(iii) In *Cambridge and District Co-operative Society Ltd* v *Ruse* [1993] IRLR 156 the EAT held that it was reasonable for an employee to refuse alternative work if the new job involved what he reasonably believed to be a loss of status. In that case the manager of a Co-op mobile butcher's shop was offered a post in the butcher's section of a Co-op supermarket which he refused to accept because he was under another manager; quite reasonably, he felt it involved a loss of status. He was successful in his claim for a redundancy payment.

LAW OF TORTS: GENERAL PRINCIPLES

Nature of tort: not all harm is actionable

261 *Perera* v *Vandiyar* [1953] 1 All ER 1109

The claimant was the tenant of a flat in Tooting, and the defendant was the landlord. On 8 October 1952, the landlord cut off the supply of gas and electricity to the flat in order to induce the claimant to leave. As a result, the claimant was forced to move out of the flat and lived elsewhere until the services were restored on 15 October 1952. The claimant sought damages for breach of implied covenant for quiet enjoyment, and for eviction.

Held – the claimant was entitled to damages for breach of the implied covenant, but punitive damages on the purported tort of eviction were not recoverable because the defendant had not committed a tort. It had not been necessary for the defendant to trespass on any part of the demised premises in order to cut off the services, and mere intention to evict was not a tort.

Comment This kind of conduct by a landlord is now a criminal offence under s 1 of the Protection from Eviction Act 1977. However, there is no civil action for breach of the statutory duty (*McCall* v *Abelesz* [1976] 1 All ER 727).

262 *Hargreaves* v *Bretherton* [1958] 3 WLR 463

The claimant pleaded that the defendant had falsely and maliciously and without just cause or excuse committed perjury as a witness at the claimant's trial for certain criminal offences, and that as a result the claimant had been convicted and sentenced to eight years' imprisonment. A point of law arose because the claimant's case was, in effect, based on the purported tort of perjury.

Held – no action lay on this cause, since there was no tort of perjury, and, therefore, the claimant's claim must be struck out.

263 *Roy* v *Prior* [1969] 3 All ER 1153

The claimant, a doctor, sued the defendant, a solicitor, for damages alleging, amongst other things, that the defendant had caused his arrest and forcible attendance at court to give evidence in a criminal case by saying falsely in court that the claimant was evading a witness summons. The action failed, Lord Denning, MR saying in the course of his judgment:

> It is settled law that, if a witness knowingly and maliciously tells untruths in the witness box, and as a result an innocent person is imprisoned, nevertheless no action lies against that witness. . . . The reason lies in public policy. Witnesses must be able to give their evidence without fear of the consequences. They might be deterred from doing so if they were at risk of being sued for what they said. So the law gives a witness the cloak of absolute immunity from suit. This applies not only to statements made by a witness in the box, but also to statements made whilst he is giving his proof to his solicitor beforehand. The reason is because the protection given to the witness in the box would be useless to him if it could be got round by an action against him in respect of his proof. . . .

Comment The Criminal Justice Act 1988 gives prisoners whose convictions are quashed or pardoned a *right* to monetary compensation from the government. The matter of compensation was formerly a matter for the discretion of the Home Secretary.

Nature of tort: no tort of invasion of privacy: effect of the law of confidence

263a *Douglas and Others* v *Hello! Ltd* [2005] 4 All ER 128

The first two claimants are well-known film stars. They married in November 2000. Before the ceremony they made a contract with the third claimant, *OK!* magazine, under which that magazine acquired exclusive photographic rights to the event. Unauthorised photographs were taken at the event and sold to *OK!*'s rival magazine *Hello!* which published them on the same day as *OK!* magazine. The claimants asked for damages for breach of confidence and the film stars claimed additionally for breach of the law of privacy.

The High Court ruled in 2003 that there was no existing tort of breach of privacy and refused to extend the common law into this area. There was furthermore no need to introduce Art 8 of the Convention on Human Rights (right to respect for private and family life) because English law was not

inadequate in regard to the circumstances of this case. It could be dealt with as a breach of commercial confidence which was a recognised head of law. The judge also awarded the Douglases compensation for damage and distress under the Data Protection Act 1998. The unauthorised pictures were to be regarded as personal data and *Hello!* magazine was a data controller. Thus publication of the pictures was 'processing' by *Hello!* which was bound by the requirements of the Act. The judge said however that damages for the data infringement would be nominal. The amount of the other damages was left to be dealt with on the basis of submissions by the parties at a later date.

Comment (i) The High Court was of the opinion that if a general law of invasion of privacy was to be created it should be done by Parliamentary legislation and not by the judiciary since the latter did not have adequate consultation powers with interests that might be affected.

