TRESPASS TO THE PERSON

ASSAULT

***Tuberville v Savage* (1669) 86 ER 684**

If a man lay his band upon his sword and say, "If it were not assize-time, I would not take such language," this is no assault. - S. C. 2 Keb. 545. S. C. 1 Vent. 256. 2 Ro. Ab. 547. 6 Mod. 149. 10 Mod. 187. 1 Lev. 282. 1 Bac. Ab. 154. Gilb. Law of Evid. 256. 1 Com. Dig. 591. Bull. N. P. 15. 1 Hawk. P. C. 263.

Action of *assault*, *battery*, and *wounding*. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "*If it were not assize-time, I would not take inch language from you*." - The question was, If that were an assault? - The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and *the intention* as well as *the act* makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no *intention* to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. - In the principal case the plaintiff had judgment.

***Thomas v NUM* [1985] 2 All ER 1**

The plaintiffs were members of a branch union of the National Union of Mineworkers (the NUM). In March 1984 the branch union voted to support strike action against the Mineworkers' employer (the NCB) and in May the national executive of the NUM indorsed proposals by various branch unions for strike action and set up a coordinating committee to coordinate industrial action against the NCB, including the co-ordination of secondary picketing by branch unions outside their respective areas. In November the plaintiffs decided not to carry on with the strike and returned to work at their mines. However, the presence of 60 to 70 pickets outside the colliery gates each day and the accompanying demonstrations and abusive and violent language made it necessary for working miners, including the plaintiffs, to be brought into the collieries by vehicles and for the police to be present. The plaintiffs sought interlocutory injunctions against the branch union, its executive officers and trustees, and against the NUM and its coordinating committee. The plaintiffs contended, inter alia, that the picketing at the colliery gates was an actionable tort because it involved criminal offences under s 7 of the Conspiracy and Protection of Property Act 1875, such as using violence to or intimidating other people, persistently following other people, and watching and besetting the place of work of other people, and (ii) that in any event the picketing at the colliery gates was an actionable tort either as an assault, an obstruction of the highway, an unlawful interference with contract or intimidation to compel the plaintiffs and other working miners to abstain from working.

Held - (1) It did not follow that because picketing was an offence under s 7 of the 1875 Act it was therefore tortious, since in order to establish an offence under s 7 it was necessary first to show that the picketing amounted to a tort (see p 17 f g and p 19 h j, post); *J Lyons & Sons Ltd v Wilkins* [1899] 1 Ch 255 and *Ward Lock & Co Ltd v Operative Printers' Assistants' Society* (1906) 22 TLR 327 considered.

(2) The picketing at the colliery gates was not actionable in tort either (a) as an assault, since working miners were in vehicles and the pickets were held back from the vehicles by the police and therefore there was no overt act against the working miners, or (b) as obstruction of the highway, since entry to the collieries was not physically prevented by the pickets and in any event if there was an obstruction it was not actionable at the suit of the plaintiffs because it did not cause them any special damage, or (c) as an unlawful interference with contract, since the picketing did not interfere with the performance of a primary obligation under the plaintiffs' contracts of employment with the NCB. Accordingly, the plaintiffs could not complain on any of those grounds that the picketing and demonstrations were tortious (see p 20 g h and p 21 a to c and f to j, post); *Broome v DPP* [1974] 1 All ER 314, *Hubbard v Pitt* [1975] 3 All ER 1 and *Merkur Island Shipping Corp v Laughton* [1983] 2 All ER 189 considered.

(3) However, on the principle that any unreasonable interference with the rights of others was actionable in tort, the picketing was tortious if its effect was that the working miners were being unreasonably harassed, in the exercise of their right to use the highway for the purpose of entering and leaving their place of work, by the presence and behaviour of pickets and demonstrators. Since the plaintiffs had the right to use the highway to go to work and since the picketing by 60 to 70 pickets in a manner which required a police presence was intimidatory and an unreasonable harassment, the picketing at the colliery gates amounted to conduct which was tortious at the suit of the plaintiffs (see p 22 a to f and h to p 23 a, p 26 c and p 29 j, post).

Per curiam. Mass picketing, ie picketing which by sheer weight of numbers blocks the entrance to premises or prevents the entry thereto of vehicles or people, is both common law nuisance and an offence under s 7 of the 1875 Act (see P 30 j, post).

BATTERY

***Collins v Wilcock* [1984] 1 WLR 1172**

Two police officers on duty in a police car observed two women in the street who appeared to be soliciting for the purpose of prostitution. One of the women was known to the police as a prostitute but the other, the appellant, was not a known prostitute. When the police officers requested the appellant to get into the car for questioning she refused to do so and instead walked away from the car. One of the officers, a policewoman, got out of the car and followed the appellant in order to question her regarding her identity and conduct and to caution her, if she was suspected of being a prostitute, in accordance with the approved police procedure for administering cautions for suspicious behaviour before charging a woman with being a prostitute, contrary to s 1 of the Street Offences Act 1959. The appellant refused to speak to the policewoman and walked away, whereupon the policewoman took hold of the appellant's arm to detain her. The appellant then swore at the policewoman and scratched the officer's arm with her fingernails. The appellant was convicted of assaulting a police officer in the execution of her duty, contrary to s 51(1) of the Police Act 1964. She appealed against the conviction, contending that when the assault occurred the officer was not exercising her power of arrest and was acting beyond the scope of her duty in detaining the appellant by taking hold of her arm. The police contended that the officer was acting in the execution of her duty when the assault occurred because the officer had good cause to detain the appellant for the purpose of questioning her to see whether a caution for suspicious behaviour should be administered.

