undergo electro-convulsive therapy. He signed a form of consent to the treatment but was not warned of the risk of fracture involved. There was evidence that the risk of fracture was very small, viz., of the order of one in ten thousand. On the second occasion when the treatment was given to the plaintiff in the defendants' hospital he sustained fractures. No relaxant drugs or manual control (save for support of the lower jaw) were used, but a male nurse stood on each side of the treatment couch throughout the treatment. The use of relaxant drugs would admittedly have excluded the risk of fracture. Among those skilled in the profession and experienced in this form of therapy, however, there were two bodies of opinion, one of which (since 1953) favoured the use of relaxant drugs or manual control as a general practice, and the other of which, thinking that the use of these drugs was attended b-%, mortality risks, confined the use of relaxant drugs to cases where there were particular reasons for their use. The plaintiff's case was not such a case. Similarly there were two bodies of competent opinion on the question whether, if relaxant drugs were not used, manual control should be used. So, too, different views were held among competent professional men on the question whether a patient should be expressly warned about risk of fracture before being treated, or should be left to inquire what the risk was; and there was evidence that in cases of mental illness explanation of risk might well not affect the patient's decision whether to undergo the treatment. The plaintiff having sued the defendants for negligence in the administration of the treatment, viz., in not using relaxant drugs or some form of manual control, and in failing to warn him of the risk involved before the treatment was given, the jury returned a verdict for the defendants. In the summing-up,

The jury were directed: (i) a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view. Principle stated by Lord President

Clyde in *Hunter v. Hanley* ([1955] S.L.T. at p. 217) applied (see p. 122, letter B, post).

(ii) that the jury might well think that when a doctor was dealing with a mentally sick man and had a strong belief that his only hope of care was submission to electro-convulsive therapy, the doctor could not be criticised if, believing the dangers involved in the treatment to be minimal, he did not stress them to the patient (see p. 124, letter G, post).

(iii) in order to recover damages for failure to give warning the plaintiff' must show not only that the failure was negligent but also that if he had been warned he would not have consented to the treatment (see p. 124, letter I, post).

***Sidaway v Bethlem Royal Hospital* [1985] 1 All ER 643, HL**

The plaintiff, who suffered from persistent pain in her neck and shoulders, was advised by a surgeon employed by the defendant hospital governors to have an operation on her spinal column to relieve the pain. The surgeon warned the plaintiff of the possibility of disturbing a nerve root and the possible consequences of doing so but did not mention the possibility of damage to the spinal cord even though he would be operating within three millimetres of it. The risk of damage to the spinal cord was very small (less than 1%) but if the risk materialised the resulting injury could range from the mild to the very severe. The plaintiff consented to the operation, which was carried out by the surgeon with due care and skill. However, in the course of the operation the plaintiff suffered injury to her spinal cord which resulted in her being severely disabled. She brought an action against the hospital governors and the surgeon's estate (the surgeon having died in the mean time) claiming damages for personal injury. Being unable to sustain a claim based on negligent performance of the operation, the plaintiff instead contended that the surgeon had been in breach of a duty owed to her to warn her of all possible risks inherent in the operation with the result that she had not been in a position to give an 'informed consent' to the operation. The trial judge applied the test of whether the surgeon had acted in accordance with accepted medical practice and dismissed the claim. On appeal the Court of Appeal upheld the judge, holding that the doctrine of informed consent based on full disclosure of all the facts to the patient was not the appropriate test under English law. The plaintiff appealed to the House of Lords.

Held - (1) (Per Lord Diplock, Lord Keith and Lord Bridge, Lord Scarman dissenting) The test of liability in respect of a doctor's duty to warn his patient of risks inherent in treatment recommended by him was the same as the test applicable to diagnosis and treatment, namely that the doctor was required to act in accordance with a practice accepted at the time as proper by, a responsible body of medical opinion. Accordingly, English law did not recognise the doctrine of informed consent. However (per Lord Keith and Lord Bridge), although a decision on what risks should be disclosed for the particular patient to be able to make a rational choice whether to undergo the particular treatment recommended by a doctor was primarily a matter of clinical judgment, the disclosure of a particular risk of serious adverse consequences might be so obviously necessary for the patient to make an informed choice that no reasonably prudent doctor would fail to disclose that risk (see p 658 b to d, p 659 c to f, p 660 c d f g and p 662 a b f g and j to p 663 d post); *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 applied; *Canterbury v Spence* (1972) 464 F 2d 772 not followed; *Reibl v Hughes* (1980) 114 DLR (3d) 1 considered.

(2) (Per Lord Templeman) When advising a patient about a proposed or recommended treatment a doctor was under a duty to provide the patient with the information necessary to enable the patient to make a balanced judgment

in deciding whether to submit to that treatment, and that included a requirement to warn the patient of any dangers which were special in kind or magnitude or special to the patient. That duty was, however, subject to the doctor's overriding duty, to have regard to the best interests of the patient. Accordingly, it was for the doctor to decide what information should be given to the patient and the terms in which that information should be couched (see p 664j and p 665 c and g to p 666 g; post).

(3) Since (per Lord Diplock, Lord Keith and Lord Bridge) the surgeon's non-disclosure of the risk of damage to the plaintiff's spinal cord accorded with a practice accepted as proper by a responsible body of neuro-surgical opinion and since (per Lord Scarman and Lord Templeman) the plaintiff had not proved on the evidence that the surgeon had been in breach of duty by failing to warn her of that risk the defendants were not liable to the plaintiff. The appeal would accordingly be dismissed (see p 645 a b g, p 655 f to h, p 656 j, p 659 e, p 663 d to f, p 665 a b and p 666 g, post).