On appeal to the Court of Appeal in 2005 that court, in a landmark privacy ruling, found that *Hello!* had breached the privacy rights of Michael Douglas and Catherine Zeta-Jones by taking unauthorised pictures of their wedding but had not tried to cause commercial damage to rival *OK!* by publishing the photos. Overruling the 2003 High Court judgment, the Court of Appeal ruled that *Hello!* need not pay *OK!* £1 million compensation for commercial damage and a similar amount for legal costs. However, the court upheld the Douglases' award of £14,750 but refused to increase it, as they had received £1 million from *OK!* for the authorised shots. As regards the position between the magazines, the economic tort relied upn by *OK!* had to be done with the intention of injuring the claimant, whereas *Hello!* merely intended to boost its own sales.

It appears from this judgment that an individual has a right to protect his or her privacy.

(ii) In *A* v *B plc* [2001] 1 WLR 2341 the claimant was a married professional footballer. He claimed an injunction against the first defendant newspaper to restrain it from publishing or disclosing any information concerning the sexual relationship he had had with the second defendant and another woman and to restrain any disclosure by the women to anyone with a view to such information being published in the media.

The High Court granted the injunction. Having said that the claimant succeeded on the basis of confidentiality there being no matter of public interest (in the legal sense) in the circumstances as there might be in revelations of commercial fraud, the judge went on to say that the claimant's Convention right to privacy under Art 8 of the Convention prevailed over the defendant newspaper's right to freedom of expression under Art 10 of the Convention.

Nature of tort: expanding role of negligence from the Atkinian neighbour test

264 ***Donoghue (or M'Alister)* v *Stevenson*** [1932] AC 562

The appellant's friend purchased a bottle of ginger beer from a retailer in Paisley and gave it to her. The respondents were the manufacturers of the ginger beer. The appellant consumed some of the ginger beer and her friend was replenishing the glass, when, according to the appellant, the decomposed remains of a snail came out of the bottle. The bottle was made of dark glass so that the snail could not be seen until most of the contents had been consumed. The appellant became ill and served a writ (now claim form) on the manufacturers claiming damages. The question before the House of Lords was whether the facts outlined above constituted a cause of action in negligence. The House of Lords *held* by a majority of three to two that they did. It was stated that a manufacturer of products, which are sold in such a form that they are likely to reach the ultimate consumer in the form in which they left the manufacturer with no possibility of intermediate examination, owes a duty to the consumer to take reasonable care to prevent injury. This rule has been broadened in subsequent cases so that the manufacturer is liable more often where defective chattels cause injury. The following important points also arise out of the case.

(*a*) It was in this case that the House of Lords formulated the test that the duty of care in negligence is based on the foresight of the reasonable man. As Lord Atkin said:

> The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' [fault] is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. 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? The answer seems to be – 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.

(*b*) Lord Macmillan's remark in his judgment that the categories of negligence are never closed suggests that the tort of negligence is capable of further expansion. That this has been so is revealed by the discussion of later cases in Chapter 21. There are still some difficulties in regard to the extension of the principle where physical damage to *property* causes a money loss, e.g. a loss of profit.

(*c*) The duty of care with regard to chattels as laid down in the case relates to chattels not dangerous in themselves. The duty of care in respect of chattels dangerous in themselves, e.g. explosives, is much higher.

(*d*) The appellant had no cause of action against the retailer in contract because her friend bought the bottle, so that there was no privity of contract between the retailer and the appellant. Therefore, terms relating to fitness for purpose and merchantable (now satisfactory) quality, now implied into such contracts by the Sale of Goods Act 1979, did not apply here.

Comment (i) A remedy under the Sale of Goods Act could have been given to the appellant if the reasoning of Tucker, J in *Lockett* v *A & M Charles Ltd* [1938] 4 All ER 170 had been applied in *Donoghue*. In *Lockett*, husband and wife went into a hotel for lunch. The wife ordered whitebait which was not fit for human consumption. She only ate a small amount of the whitebait and was then taken ill. In the subsequent action against the hotel, Tucker, J *held* that although the husband ordered the meal there was an assumption in these cases that each party would be, if necessary, personally liable for what he or she consumed. There was, therefore, a contract between the hotel and the wife into which Sale of Goods Act terms could be implied and she was awarded damages because the whitebait was not fit for the purpose or of merchantable (now satisfactory) quality. This approach is surprisingly modern in spite of the fact that the case was decided in 1938.

(ii) The general statement of principles in this case is at the root of the tort of negligence. However, it should be noted that the Consumer Protection Act 1987 provides a statutory basis for claims against a manufacturer for product liability and without the need to prove negligence (see further Chapter 21).

Damage and liability: *damnum sine injuria*; effect of malice and relevance of motive

265 ***Best* v *Samuel Fox & Co Ltd*** [1952] 2 All ER 394

Best was a workman at the defendant's factory and because of an accident caused by the defendant's negligence he was emasculated and thus rendered incapable of sexual intercourse. Best's claim for damages was successful but his wife also claimed damages for loss of her husband's *consortium* through the defendant's negligence. The House of Lords *held* that her claim failed because the *damnum* was not of a kind recognised by law. 'It is true that a husband is entitled to recover damages for loss of *consortium* against a person who negligently injures his wife, but this exceptional right is an anomaly at the present day. A wife . . . was never regarded as having any proprietary right in her husband. . . .' (*per* Lord Morton of Henryton).