Held - (1) Except when lawfully exercising his power of arrest or some other statutory power a police officer had no greater rights than an ordinary citizen to restrain another. Accordingly, whether a police officer's conduct was lawful when detaining a person, to question him in circumstances where the officer was not exercising his power of arrest or other statutory power depended on whether the physical contact the officer used to detain the person was no more than generally acceptable physical contact between two citizens for the purpose of one of them engaging the attention of the other and as such was lawful physical contact as between two ordinary citizens. If the conduct used by the officer went beyond such generally acceptable conduct eg if the officer gripped a person's arm or shoulder rather than merely laying a hand on his sleeve or tapping his shoulder, the officer's conduct would constitute the infliction of unlawful force and thus constitute a battery (see p 378 j and p 379 a to e, post); dictum of Parke B in *Rawlings v Till* (1837) 3 M & W at 29, *Kenlin v Gardiner* [1966] 3 All ER 931, *Ludlow v Burgess* (1971) 75 Cr App R 227 and *Bentley v Brudzinski* (1982) 75 Cr App R 217 applied; *Wiffin v Kincard* (1807) 2 Bos & PNR 471 and *Donnelly v Jackman* [1970] 1 All ER 987 distinguished.

(2) The 1959 Act did not confer power on a police officer to stop and detain a woman who was a prostitute for the purpose of cautioning her. Furthermore, the fact that the reason an officer detained a woman was to caution her regarding her suspicious behaviour did not render the officer's conduct lawful if in detaining her he used a degree of physical contact that went beyond lawful physical contact as between two ordinary citizens (see p 380 b to f, post).

(3) Since the policewoman had not been exercising her power of arrest when she detained the appellant, and since in taking hold of the appellant's arm to detain her the policewoman's conduct went beyond acceptable lawful physical contact between two citizens, it followed that the officer's act constituted a battery on the appellant and that she had not been acting in the execution of her duty when the assault occurred. Accordingly the appeal would be allowed and the conviction quashed (see p 380 f g, post).

Wilson v Pringle **[1986] 2 All ER 440**

The plaintiff and the defendant were two schoolboys involved in an incident in a school corridor as the result of which the plaintiff fell and suffered injuries. The plaintiff issued a writ claiming damages and alleging that the defendant had committed a trespass to the person of the plaintiff. In his defence the defendant admitted that he had indulged in horseplay with the plaintiff and on the basis of that admission the plaintiff applied for summary judgment under RSC Ord 14. The registrar refused to enter judgment but on appeal by the plaintiff the judge held that the defendant had admitted that his act had caused the plaintiff to fall and in the absence of any allegation of express or implied consent the defence amounted to an admission of battery and consequently an unjustified trespass to the person. He accordingly gave the plaintiff leave to enter Judgment. The defendant appealed to the Court of Appeal, contending that the essential ingredients of trespass to the person were a deliberate touching, hostility and an intention to inflict injury, and therefore horseplay in which there was no intention to inflict injury could not amount to a trespass to the person. The plaintiff contended that there merely had to be an intentional application of force, such as horseplay involved, regardless of whether it was intended to cause injury.

Held - An intention to injure was not an essential ingredient of an action for trespass to the person, since it was the mere trespass by itself which was the offence and therefore it was the act rather than the injury which had to be intentional. However, the intentional act, in the form of an intentional touching or contact in some form, had to be proved to be a hostile touching,

and hostility could not be equated with ill-will or malevolence, or governed by the obvious intention shown in acts like punching, stabbing or shooting or solely by an expressed intention, although that could be strong evidence. Whether there was hostility was a question of fact in every case. Since the defence did not admit a hostile act on the part of the defendant there were triable issues which prevented the entry of summary judgment. The appeal would therefore be allowed, and the defendant given unconditional leave to defend (see p 445 g j and p 447 j to p 448 a e f, post).

Tuberville v Savage (1669) 1 Mod Rep 3, *Cole v Turner* (1704) Holt KB 108, *Williams v Jones* (1736) Lee *temp* Hard 298, *Fowler v Lanning* [1959] 1 All ER 290, *Letang v Cooper* [1964] 2 All ER 929 and *Collins v Wilcock* [1984] 3 All ER 374 considered.

Per Curiam. Where the immediate act of touching does not of itself demonstrate hostility the plaintiff should plead the facts alleged to do so (see p 448 C, post).