Per Lord Keith, Lord Bridge and Lord Templeman. When questioned specifically by a patient of apparently sound mind about the risks involved in a particular treatment proposed, the doctor's duty is to answer both truthfully and as fully as the questioner requires (see p 659 e, p 661 d and p 665 b, post).

Decision of the Court of Appeal [1984] 1 All ER 1018 affirmed.

***Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771, HL**

On 16 January 1984 a two-year-old boy, P, who had a past history of hospital treatment for croup, was readmitted to hospital under the care of Dr H and Dr R. On the following day he suffered two short episodes at 12.40 pm and 2.00 pm during which he turned white and clearly had difficulty breathing. Dr H was called in the first instance and she delegated Dr R to attend in the second instance but neither attended P, who at both times appeared quickly to return to a stable state. At about 2.30 pm P suffered total respiratory failure and a cardiac arrest, resulting in severe brain damage. He subsequently died and his mother continued his proceedings for medical negligence as administratrix of his estate. The defendant health authority accepted that Dr H had acted in breach of her duty of care to P but contended that the cardiac arrest would not have been avoided if Dr H or some other suitable deputy had attended earlier than 2.30 pm. It was common ground that intubation so as to provide an airway would have ensured that respiratory failure did not lead to cardiac arrest and that such intubation would have had to have been carried out before the final episode. The judge found that the views of P's expert witness and Dr D for the defendants, though diametrically opposed, both represented a responsible body of professional opinion espoused by distinguished and truthful experts. He therefore held that Dr H, if she had attended and not incubated, would have come up to a proper level of skill and competence according to the standard represented by Dr D's views and that it had not been proved that the admitted breach of duty by the defendants had caused the injury which occurred to P. The Court of Appeal dismissed an appeal by P's mother and she appealed to the House of Lords.

Held - A doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not

capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible. The instant case was not such a situation since it was implicit in the judge's judgment that he had accepted Dr D's view as reasonable and although he thought that the risk involved would have called for intubation, he considered that could not dismiss Dr D's views to the contrary as being illogical. The appeal would, accordingly, be dismissed (see p 778 b to g and p 779 e to g j to p 780 a e to j, post). *Bolam v Friem Hospital Management Committee* [1957] 2 All ER 118 and *Hucks v Cole* (1968) (1993) 4 Med LR 393 applied.

Philips v William Whiteley **[1938] 1 All ER 566, KBD**

The plaintiff, requiring her ears to be pierced so that she could wear ear-rings, approached the defendants, who arranged with C, whole was a jeweller, to do this for then at their premises. C, before he set out for the defendants' establishment, placed his instrument in a flame and washed his hands, and, upon arrival there, dipped both the instrument and his fingers into a glass of Lysol before he pierced the ear. On the following, the plaintiff entered a nursing-home for the purpose of undergoing a severe operation, and some 13 days later after she had experienced some pain in the neck, an abscess formed there, owing to the entry of infection into the hole that had been pierced in the car :-

HELD: (i) a jeweller is not bound to take the same precautions as a surgeon would take, and, upon the facts, C had taken all reasonable precautions. (ii) it was not proved that the infection entered the ear at the time when C pierced it.

[EDITORIAL NOTE. It will be noticed that it has long been customary for jewellers to pierce woman's ear. When a jeweller undertakes what is in effect a minor surgical operation, he is not expected to take all those precautions which would be taken by a surgeon. It is sufficient that he takes the usual precautions that have been thought by jewellers to be necessary when carrying out the operation.]

Wilsher v Essex Area Health Authority **[1986] 3 All ER 801, CA** (overruled on the issue of causation in **[1988] 1 All ER 871, HL**, and a retrial ordered, see below)

The plaintiff was an infant child who was born prematurely suffering from various illnesses, including oxygen deficiency. His prospects of survival were considered to be poor and he was placed in the 24-hour special care baby unit at the hospital where he was born. The unit was staffed by a medical team, consisting of two consultants, a senior registrar, several junior doctors and trained nurses. While the plaintiff was in the unit a junior and inexperienced doctor monitoring the oxygen in the plaintiff's bloodstream mistakenly inserted a catheter into a vein rather than an artery but then asked the senior registrar to check what he had done. The registrar failed to see the mistake and some hours later, when replacing the catheter, did exactly the same thing himself. In both instances the catheter monitor failed to register correctly the amount of oxygen in the plaintiff's blood, with the result that the plaintiff was given excess oxygen. The plaintiff subsequently brought an action against the health authority claiming damages and alleging that the excess oxygen in his bloodstream had caused an incurable condition of the retina resulting in near blindness. At the trial of the action the judge awarded the plaintiff £116,199. The health authority appealed to the Court of Appeal, contending, inter alia, (i) that there had been no breach of the duty of care owed to the plaintiff because the standard of care required of the doctors in

the unit was only that reasonably required of doctors having the same formal qualifications and practical experience as the doctors in the unit, and (ii) that the plaintiff had failed to show that the health authority's actions had caused or contributed to the plaintiff's condition since excess oxygen was merely one of several different factors any one of which could have caused or contributed to the eye condition from which the plaintiff suffered.

Held - (1) Where hospital treatment was provided by a specialist unit or team of doctors, the existence of a duty of care and the standard of care required of the unit and its members were to be determined on the basis that-

(a) (per Sir Nicolas Browne-Wilkinson V-C and Glidewell LJ) there was no reason why, in certain circumstances, a health authority could not be directly liable to a plaintiff if it failed to provide sufficient or properly qualified and competent medical staff for the unit (see p 831 g and p 833 h j, post);

(b) there was no concept of 'team negligence', in the sense that each individual member of the team was required to observe the standards demanded of the unit as a whole, because it could not be right, for example, to expose a student nurse to all action for negligence for her failure to possess the experience of a consultant (see p 812 j to p 813 b, p 831 h and p 832 h, post);

(c) (Sir Nicolas Browne-Wilkinson V-C dissenting) the standard of care required of' members of the unit was that of the ordinary skilled person exercising and professing to have that special skill, but that standard was to be determined in the context of the particular posts in the unit rather than according to the general rank or status of the people filling the posts, since the duty ought to be tailored to the acts which the doctor had elected to perform rather than to the doctor himself. It followed that inexperience was no defence to an action for medical negligence. However (per Glidewell LJ), an inexperienced doctor who was called on to exercise a specialist skill and who made a mistake nevertheless satisfied the necessary standard of care if he had sought the advice and help of his superior when necessary (see p 813 b to d g to j and p 830 j to p 831 d h, post); *Bolam v Friern Hospital Management Commiittee* [1957] 2 All ER 118 applied;

(d) a plaintiff could not shift the burden of proof onto a defendant doctor or the doctor's employer merely by showing that a step in the treatment which was designed to avert or minimise a risk had not been taken in the particular circumstances (see p 814 c to e g, p 815 f g, p816 f and p 832 h, post); dictum of Peter Pain J in *Clark v MacLennan* [1983] 1 All ER at 427 disapproved.

(2) Although the junior doctor had not been negligent and had satisfied the relevant standard of care by consulting his superior, the registrar had been negligent in failing to notice that the catheter had been mistakenly inserted in a vein rather than an artery and accordingly the health authority was vicariously liable for the registrar's negligence (see p 817 f, p 818 f to h, p 831 d e and p 834 d to f, post).

(3) (Sir Nicolas Browne-Wilkinson V-C dissenting) On the issue of causation, a defendant was liable to a plaintiff in an action for medical negligence where his conduct enhanced an existing risk that injury would ensue, notwithstanding either that the conduct in question was merely one of several possible risk factors, any one of which could have caused the injury, or that the existence and extent of the contribution made by the defendant's breach of duty to the plaintiff's injury could not be ascertained. On the facts, the plaintiff had established a sufficient connection between the excessive exposure to oxygen and the development of his eye condition for the defendants to be liable to the plaintiff in negligence on the basis that their breach of duty was the cause of the plaintiff's injury. The appeal would therefore be dismissed (see p 828 j to p 829 d f and p 832 e f, post); *McGhee v National Coal Board* [1972] 3 All ER 1008 applied.

[1988] 1 All ER 871, HL

The health authority appealed to the House of Lords, contending that the plaintiff had failed to establish that the hospital's negligence had caused the plaintiff's retinal condition, since that negligence was only one of six possible causes of his condition.

Held - Where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the plaintiff's retinal condition could have been caused by any one of a number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the plaintiff had not discharged the burden of proof as to causation. The authority's appeal would therefore be allowed and a retrial ordered (see p 874 j, p 879 h , p 881 j to p 882 h and p 883 d to h, post).

Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615 and *McGhee v National Coal Board* [1972] 3 All ER 1008 considered. Dictum of Lord Wilberforce in *McGhee v National Coal Board* [1972] 3 All ER at 1012-1013 disapproved.

Decision of the Court of Appeal [1986] 3 All ER 801 reversed.

STANDARD APPLIED IN SPORTING SITUATIONS

***Woolridge v Sumner* [1962] 2 All ER 978, CA**

A spectator attending a game or competition takes the risk of any damage caused to him by any act of a participant of adequate skill and competence done in the course of, and for the purposes of, the game or competition, notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety; such a participant so acting commits no breach of duty of care towards the spectator and thus is not liable in negligence to him for such damage; and the absence of liability in such circumstances does not depend on any application of the maxim volenti non fit injuria (see p. 989, letter I, to p. 990, letter A, and p. 983, letter G, post).

A competitor of great skill and experience, who was riding a heavy hunter of the highest quality at a horse show and was exercising every endeavour to win the event, galloped the horse round a corner of the competition arena. About two feet away from the edge of the competition arena there was a series of tubs some yards apart and at some points there were benches in the line of tubs. Surrounding the arena and behind the tubs and benches was a cinder track. A film cameraman, who was unfamiliar with, and inexperienced in regard to, horses was standing about twenty-five yards from the corner by one of the benches, although he had been told by the steward of the course to go outside the competition area while the horses were galloping. The horse went into and behind the line of the tubs. When he saw the horse approaching him, he stepped back or fell into its course and was knocked down and injured. The rider was thrown, but returned later in the day to ride the horse again, and the horse was adjudged supreme champion in its class. In an action by the cameraman against the owner of the horse for damages the trial judge found that the rider brought the horse into the corner much too fast and that the horse when it crashed into the line of tubs would have gone

out on to the cinder track if its rider had allowed it to do so, where it would not have, harmed the plaintiff, and awarded the plaintiff damages for negligence. On appeal,

Held: negligence on the part of the competitor was not established, and accordingly the owner of the horse was not liable, because

(i) on the facts, any excessive speed round the comer of the competition arena was not the cause of the accident and was not negligence, but amounted only to an error of judgment (see p. 982, letter H, p. 984, letters E and G, and p. 991, letters B and H, post).