***Letang v Cooper* [1964] 2 All ER 929**

In July, 1957, the plaintiff was run over by a motor vehicle negligently driven by the defendant. By writ issued on Feb. 2, 1961 (that is, after the three years' period of limitation provided by s. 2(1) of the Law Reform (Limitation of Actions, etc.) Act, 1954, had expired) the plaintiff brought an action for damages for personal injuries, claiming in negligence and alternatively for trespass to the person. The particulars of trespass pleaded in her statement of claim repeated those pleaded in respect of negligence.

Held: the plaintiff's cause of action was statute barred by the proviso added to s. 2(1) of the Limitation Act, 1939, by s. 2(1) of the Law Reform (Limitation of Actions, etc.) Act, 1954, for the following reasons-

(i) as the personal injury to the plaintiff was inflicted unintentionally, her only cause of action at the present day lay in negligence (or, per Diplock, L.J., was a cause of action arising from a factual situation to which cause of action the preferable description was negligence), and accordingly the cause of action was statute barred after the lapse of three years (see p. 933, letter A, p. 934, letter G, p. 935, letter C, and p. 936, letter C, post). *Kruber v. Grzesiak* ([1963] V.L.R. 621) applied.

(ii) if, however, the cause of action was trespass to the person, the words "breach of duty" in the proviso to s. 2(1) of the Act of 1939 covered that cause of action (see p. 933, letter I, p. 934, letter F, p. 936, letter E, and p. 937, letter H, post.)

Per Lord Denning, M.R.: it is legitimate to look at a report of the committee that preceded legislation in order to see what was the mischief at which the statute, when enacted, was directed, but not in order to interpret the words of the statute according to the recommendations of the committee (see p. 933, letter D, post).

Decision of Elwes, J., ([1964] 1 All E.R. 669) reversed.

***Scott v Shepherd* (1773) 2 B1 R892**

Trespass and assault will lie for originally throwing a squib, which after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye.

Bird v Jones **(1845) 7 QB 742**

Plaintiff, attempting to pass in a particular direction, was obstructed by the defendant, who prevented him from going in any particular direction but one, not being that in which he had endeavoured to pass. Held, no imprisonment. And this, whether the plaintiff had or had not a right to pass in the first mentioned direction. Per Patteson, Coleridge, and Williams Js. Dissentiente Lord Denman C.J.

Robinson v Balmain New Ferry **[1910] AC 295**

In an action for damages for assault and false imprisonment it appeared that the plaintiff had contracted with the defendants to enter their wharf and stay there till the boat should start and then be taken by the boat to the other side. No breach of the defendants' undertaking was alleged, but the plaintiff after entry changed his mind and desired to effect an exit from their wharf without payment of the prescribed toll for exit, and was for a time forcibly prevented:-
Held, that he ought to have been nonsuited. The toll imposed was reasonable and the defendants were entitled to resist a forcible evasion of it.

Meering v Graham-White Aviation Co Ltd **(1920) 122 LT 44**

A private prosecutor not having the privilege that a police constable possesses of imprisoning a person on mere suspicion that a felony has been committed, false imprisonment results, if the person is detained by the private prosecutor. Arrest, however by a police constable which follows the placing of the case in his hands to do his duty is not an arrest by a private prosecutor, but is an arrest by the police constable.

The fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being possible for a person to be imprisoned in law without his being conscious of the fact and appreciating the position which he is placed, laying hands upon the person of the party imprisoned not being essential.

The definition of "Imprisonment" in "Termes de la Ley" is an adequate statement of what is meant by that expression. *Bird v Jones* 7 QB 742 and *Warner v Burford* 4 CB (NS) 204 approved.

Absence of reasonable and probable cause for instituting a prosecution against a person affords evidence from which it may be inferred that there was a want of honest belief on the part of the prosecutor in the guilt of the person accused. But absence of reasonable and probable cause alone will not suffice. There must be evidence of some further indirect motive.

The depositions of witnesses taken in pursuance of s. 17 of the Indictable Offences Act, 1848, in the form set forth in the Schedule to that Act should appear in chronological order, a record of the depositions being kept day by day with a fresh caption at the beginning of each day's proceedings showing what witnesses have been examined on that day, and what part of their evidence has been given on that day.

Observations of Duke L.J. as to the function of a judge at nisi prius.

Observations of Atkin L.J. concerning the burden cast upon judges in trying civil actions in the High Court of Justice in making the only official record of the whole of the evidence which is adduced before them by taking a note thereof in longhand.

Order of Bray J. varied.

Murray v Ministry of Defence **[1988] 2 All ER 521**

The plaintiff was suspected of having committed offences involving the collection of money in Northern Ireland for the IRA, a prohibited organisation. Acting on orders, D and five other soldiers, who were armed, went to the plaintiff's house at 7 am one morning to arrest the plaintiff. When the door was opened by the plaintiff the soldiers, in accordance with their usual procedure, entered the house and D asked the plaintiff who she was and ascertained her identity. The soldiers then assembled all the other occupants of the house in one room and searched the house. During that time D remained with the plaintiff. At 7.3o am D formally arrested the plaintiff and when asked by the plaintiff D stated that the arrest was being made under s 14 of the Northern Ireland (Emergency Provisions) Act 1978, which provided for members of the armed forces on duty to arrest without a warrant and detain for up to four hours a person suspected of committing an offence. The plaintiff was then taken to an army screening centre where she was interviewed but refused to answer any questions. She was released at 9.45 am. The plaintiff brought an action against the Ministry of Defence claiming damages for false imprisonment, contending (i) that she had been unlawfully detained between 7 am and 7.30 am because until she was told she was being arrested she was not under arrest and (ii) that the failure of the soldiers to tell her that she was being arrested until they were about to leave rendered the arrest unlawful. The trial judge dismissed her claim and his decision was affirmed on appeal by the Court of Appeal in Northern Ireland. The plaintiff appealed to the House of Lords.

Held - Where a person was detained or restrained by a police officer and knew that he was being detained or restrained, that amounted to an arrest even though no formal words of arrest were spoken by the officer. Since the plaintiff had been under restraint from the moment she was identified and must have realised that she was under restraint, she had been under arrest from that moment notwithstanding that D did not make a formal arrest until half an hour later. Furthermore, although in ordinary circumstances the police should tell a person the reason for his arrest at the time the arrest was made, the circumstances of the plaintiff's arrest were such that it was reasonable for D to delay speaking the words of arrest until the plaintiff and the soldiers were leaving the house and the failure to make a formal arrest did not render the plaintiff's arrest unlawful. The appeal would therefore be dismissed (see p 523 b c, p 526 f to j, p 527 b c g to p 528 b and p 530 g h, post).

Dicta of Lord Devlin in *Shaaban bin Hussien v Chong Fook Kam* [1969] 3 All ER at 1629, of Viscount Dilhorne in *Spicer v Holt* [1976] 3 All ER at 79 and of Lord Diplock in *Holgate-Mohammed v Duke*[1984] 1 All ER at 1056 applied.

Per curiam. False imprisonment is actionable without proof of special damage and thus it is not necessary for a person unlawfully detained to prove that he knew that he was being detained or was harmed by his detention (see p 523 b c, p 528 b c, p 529 g h and p 530 g h, post); dictum of Atkin LJ in *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT at 53-54 approved; *Herring v Boyle* (1834)1i Cr M & R 377 doubted.

Heard v Weardale Steel, Coal & Coke Co **[1915] AC 67**

A minor descended a coal mine at 9.30 am for the purpose of working therein for his employers, the owners of the colliery. In the ordinary course he would be entitled to be raised to the surface at the conclusion of his shift, which expired at 4 pm. On arriving at the bottom of the mine the miner was ordered to do certain work which he wrongfully refused to do, and at 11 am he requested to be taken to the surface in a lift, which was the only means of

egress from the mine. His employers refused to permit him to use the lift until 1.30 pm although it had been available for the carriage of men to the surface from 1.10 pm, and in consequence he was detained in the mine against his will for twenty minutes. In respect of this detention the miner sued his employers for damages for false imprisonment:-

Held, on the principle of volenti non fit injuria, that the action could not be maintained. Decision of the Court of Appeal [1913] 3 K. B. 771 affirmed.

THE RULE IN WILKINSON v DOWNTON

Wilkinson v Downton **[1897] 2 QB 57**

The defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill:-

Held, that these facts constituted a good cause of action.

Victorian Railways Commissioners v. Coultas, (1888) 13 App. Cas. 222, and *Allsop v. Allsop*, (1860) 5 H. & N. 534, considered.

Janvier v Sweeney **[1919] 2 KB 316**

False words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable.

The defendants were two private detectives. One of them was designing to inspect certain letters, to which he believed the plaintiff, a maid servant, had means of access. He instructed the other defendant, who was his assistant, to induce the plaintiff to show him the letters, telling him that the plaintiff would be remunerated for this service. The assistant endeavoured to persuade the plaintiff by false statements and threats, as the result of which the plaintiff fell ill from a nervous shock.

In an action by the plaintiff against the defendants for damages:-

Held, that the assistant was acting within the scope of his employment and that both the defendants were liable.

Wilkinson v. Downton [1897] 2 Q. B. 57 approved.

DEFENCES

CONSENT

A person is deemed to consent to a reasonable degree of physical contact as a result of social interaction (see *Collins v Wilcock*, above).

R v Billinghurst **[1978] Crim LR 553**

Newport Crown Court: Judge John Rutter: June 12 and 13, 1978.

During a Rugby Football match and in an off-the-ball incident B punched G, the opposing scrum-half, in the face fracturing his jaw in two places. B was charged with inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861. The only issue in the case was consent. Evidence was given by G that on previous occasions he had been punched and had himself punched opponents on the Rugby field, and by a defence witness Mervyn Davies, a former Welsh International Rugby player,

that in the modem game of rugby punching is the rule rather than the exception.

It was argued by the defence that in the modern game of rugby players consented to the risk of some injury and that the prosecution would have to prove that the blow struck by B was one which was outside the normal expectation of a player so that he could not be said to have consented to it by participating in the game.

The prosecution argued that public policy imposes limits on violence to which a rugby player can consent and that whereas he is deemed to consent to vigorous and even over-vigorous physical contact on the ball, he is not deemed to consent to any deliberate physical contact off the ball.