(ii) the finding that the horse would have gone on to the cinder track if its rider had allowed it to do so was an inference from primary facts that was unjustified (see p. 987, letters F to I, and p. 984, letter F, post) and in any event his conduct in this respect did not amount to negligence (see p. 982, letter I, p. 991, letter I, and p. 984, letter F, post).

Per Diplock, L.J.: if, in the course of a game or competition at a moment when he really has not time to think, a participant by mistake takes a wrong measure, he is not to be held guilty of any negligence (see p. 989, letter F, post).

Appeal allowed.

***Condon v Basi* [1985] 2 All ER 453, CA**

Participants in competitive sport owe a duty of care to each other to take all reasonable care having regard to the particular circumstances in which the participants are placed. If one participant injures another he will be liable in negligence for damages at the suit of the injured participant if it is shown that he failed to exercise the degree of care appropriate in all the circumstances or that he acted in a manner to which the injured participant cannot be expected to have consented (see p 454 g h and p 455 e to g, post). *Rootes v Shelton* [1968] ALR 33 considered.

SIR JOHN DONALDSON MR. This is an appeal from a decision of his Honour Judge Wooton in the Warwick County Court given in March 1984. It arose out of a football match played on a Sunday between Whittle Wanderers and Khalso Football Club. They are both clubs in the Leamington local league. The plaintiff was playing for Whittle Wanderers and the defendant for the Khalso Football Club. Most unfortunately, during the game the defendant tackled the plaintiff in such a manner as to lead to the plaintiff breaking his leg. The county court judge found that he had been negligent, and awarded a sum of £4,900 in damages.

It is said that there is no authority as to what is the standard of care which governs the conduct of players in competitive sports generally and, above all, in a competitive sport whose rules and general background contemplate that there will be physical contact between the players, but that appears to be the position. This is somewhat surprising, but appears to be correct. For my part I would completely accept the decision of the High Court of Australia in *Rootes v Shelton* [1968] ALR 33 … The standard is objective, but objective in a different set of circumstances. Thus there will of course be a higher degree of care required of a player in a First Division football match than of a player in a local league football match. But none of these sophistications arise in this case, as is at once apparent when one looks at the facts.

I can most conveniently deal with the matter by quoting from the report of the very experienced class I referee who officiated on this occasion. He said:

> 'After 62 minutes of play of the above game, a Whittle Wdrs player received possession of the ball some 15 yards inside Khalsa F.C. half of the field of play. This Whittle player upon realising that he was about to be challenged for the ball by an opponent pushed the ball away. As he did so,

> the opponent [the defendant] challenged, by sliding in from a distance of about 3 to 4 yards. The slide tackle came late, and was made in a reckless and dangerous manner, by lunging with his boot studs showing about a foot-18 inches from the ground. The result of this tackle was that the Whittle Wanderers No 10 player [the plaintiff] sustained a broken right leg. In my opinion, the tackle constituted serious foul play and I sent [the defendant] from the field of play.'

Then he said where he was positioned.

He gave evidence before the county court judge. He was cross-examined; and, in the event, the county court judge wholly accepted his evidence, subject to a modification in that he thought the defendant's foot was probably 9 inches off the ground. The judge said that he entirely accepted the 'value judgments' of the referee. He said:

'[The tackle] was made in a reckless and dangerous manner not with malicious intent towards the plaintiff but in an "excitable manner without thought of the consequences".'

The judge's final conclusion was:

'It is not for me in this court to attempt to define exhaustively the duty of care between players in a soccer football game. Nor, in my judgment, is there any need because there was here such an obvious breach of the defendant's duty of care towards the plaintiff. He was clearly guilty, as I find the facts, of serious and dangerous foul play which showed a reckless disregard of the plaintiff's safety and which fell far below the standards which might reasonably be expected in anyone pursuing the game.'

For my part I cannot see how that conclusion can be faulted on its facts, and on the law I do not see how it can possibly be said that the defendant was not negligent. Accordingly I would dismiss the appeal.

Stephen Brown LJ and Glidewell J agreed.

Appeal dismissed.

Smoldon v Whitworth [1997] PIQR P133, CA

See Duty of Care for PIQR, or below for [1997] CLY 3856:

N, the second defendant, appealed against a decision that he had been negligent in the refereeing of an under-19 colts rugby match, in the course of which S had been seriously injured when his neck was broken after a scrum collapsed.

Held, dismissing the appeal, that the rules in force on the date of the match included safety provisions for under-19s intended to prevent spinal injuries caused by collapsed scrums and required that a phased sequence of engagement was strictly adhered to during games. The referee owed a duty to the players to exercise a level of care that was appropriate in all the circumstances, although he would not be held liable for oversights or errors of judgment that might easily be made during a competitive and fast-moving game, *Wooldridge v. Sumner* [1963] 2 Q.B. 43, [1962] C.L.Y. 2033 and *Wilks v. Cheltenham Homeguard MotorCycle and Light Car Club* [1971] 1 W.L.R. 668, [1971] C. L.Y. 7829 distinguished. One of the duties of a referee was to ensure the players' safety and he would be in breach of that duty if he failed to take steps to prevent a scrum collapse and would be liable for the foreseeable resulting spinal injuries, even though the probability of

such injury occurring was slight. On the facts, N had failed to ensure that the standard sequence of engagement was used, evidenced by the large number of collapsed scrums occurring during the game which, in the light of expert evidence, meant N's refereeing had fallen below an acceptable standard. Further, it was not open to N to argue that S had consented to the risk of injury by participating voluntarily in the scrum. S might have consented to the ordinary risks of the game, but could not be said to have agreed to N's breach of duty in failing to apply the rules intended to protect players from injury.