The following article and authorities were referred to: "Consent and Public Policy" by Glanville Williams [1962] Crim.L.R. 74 at p. 80; *Coney*, 8 Q.B.D. 534; *Bradshaw*, 14 Cox C.C. 83; *Moore* (1898) 14 T.L.R. 229; *Maki* (1970) 14 D.L.R. 164; *Green* (1970) 16 D.L.R. 127.

The judge directed the jury that Rugby was a game of physical contact necessarily involving the use of force and that players are deemed to consent to force "of a kind which could reasonably be expected to happen during a game." He went on to direct them that a rugby player has no unlimited licence to use force and that "there must obviously be cases which cross the line of that to which a player is deemed to consent." A distinction which the jury might regard as decisive was that between force used in the course of play and force used outside the course of play. The judge told the jury that by their verdict they could set a standard for the future.

The jury, by a majority verdict of 11 to 1, convicted B, who was treated as a man of previous good character and sentenced to nine months' imprisonment suspended for two years.

Chatterton v Gerson [1981] 1 All ER 257

Following a hernia operation the plaintiff suffered chronic and intractable pain in the area surrounding the operation scar. She was referred to the defendant who was a specialist in the treatment of chronic intractable pain. The defendant operated on the plaintiff by injecting a solution near the spinal cord with the object of destroying pain conducting nerves which served the scar area. Although the defendant could not remember what he told the plaintiff prior to the operation, it was his practice to explain to patients that the form of treatment used would involve numbness at the site of the pain and a larger surrounding area and might involve temporary loss of muscle power. The plaintiff's recollection was that although the defendant told her of the method of pain blocking treatment he intended to use she was not warned of the prospect of numbness and possible loss of muscle power. After the operation by the defendant the plaintiff's pain was temporarily relieved but she experienced numbness in her right leg. After two months the pain returned and the defendant operated on the plaintiff by administering a second spinal injection. The defendant did not warn the plaintiff a second time of the possible side effects since he considered the second operation involved no more risk than the first. The second operation was unsuccessful and failed to relieve the pain. The plaintiff also found that, her right leg was completely numb, which considerably impaired her mobility. The plaintiff claimed damages from the defendant alleging that he had not given her an explanation of the operations and their implications so that she could make an informed decision whether to risk them, and that the defendant (i) had committed a trespass to her person since her consent to the operations was vitiated by the lack of prior explanation and (ii) had been negligent in not giving an explanation as he was required to do as part of his duty to treat a patient with the degree of professional skill and care expected of a reasonably skilled medical practitioner.

Held - The plaintiff's action would be dismissed for the following reasons-
(1) In an action against a medical practitioner for trespass to the person based on alleged lack of consent to the treatment administered by, the practitioner the patient had to show that there had been a lack of real consent. Furthermore, once the patient had been informed in broad terms of the nature of the intended treatment and had given his consent the patient could not then say that there had been a lack of real consent. Since the plaintiff had been under no illusion as to the general nature of the operations performed by the defendant, there had been no lack of real consent on her part and her claim for trespass to the person would be dismissed (see p 264 j, p 265 d to h and p 267 c, post).
(2) A doctor was required, as part of his duty of care to his patient, to explain what he intended to do, and the implications involved, in the way in which a responsible doctor in similar circumstances would have done, and if there was a real risk of misfortune inherent in the procedure, however well it was carried out, the doctor's duty was to warn of the risk of such misfortune. On the facts, the defendant had carried out his duty to inform the plaintiff of the implications of the operation, and since the numbness in her leg was not a foreseeable risk of the operation the defendant was not under a duty to warn the plaintiff of that possibility. In any event, even if the defendant had failed in his duty to warn the plaintiff of the implications inherent in the second operation, the plaintiff had not proved that if she had been properly informed she would have refused to undergo the operation and the risks involved (see p 262 g h, p 265 j to p 266 a and e to p 267 c, post).

Sidaway v Governors of the Bethlehem Royal Hospital **[1985] 1 All ER 643**

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, 660 c d f g and p 662 a b f g and j to p 663 d, post); *Bolam 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 664 j and p 665 c and g to p 666 g, post).

(3) Since (per Lord Diplock, Lord Keith and Lord Bridge) the surgeon's nondisclosure 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.

In re F (Mental Patient: Sterilisation) **[1989] 2 All ER 545**

The plaintiff, F, a woman aged 36, suffered from serious mental disability. She had the verbal capacity of a child aged two and, the general mental capacity of a child aged four or five. Since the age of 14 she had been a voluntary in-patient at a mental hospital controlled by the defendant health authority. She had formed a sexual relationship with a male patient, P. There was medical evidence that, from a psychiatric point of view, it would be disastrous for her to become pregnant and since there were serious objections to all ordinary methods of contraception, either because she would be unable to use them effectively or because of a risk to her physical health, the medical staff in charge of F decided that the best course was for her to be sterilised. Because she was disabled by her mental capacity from giving her consent to the operation her mother, acting as her next friend, sought as against the health authority a declaration under RSC Ord 15, r16 that the absence of her consent would not make sterilisation of her an unlawful act. It was conceded that the court had no power to give consent on behalf of F or to dispense with the need for such consent because the patens patriae jurisdiction in respect of persons suffering from mental incapacity no longer existed and there was no comparable statutory jurisdiction. The judge granted the declaration sought. The Official Solicitor appealed to the Court of Appeal, which affirmed the judge's decision, holding that the court had power to authorise such an operation. The Official Solicitor appealed to the House of Lords, contending that in the absence of a patens patriae

jurisdiction sterilisation of an adult mental patient who was unable to give her consent to the operation could never be lawful.

Held - The court had no jurisdiction either by statute or derived from the Crown as patens patriae to give or withhold consent to a sterilisation operation on an adult woman disabled by mental incapacity (as it would have in wardship proceedings in the case of a minor) because the Crown's previous statutory and prerogative jurisdiction in lunacy had been replaced by the provisions of the Mental Health Act 1983. Furthermore, the jurisdiction conferred on the nominated judge under s 93(l) of the 1983 Act to manage 'the affairs of patients' did not extend to questions relating to the medical treatment of a patient but related solely to a patient's business affairs and the like. However, the court did have jurisdiction either under its inherent jurisdiction or under RSC Ord 15, r16 to make a declaration that the proposed operation was lawful on the ground that in the circumstances it was in the best interests of the patient, and although (Lord Griffiths dissenting) such a declaration was not necessary to establish the lawfulness of the operation, because a doctor, could lawfully operate on such a patient if it was in her best interests, in practice the court's jurisdiction should be invoked whenever it was proposed to perform such an operation, since a declaration would establish by judicial process whether the proposed operation was in the best interests of the patient and therefore lawful. In determining whether the proposed operation was in the best interests of the patient the court should apply the established test of what would be accepted as appropriate treatment at the time by a reasonable body of medical opinion skilled in that particular form of treatment. The judge had accordingly been right to grant the declaration sought and the appeal would therefore he dismissed (see p 548 d to f, p550 h, p 552 d, p 553 b, p 554 c to e, p 556 g to p 557 b e f, p 558 a, p 560 e to g, p 561 d e h j, p 562 f, p 563 a, p 565 j to p 566 a f g, p 567 f to h, p 568 g and p 571 b d to f h, post). *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 applied.

Per curiam. (1) Applications for a declaration that a proposed operation on, or medical treatment for, a patient can lawfully be carried out despite the inability of such patient to give his consent to it should be made by way of originating summons issued out of the Family Division of the High Court. The applicants should normally be those responsible for the care of the patient or those intending to carry out the proposed a operation or other treatment if it is declared to be lawful. The patient must always be a party and should normally be a respondent. In cases in which the patient is a respondent the patient's guardian ad litem should normally be the Official Solicitor. In any cases in which the Official Solicitor is neither the next friend nor the guardian ad litem of the patient nor an applicant he must be a respondent. With, a view to protecting the patient's privacy, but always subject to the judge's discretion, the hearing should be in chambers, but the decision and the reasons for it should be given in open court (see p 548 d f g, p 555 d, p 558 c to f, p 561 d e, p 568 h, p 569 a and p 571 f, post).
(2) At common law a doctor can lawfully operate on or give other treatment to adult patients who are incapable of consenting to his doing so, provided that the operation or treatment is in the best interests of such patients. The operation or treatment will be in their best interests only if it is carried our in order either to save their lives or to ensure improvement or prevent deterioration in their physical or mental health (see p 548 d, p549 a b, p551 c, p 557 e, p560 e f, p 561 d e, p 565 j to p 566 a f g and p 571 f h, post).

***Re T* [1992] 4 All ER 649**

T was injured in a car accident when she was 34 weeks pregnant. She was admitted to hospital and the possibility of her requiring a blood transfusion arose. T had been brought up by her mother, who was a Jehovah's Witness, but she was not herself a member of that religious sect. After a private conversation with her mother, T told the staff nurse that she used to belong to a religious sect which believed blood transfusion to be a sin and a bar to eternal salvation, that she still maintained some beliefs of the sect and that she did not want a blood transfusion. Shortly afterwards she went into labour and because of her distressed condition it was decided that delivery should be by Caesarian section. After being alone with her mother, T again told medical staff that she did not want a blood transfusion and was informed that other solutions to expand the blood could be used and that blood transfusions were not often necessary after a Caesarian section. T then blindly signed a form of refusal of consent to blood transfusions but it was not explained to her that it might be necessary to give a blood transfusion to save her life. After undergoing an emergency Caesarian operation her condition deteriorated and she was transferred to an intensive care unit where, given a free hand, the consultant anaesthetist would unhesitatingly have administered a blood transfusion but felt inhibited from doing so in the light of T's expressed wishes. T was instead put on a ventilator and paralysing drugs were administered. T's father and boyfriend applied to the court for assistance and following an emergency hearing the judge authorised the administration of a blood transfusion to T and declared that, in the circumstances then prevailing, it would not be unlawful for the hospital to do so, despite the absence of her consent, because a blood transfusion appeared manifestly to be in her best interests. At a second hearing the judge held that T had neither consented to nor refused a blood transfusion in the emergency which had arisen and accordingly that it was lawful for the doctors to treat her in whatever way they considered, in the exercise of their clinical judgment, to be in her best interests. T appealed.