STANDARD APPLIED TO CHILDREN

***Mullins v Richards* [1998] 1 All ER 920, CA**

M and R, two 15-year-old schoolgirls, were fencing with plastic rulers during a class when one of the rulers snapped and a fragment of plastic entered M's right eye, causing her to lose all useful sight in that eye. M brought proceedings for negligence against R and the local education authority. The judge, dismissed the claim against the education authority, but found that both M and R had been guilty of negligence of which M's injury was the foreseeable result and, accordingly, that M's claim against R succeeded subject to a reduction of 50% for contributory negligence. R appealed, contending, inter alia, that the judge had erred when considering foreseeability by omitting to take account of the fact that R was not an adult.

Held - Although the test of foreseeability in negligence was an objective one, where the defendant was a child the question for the judge was not whether the actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised gave rise to a risk of injury, but whether an ordinarily prudent and reasonable child of the same age as the defendant in the defendant's situation would have realised as much. Since the judge in his judgment had referred to M and R's age, it followed that he had had in mind the correct principles and had approached the matter in the correct way. However, there was insufficient evidence to justify his finding that the accident was foreseeable, since there was no evidence as to the propensity or otherwise of such rulers to break or any history of their having done so, nor that the practice of playing with rulers was banned or even frowned on in the school, nor that either of the girls had used excessive or inappropriate violence. What had taken place was nothing more than a schoolgirl's game which was commonplace in the school and there no justification for attributing to the participants the foresight of any significant risk of the likelihood of injury. The appeal would therefore be allowed and judgment entered for R (see p 924 e to j, p 926 c to e j, p 927 b toj and p 928 a to j, post). *McHale v Watson* (1966) 115 CLR 109 adopted.

***Williams v Humphrey* [1975] The Times, February 20, QBD**

Before Mr justice Talbot [judgment delivered February 12].

A youth of 15 who went swimming with a neighbouring family and in playfulness pushed the father of the family into the swimming pool, thereby causing him serious injuries was held liable both in negligence and trespass.

The plaintiff, Mr Roy Webster Williams, aged 49, a quantity surveyor, of Ashtead, Surrey, was awarded £13,352 damages for personal injuries and costs against the defendant, Stephen Humphrey, also of Ashtead.

HIS LORDSHIP said that the two families were on friendly terms and on occasion the defendant would accompany Mr Williams and his family to the swimming pool. Mr Williams described the defendant as a nice, well brought up boy who always treated him and his wife with respect.

On the day of the accident in 1971, Mr Williams's son invited the defendant to go with the family to the pool. At the pool everybody was having a great deal of fun and innocent pleasure; and there was a certain amount of ducking, splashing, jumping in, and pushing people into the pool.

As Mr Williams walked by the edge of the pool, at the shallow end where the water was only 3ft deep, the defendant pushed Mr Williams into the water, intending no harm but only to cause a big splash. Mr Williams's left foot struck the edge of the pool, and he sustained severe injuries to his foot and ankle. He had undergone five operations and was now crippled.

The allegation in the statement of claim was simply that the defendant deliberately pushed the plaintiff into the pool without warning. Was it a negligent act? Three features of the case were relevant: (1) the act of pushing was deliberate, hard and without warning; (2) foreseeability of injury that might arise; (3) the defendant's age.

The relevant principle was stated by Lord Atkin in *Donoghue v Stevenson* ([1932] AC 562, 580): "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? … persons who are, so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

On the evidence, Mr Williams had not taken such part in the activities at the pool that he could be said to have willingly accepted the risk of personal injury. It was against that background that the defendant's deliberate act must be judged.

The defence relied on Lord Porter's words in *Bolton v Stone* ([19511 AC 850, 858): "… the hitting of a cricket ball out of the ground was an event which might occur and, therefore, … there was a conceivable possibility that someone would be hit by it. … The hitting of a ball out of the ground is an incident in the game and, indeed, one which the batsman would wish to bring about; but in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of injury being caused."

With those dicta in mind, his Lordship found that the defendant by his intentional acts exposed Mr Williams to potential risks. His motive was irrelevant when considering the consequences of those acts, for the test was objective. The likelihood of injury should have been foreseen by a reasonable man, and since the risk of injury was not so small "that a reasonable man careful of the safety of his neighbour would think it right to neglect it" (Lord Reid in *Overseas Tankship Ltd v Miller Steamship Co* ([1967] AC 617, 643)) the defendant was negligent.

At the time of the incident the defendant was 15 years 11 months old. Though not a man, he was not a child, and it would not be appropriate to judge his conduct by a lower standard of care than would be expected of an adult person.

Nor was his liability affected because the injuries that ensued were graver than he could have foreseen, so long as those injuries were of a type which were reasonably foreseeable in the circumstances: *Hughes v Lord Advocate* ([1963] AC 837); contrast *Doughty v Turner* ([19641 1 QB 518).

Although the pleadings followed the pattern of a claim, in negligence, Mr Machin in his final address had relied on a second head of claim, trespass to the person. Mr Stuart-Smith had submitted that that claim could not be pursued because it had not been pleaded. In his Lordship's view, a simple allegation that the defendant pushed the plaintiff into the pool was in essence an allegation of a trespass to the person, and it added nothing to that allegation to include the word "intentionally".