Held - Although prima facie every adult had the right and capacity to decide whether he would accept medical treatment, even if a refusal might risk a permanent injury to his health or even lead to premature death, and regardless of whether the reasons for the refusal were rational or irrational, unknown or even non-existent, if an adult patient did not have the capacity at the time of the purported refusal and continued not to have that capacity, or if his capacity to make a decision had been overborne by others, it was the duty of the doctors to treat him in whatever way they considered, in the exercise of their clinical judgment, to be in his best interests. On the facts, the doctors had been justified in disregarding T's instructions and in administering a blood transfusion to her as a matter of necessity since the evidence showed that T had not been fit to make a genuine decision because of her medical condition and that she had been subjected to the undue influence of her mother, which vitiated her decision to refuse a blood transfusion. The appeal would therefore be dismissed (see p 660 d f to j, p 661 e to g, p 662 b, p 663 b, p 664 a to g j, p 665 c to f, p 666 d e, p 667 j to p 668 b e and p 670 b, post).

Per Lord Donaldson MR and Butler-Sloss LJ. (1) The next of kin of a patient who is physically and mentally capable of exercising a choice but who is not in the position to make such a decision because, for example, he is unconscious has no legal right to consent or to refuse consent to medical treatment on behalf of the patient. However, to seek the consent of the next of kin is not an undesirable practice if the interests of the patient will not be adversely affected by any consequential delay, since consultation with the next of kin may reveal that the patient has made an anticipatory choice whether to accept or refuse specific treatment, eg a blood transfusion, which

if clearly established and applicable in the circumstances will bind the medical practitioner (see p 653 f to h and p 664 j, post).

(2) The standard forms of refusal to accept a blood transfusion used by hospitals should be redrafted to separate the disclaimer of legal liability on the part of the hospital from the declaration by the patient of his decision not to accept a blood transfusion so as to bring the possible consequences of a refusal forcibly to the patient's attention (see p 663 d e and p 664 g j, post).

(3) A patient should know in broad terms the nature and effect of the procedure to which consent is given or refused. But, although doctors are under a duty to give the patient appropriately full information as to the nature of the treatment and the likely risks (including any special risks attaching to the treatment being administered by particular persons), failure to perform that duty will only amount to negligence and does not as such vitiate a consent or refusal. However, misinforming a patient, whether innocently or not, and withholding information which is expressly or impliedly sought by the patient may well vitiate either a consent or a refusal (see p 663 f g and p 664 j, post).

(4) If, in a potentially life-threatening situation or one in which irreparable damage to the patient's health can be anticipated, doctors or hospital authorities are faced with a refusal of an adult patient to accept essential treatment and they have real doubts as to the validity of that refusal, they should both in the public and the patient's interest at once seek a declaration from the courts as to the lawfulness of the proposed treatment and it should not be left to the patient's family to take action (see p 663 h j and p 664 h j, post).

LAWFUL ARREST

Albert v Lavin [1981] 3 All ER 878

The appellant caused a disturbance in a bus queue while attempting to board a bus. He was restrained by an off-duty police officer who was in plain clothes. A struggle ensued between the appellant and the officer, in the course of which the officer told the appellant that he was a police officer, a statement which the appellant in his excited state honestly but unreasonably disbelieved. The appellant continued to hit the officer and was arrested and charged with assaulting a police officer in the execution of his duty. The appellant was convicted by magistrates on that charge. He appealed, contending, inter alia, that his belief that he was being subjected to an unjustified assault because of his genuine, albeit mistaken, belief that the officer was not a policeman was a good defence to the charge. The Divisional Court ([1981]) 1 All ER 628) dismissed his appeal, holding that it was not a defence to a charge of assault that the accused honestly but mistakenly believed that his action was justified as being reasonable self-defence if there were no reasonable grounds for his belief. The appellant appealed to the House of Lords.

Held - The well-established principle that to detain a man against his will without arresting him was an unlawful act and a serious interference with a citizen's liberty was subject to an equally well-established exception (which was not confined to detention effected by a police constable in the execution of his duty) that it was the right and duty at common law of every citizen in whose presence an actual or reasonably apprehended breach of peace was being or about to be committed to make the person who was breaking or threatening to break the peace refrain from so doing and, in appropriate cases, to detain him against his will. It followed therefore that, even if the appellant's belief that the officer was a private citizen and not a constable had been correct, it would not have made his resistance to the officer's restraint of

him lawful. The appeal would accordingly be dismissed (see p 880 c to e f and h to p 881 b, post).

Decision of the Divisional Court of the Queen's Bench Division [1981] 1 All ER 628 affirmed on other grounds.

Collins v Wilcock **[1984] 1 WLR 1172**

See above.