All that was necessary to make the defendant liable in trespass was to prove that he acted intentionally. On the facts of the case, therefore, the claim in trespass was also made out. Whether the claim lay in negligence or trespass, the damages would be calculated in the same way.

Carmarthenshire County Council v Lewis **[1955] 1 All ER 565, HL**

A small boy, aged about four years, who was a pupil at a nursery school conducted by the appellants, the local education authority, was made ready with another child to go out for a walk with one of the mistresses. The mistress left them unattended in the classroom, she herself going to get ready. While out of the classroom she met another child who had cut himself and she bandaged him. During her absence of about ten minutes, the boy got out of the classroom and made his way out of the school playground through an unlocked gate down a lane into a busy highway where he caused the driver of a lorry to make the lorry swerve so that it struck a telegraph pole as a result of which the driver was killed. His widow brought an action for damages for negligence against the appellants.

Held: (i) in the circumstances of the case, there was no negligence on the part of the mistress concerned.

(ii) (by Lord Goddard, Lords Reid, Tucker and Keith of Avonholm; Lord Oaksey not concurring) the presence of a child as young as the child in the present case wandering alone outside the school premises in a busy street at a time when he was in the care of the appellants indicated a lack of reasonable precautions on the part of the appellants who had given no adequate explanation of the child's presence in the street, and, since it was foreseeable that such an accident as happened might result from the child being alone in the street, the appellants were guilty of negligence towards the deceased and were liable to the respondent in damages.

Decision of the Court of appeal, sub nom. *Lewis v. Carmarthenshire County Council* ([1953] 2 All E.R. 1403) affirmed on a different ground.

[Editorial Note. Although the decision of the Court of Appeal was affirmed on a different ground, viz., the negligence of the local education authority, not the negligence of the mistress, there was no dispute in any court that, judged by the test of foreseeability, there had been a breach of duty towards the deceased in not preventing a child of about four years of age being unattended in a busy street at a time when he was in the care of a school authority. Lord Oaksey did not dissent from this, but he did not concur in the decision to dismiss the appeal because he considered that the appeal ought to stand or fall on the issue of the negligence of the mistress.]

Barnes v Hampshire County Council **[1969] 3 All ER 746, HL**

The appellant, a five year old girl, attended a school run by a local education authority, the respondents. The appellant, with other five year olds, was accommodated in an annexe under the control of two teachers. At the end of each day the five year old children (other than those going home by school bus) were let out of the playground by one of the teachers to meet their parents (a few went home alone). No effort was made by the teachers to pair the children with their parents but the children were instructed to return to the playground if they were expecting to be met but could not find their respective parents. Roughly 170 yards from the school there was a main road. On the last day of term the children were released from the annexe at, or shortly, before 3.25 p.m. The appellant left the playground and on her way home was knocked down and injured on the main road at 3.29 p.m. (no

blame attaching to the vehicle driver concerned). The appellant's mother, who arrived at the scene of the accident at 3.31 p.m., would have met the appellant before she reached the main road had the children been released at 3.30 p.m. as normally. The appellant claimed damages for injuries from the respondents. It was not contended that the responsibilities of the school authorities ceased before 3.30 p.m.

Held: the appellant was entitled to damages since the period of five minutes was not a negligible one in the circumstances and the release of the children roughly five minutes before the scheduled time amounted to negligence on the part of the school authorities (see p. 747, letters A and H, p. 749, letters H and I, p. 750, letter I, p. 753, letter B, and p. 755, letters E to G, post). Observations on whether school authorities are under a duty to ensure that five year old children on leaving school to go home are paired off with responsible adults (see p. 747, letter B, p. 748, letter I, and p. 750, letter B, post).

Appeal allowed.

PROOF OF NEGLIGENCE

WHEN THE MAXIM 'RES IPSA LOQUITUR' APPLIES

***Easson v LNER* [1944] 2 All ER 425, CA**

The infant plaintiff, a boy aged five, travelled in the company of his mother on an express corridor train from Newcastle to London. Soon after the train had left Grantham station, the boy was allowed by his mother to go to the lavatory. He went down the corridor of the coach and fell through a door on the off-side of the train on to the railway line and was seriously injured. There was no evidence how the door became open. It was in proper working order, fitted with a proper lock and provided with a safety catch which would have prevented the door from flying open even if it had been improperly shut. There were no means of opening the door from inside, it could only be opened by lowering the window and turning the handle outside the carriage. It was contended that since the infant plaintiff was too small to have opened the door from outside himself, the case was one in which the doctrine of *res ipsa loquitur* would apply, and- the onus was on the defendants to establish absence of negligence :-

HELD : though it was the duty of the railway company to inspect the carriage-doors and see that they were properly fastened before the train leaves a station, the doors were not continuously under their sole control in the sense necessary for the doctrine of *res ipsa loquitur* to apply, and the mere fact that a door came open was not in itself *prima facie* evidence of negligence against the railway company.

[EDITORIAL NOTE. Consideration is given here to the question of how far the doctrine of *res ipsa loquitur* is applicable to accidents caused by the opening of railway carriage doors. It is essential to the application of this doctrine that the thing causing the accident should be wholly under the control of the defendant and the court holds that on a long journey it is impossible to say that the doors are so continuously under the control of the railway company that upon the happening of an accident through an open door the burden is upon the company to disprove negligence.]

***Scott v London and St Katherine Docks* (1865) 3 H & C 596**

Held, in the Exchequer Chamber, that in an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the Judge in leaving the ease to the jury.- But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. -In an action against a dock Company for injury to the plaintiff by their alleged negligence the plaintiff proved that he was an officer of the Customs, and that, whilst in the discharge of his duty he was passing in front of a warehouse in the dock, six bags of sugar fell upon him. Held, reasonable evidence of negligence to be left to the jury: per Crompton, J., Byles, J., Blackburn, J., and Keating, J. Dissentientibus Erle, C. J., and Mellor, J.

***Barkway v South Wales Transport* [1950] 1 All ER 392, HL**

The appellant's husband was killed while travelling as a passenger in the respondents' omnibus, which at the time of the accident was being driven at a speed of some twenty-five miles per hour in a "black-out." After the offside front tyre had burst, the omnibus veered across the road and fell over an embankment. Evidence was given that the cause of the bursting of the tyre was an impact fracture due to one or more heavy blows on the outside of the tyre leading to the disintegration of the inner parts. Such a fracture might occur without leaving any visible external mark, but a competent driver would be able to recognise the difference between a blow heavy enough to endanger the strength of the tyre and a lesser concussion. The appellant contended that in the circumstances the speed at which the omnibus was driven was excessive and caused it to be thrown off the road when the tyre burst, that the defect in the tyre would have been revealed had adequate steps been taken regularly to inspect it, and that the respondents were negligent in not requiring their drivers to report occurrences which might result in impact fractures. The respondents contended that they had a satisfactory system of tyre inspection, which took place twice a week, and that impact fractures were so rare as to be a negligible risk which the public using their vehicles must take.

HELD: (i) the application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting *onus* of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the respondents to give an adequate explanation, if the facts were sufficiently known the question ceased to be one where the facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be inferred.

(ii) it could not be said on the evidence that the speed at which the omnibus was being driven at the time of the tyre burst bad any causal connection with the subsequent accident.

(iii) despite the statements of the respondents' witnesses that their system of tyre inspection was satisfactory and accorded with the practice of other omnibus companies, the evidence showed that the respondents had not taken all the steps they should have taken to protect passengers because they had not instructed their drivers to report heavy blows to tyres likely to cause impact fractures.

(iv) the cause of the accident was a defect of the tyre which might have been discovered by due diligence on the part of the respondents, and the

respondents were liable although it was not possible to affirm that the fracture would have been discovered by the exercise of due diligence.

By the Motor Vehicles (Construction and Use) Regulations, 194 1, reg. 7 1: "All the tyres of a motor vehicle ... shall at all times, while the vehicle ... is used on a road be maintained in such condition as to be free from any defect which might in any way cause ... danger to persons on or in the vehicle …"
HELD: this regulation gives no right of action to persons injured by a breach of it.

Decision of the Court of Appeal ([1948] 2 All E.R. 460), reversed.

ITS EFFECT

***Colvilles Ltd v Devine* [1969] 2 All ER 53, HL**

The appellants owned a steelworks in Scotland. A process for manufacturing steel by the injection of oxygen into converters containing 100 tons of molten metal had been installed 4 1/2 months before the relevant day. The oxygen originated from the works of a third party approximately one mile away. It was supplied by means of a pipe, which belonged to the third party, which was connected up to the main distribution centre in the works. At the main intake there was a filter for the purpose of removing foreign bodies from the oxygen stream. From the main distribution centre the oxygen was taken by a hose, under the control of the appellants, to a lance by means of which it was injected into the molten metal. The respondent was employed in the steelworks by the appellants. On the relevant day, he was working on a platform some 15 feet from the ground when there was an explosion in the proximity of a converter approximately 75 yards away. Scared by this explosion, he jumped off the platform and sustained injuries, in respect of which he claimed damages from the appellants. In evidence, the probable cause of the explosion was given as a fire resulting from the ignition of particles in the oxygen stream by friction, which caused the hose to bum. The appellants had received no warning of any such dangers from the makers of the plant, nor had any comparable mishap occurred previously.

Held: (i) the plant (including the, hose which caught fire) was under the management of the appellants and, since an explosion of such violence would not have occurred in the ordinary course of things if those who had the management had taken proper care, the maxim res ipsa loquitur applied;
(ii) it was not necessary that there should be positive proof of the existence of the particles in the oxygen stream in order to establish the appellants' explanation, but for that explanation to be available as a defence it must be consistent with no negligence on their part; accordingly, the appellants not having adduced evidence of any inspection of the filters in the oxygen stream, they had not discharged the onus imposed on them by the maxim.
Appeal dismissed.

***Henderson v Henry Jenkins & Sons* [1969] 3 All ER 756, HL**

A five-year old lorry was driven down a steep hill by its driver. At one point the brakes failed and the lorry collided with two other vehicles, killed a man and caused other damage. It was subsequently discovered that the pipe carrying the brake fluid was badly corroded and that the brake failure must have been caused by a large hole in the corroded part of the pipe. The instantaneous development of this hole was very uncommon and would have allowed the driver no warning of the pending brake failure. The appellant sued the driver* and his employers, the respondents. In evidence it was

shown that neither the vehicle manufacturers nor the Ministry of Transport recommended the removal of the pipe for inspection, although only 60 per cent. of it was visible in situ and the remaining 40 per cent. (in which part of pipe the hole had occurred) was particularly prone, by reason of its position, to corrosion. Evidence also established that the degree and speed of corrosion was largely determined by the use to which the vehicle was put (e.g., type of leads carried, places visited, unusual occurrences). The respondents led no evidence on this subject, however, relying on a plea of latent defect.