SELF DEFENCE

R v Williams (Gladstone) **(1984) Cr App R 276**

M saw a youth attempting to rob a woman in the street. He gave chase, knocked the youth to the ground and attempted to immobilise him. The appellant, who had not witnessed the attempted robbery, then came on the scene. M told the appellant that he was a police officer, which was untrue, and that he was arresting the youth. When M failed to produce a warrant card a struggle ensued in which the appellant punched M in the face. The appellant was charged with assault causing actual bodily harm. At his trial his defence was that he had honestly believed that the youth was being unlawfully assaulted by M and that it was irrelevant whether his mistake was reasonable or unreasonable. The judge directed the jury that the appellant had to have an honest belief based on reasonable grounds that M was acting unlawfully. The appellant was convicted. He appealed on the ground that the judge had misdirected the jury.

Held - if a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant's belief was only material to the question of whether the belief was in fact held by the defendant at all. it followed that there had been a material misdirection. The appeal would therefore be allowed and the conviction quashed (see p 413 g, p 414 c to e and p 415 d e g j, post).

Dictum of Lawton LJ in *R v Kimber* [1983] 3 All ER at 320 applied.

Dictum of Hodgson J in *Albert v Lavin* [1981] 1 All ER at 639 disapproved.

Per curiam. The defence of self-defence is made out if the defendant shows that he used such force in the defence of himself or another as was reasonable in the circumstances as he believed them to be. However, if the defendant's alleged belief was mistaken and his mistaken belief was unreasonable that may be good grounds for the jury to find that the belief was not honestly held (see p 415 f, post).

Beckford v R **[1988] AC 130**

The appellant was a police officer who was a member of an armed posse which was sent to investigate a report that an armed man was terrorising and menacing his family at their house. When the police arrived at the house a man ran out of the back of the house pursued by police officers, including the appellant. There was a conflict of evidence about what then occurred. The Crown alleged that the man was unarmed and was shot by the appellant and another police officer after he had been discovered in hiding and had surrendered, while the appellant claimed that the man had a firearm, had fired at the police and had been killed when they returned the fire. At the trial of the appellant for murder the judge directed the jury that if the appellant had a reasonable belief that his life was in danger or that he was in danger of

serious bodily injury he was entitled to be acquitted on the grounds of self-defence. He was convicted. He appealed to the Court of Appeal of Jamaica, contending that he was entitled to rely on the defence of self-defence if he had had an honest belief that he had been in danger. The Court of Appeal held that the appellant's belief that the circumstances required self-defence had to be reasonably and not merely honestly held, and dismissed his appeal. The appellant appealed to the Privy Council.

Held - if a plea of self-defence was raised when the defendant had acted under a mistake as to the facts, he was to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake was reasonable. Accordingly, the test for self-defence was that a person could use such force in the defence of himself or another was reasonable in the circumstances as he honestly believed them to be. It followed that the trial judge had misdirected the jury. The appeal would therefore be allowed and the conviction quashed (see p 426 g, p 431 e f and p 432 e f, post).

R v Williams (1983) [1987] 3 All ER 411 approved.

Palmer v R [1971] 1 All ER 1077 explained.

Per curiam. A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot: circumstances may justify a pre-emptive strike in self-defence (see p 431 c d, post).

NECESSITY

***Re F* [1989] 2 All ER 545**

See above.

PROVOCATION

***Lane v Holloway* [1967] 3 All ER 129**

The plaintiff, an old man of sixty-four, and the defendant, a young man of twenty-three, were neighbours. Relations between them were strained because of the defendant's cafe, noise from which disturbed the court where they both lived. One night at about 11 p.m. the plaintiff, having returned from a public house, was talking to a neighbour in the courtyard. The defendant's wife called out to them, and the plaintiff replied; this was vulgar abuse between them. The defendant came to the window and said "What did you say to my wife?". The plaintiff replied with words that amounted to a challenge to fight. The defendant came down into the yard and approached the plaintiff menacingly. The plaintiff punched him on the shoulder, whereupon the defendant hit the plaintiff a severe blow on the eye. The plaintiff was in hospital for a month from the injury thus caused, and had nineteen stitches roud his eye. The defendant was found guilty, by a magistrates' court, of unlawful wounding. In an action for personal injuries the trial judge found that the injury to the plaintiff's eye was caused by the defendant's fist alone, and, on the question of the amount of damages, took into consideration the plaintiff's own bad behaviour by way of mitigation of damages and awarded £75 damages. On appeal,

Held: (i) as the blow struck by the defendant was a savage blow out of all proportion to the occasion, there was an assault for which he was liable in damages to the plaintiff, neither the maxim ex turpi causa non oritur actio nor the maxim volenti non fit injuria affording a defence (see p. 131, letters F and G, p. 133, letters D and E, and p. 136, letter H, post).

(ii) the amount of the compensation to be awarded as damages for the physical injury done ought not to have been reduced by reason of the

provocation afforded by the plaintiff's conduct; and accordingly the damages would be increased from £75 to £300 (see p. 132, letters B and C, p. 133, letter G, p. 134, letter I, to p. 135, letter A, and p. 135, letter E, post).

Fontin v. Katapodis ((1962), 108 C.L.R. 177) applied.

Appeal allowed.