Held: (Lord Guest and Viscount Dilhorne dissenting) the respondents had to prove that, in all the circumstances which they knew or ought to have known, they took all proper steps to avoid danger; they had failed to prove this and accordingly the appellant was entitled to damages (see p. 758, letter I, p. 765, letter I, p. 766, letter C, p. 767, letter D, and p. 768, letters F to H, post).

Decision of the Court of Appeal ([1969] 1 All E.R. 401) reversed.

* The appellant's claim against the driver was dismissed and the appellant did not appeal against that part of the judgment at first instance which dismissed the claim against the driver.

Ward v Tesco Stores **[1976] 1 All ER 219, CA**

The defendants owned and managed a supermarket store. While shopping in the store, the plaintiff slipped on some yoghourt which had been spilt on the floor and was injured. She brought an action against the defendants claiming damages for personal injuries allegedly caused by the defendants' negligence in the maintenance of the floor. It was not suggested that the plaintiff had in any way been negligent in failing to notice the spillage on the floor as she walked along doing her shopping. At the trial the defendants gave evidence that spillages occurred about ten times a week and that staff had been instructed that if they saw any spillages on the floor they were to stay where the spill had taken place and call somebody to clear it up. Apart from general cleaning, the floor of the supermarket was brushed five or six times every day on which it was open. There was, however, no evidence before the court as to when the floor had last been brushed before the plaintiff's accident. The plaintiff gave evidence that three weeks after the accident, when shopping in the same store, she had noticed that some orange squash had been spilt on the floor; she kept her eye on the spillage for about a quarter of an hour and during that time nobody had come to clear it up. The trial judge held that the plaintiff had proved a prima facie case and that the defendants were liable for the accident. The defendants appealed, contending that the onus was on the plaintiff to show that the spillage had been on the floor an unduly long time and that there had been opportunities for the management to clear it up which had not been taken, and that unless there was some evidence when the yoghourt had been spilt on to the floor no prima facie case could be made against the defendants.

Held (Ormrod LJ dissenting) - It was the duty of the defendants and their servants to see that the floors were kept clean and free from spillages so that accidents did not occur. Since the plaintiff's accident was not one which, in the ordinary course of things, would have happened if the floor had been kept clean and spillages dealt with as soon as they occurred, it was for the defendants to give some explanation to show that the accident had not arisen from any want of care on their part. Since the probabilities were that, by the time of the accident, the spillage had been on the floor long enough for it to have been cleared up by a member of the defendant's staff, the judge was, in the absence of any explanation by the defendants, entitled to conclude that the accident had occurred because the defendants had failed to take

reasonable care. Accordingly the appeal would be dismissed (see p 222 b to j, p 223 g and p 224 a to e, post).

Dictum of Erle CJ in *Scott v The London and St Katherine Docks Co* (1865) 3 H & C at 601 applied. *Turner v Arding & Hobbs Ltd* [1949] 2 All ER 911 approved. Dictum of Devlin J in *Richards v WF White & Co* [1957] 1 Lloyd's Rep at 369, 370 explained.

***Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, PC**

The first defendant was driving a coach owned by the second defendant westwards in the outer lane of a dual carriageway in Hong Kong. Suddenly the coach crossed the central reservation and collided with a public light bus travelling in the inner lane of the eastbound carriageway. One passenger in the bus was killed, and the driver and three other passengers were injured. The plaintiffs, who were those injured and the personal representatives of the deceased, commenced against the defendants an action claiming damages for negligence. At the trial the plaintiffs did not call oral evidence and relied on the doctrine of res ipsa loquitur, contending that the fact of the accident alone was sufficient evidence of negligence by the first defendant. The defendants called evidence which established that an untraced car being driven in the inner lane of the westbound carriageway had cut into the outer lane in front of the coach, and to avoid hitting the car the first defendant had braked and swerved to the right whereupon the coach had skidded across colliding with the bus. The judge gave judgment for the plaintiffs on liability holding that the defendants had failed to discharge the burden of disproving negligence. On appeal the Court of Appeal of Hong Kong reversed that decision and found that the plaintiffs had failed to prove negligence. On appeal to the Judicial Committee of the Privy Council:

Held, that it was misleading to talk of the burden of proof shifting to the defendant in a res ipsa loquitur situation because the burden of proving negligence rested throughout the case on the plaintiff (p 300L); that in an appropriate case the plaintiff established a prima facie case by relying upon the fact of the accident and if the defendant adduced no evidence there was nothing to rebut the inference of negligence and the plaintiff would have proved his case, but if the defendant did adduce evidence that evidence had to be evaluated to see if it was still reasonable to draw the inference of negligence from the mere fact of the accident (p 301D); that the judge had mislead himself by assuming that there was a legal burden on the defendants to disprove negligence and he had also failed to give effect to those authorities which established that a defendant placed in a position of peril and emergency had not to be judged by too critical a standard when he acted on the spur of the moment to avoid an accident (p 302D); that in attempting to extricate himself, his coach and his passengers from a situation which appeared to him as one of extreme danger, the first defendant had acted with the alertness, skill and judgment which could reasonably have been expected in the circumstances, and that, accordingly, the appeal should be dismissed (p 302 H-J).

Scott v London and St Katherine Docks Co (1865) 3 H & C 596, *Henderson v Henry E Jenkins & Sons* [1970] RTR 70, HL(E) and *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749, [1971] 2 All ER 1240, CA applied.