Comment Some American jurisdictions allow such a claim. The *Best* case is in no sense anti-female. The House of Lords simply took the view that the right of *consortium* in both parties was an anachronism and took the opportunity to deny the right of *consortium* in the wife. The Law Commissioners recommended giving equal rights to husband and wife by abolishing the husband's right to compensation for loss of his wife's *consortium.* (See Report No 56 on *Personal Injury Litigation – Assessment of Damages* (1973).) This has been achieved by s 2(a) of the Administration of Justice Act 1982.

266 ***Electrochrome Ltd* v *Welsh Plastics Ltd*** [1968] 2 All ER 205

A lorry driver employed by the defendants drove the defendants' vehicle into a fire hydrant near to the claimant's factory. Water escaped from the damaged hydrant and the supply had to be cut off while repairs were carried out. The claimant lost a day's work at its factory and sued for this loss. However, since it was not the owner of the hydrant, it was *held* that no action lay. The claimant had suffered loss, but there had been no infringement of its legal rights.

Comment (i) The case is a good example of the reluctance of a court to allow the law of tort to be used to compensate for economic loss, i.e. the mere loss of an opportunity to make a profit, perhaps on the ground that the law of contract is more concerned with the loss of expectations. Furthermore, the decision in this case can be reached by way of *damnum sine injuria* or by saying that there was no duty of care or, if there was, that the damage was too remote.

(ii) In *Junior Books Ltd* v *Veitchi Co Ltd* (1982) (see Chapter 21) the House of Lords decided that if a claimant was in sufficiently close proximity to the defendant, he could recover foreseeable economic loss, even though there was no physical damage either to a person or to property. It would, however, be unwise to assume that *Junior Books* covers all cases of economic loss, particularly where, as in the *Electrochrome* case, proximity of the claimant and defendant does not exist in the *Junior Books* way. Anyway, the effect of the decision has been largely whittled away in more recent cases (see Chapter 21).

267 ***Bradford Corporation* v *Pickles*** [1895] AC 587

The Corporation had statutory power to take water from certain springs. Water reached the springs by percolating (but not in a defined channel) through neighbouring land belonging to Pickles. In order to induce the Corporation to buy his land at a high price, Pickles sank a shaft on it, with the result that the water reaching the Corporation's reservoir was discoloured and its flow diminished. The Corporation asked for an injunction to restrain Pickles from collecting the subterranean water.

Held – an injunction could not be granted. Pickles had a right to drain from his land subterranean water not running in a defined channel. (This right of a landowner was established by the House of Lords in *Chasemore* v *Richards* (1859) 7 HL Cas 349.) Any malice which he might have had in doing it did not affect that right, since English law knows no doctrine of abuse of rights. No use of property which would be legal if due to a proper motive can become illegal because it is prompted by an improper or malicious motive.

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

The defendant as a 'practical joke', called on Mrs Wilkinson and told her that her husband had been seriously injured in an accident while returning home from the races and had had both his legs broken. Mrs Wilkinson travelled to see her husband at Leytonstone and, believing the message to be true, sustained nervous shock and in consequence was seriously ill. This action was brought for damages for false and malicious representation. Damages were awarded. The court *held* that intentional physical harm is a tort even though it does not consist of a trespass to the person. Further, whether the act is malicious or by way of a joke is irrelevant.

Comment (i) Although it is often stated that trespass lies only for direct damage, trespass is felt to be the basis of this action and it clearly suggests that the tort of trespass is available for indirect physical damage caused wilfully.

(ii) The *Wilkinson* case was the sole basis of liability in the defendant in *C* v *D* [2006] All ER (D) 329 (Feb). The case concerned the alleged sexual abuse of the claimant while a school pupil. The first incident involved showing a video of the claimant and others in the school showers and the second concerned an incident in the school infirmary where the defendant had allegedly pulled down the claimant's trousers and underwear and had stared at his genitals. The claim was for psychiatric injury and the mental intention of the defendant to cause it. The judge found that the video was not a cause of psychiatric injury but the infirmary incident was. The question was 'did the defendant mean it?' Was it possible to impute a bad motive under in the *Wilkinson* situation? The judge ruled that a less than innocent motive could be imputed and was imputed as regards the infirmary incident on the basis that the defendant was at least reckless as to whether he caused psychiatric harm.

There was little discussion of the vicarious liability of D's employer, a local authority, but the authority was held vicariously liable, since sexual abuse had been regarded as within the course of employment in the sense that D's employment gave him the opportunity to carry out the abuse (see *Lister* v *Hesley Hall Ltd* [2001] 1 AC 215 (Case **284a**)).

Minors: liability as defendant

269 ***Williams* v *Humphrey***, *The Times*, 20 February 1975

The defendant, a youth of nearly 16, accompanied his friend and the friend's parents to a swimming pool. As part of the general fun, the defendant pushed the friend's father, the claimant, a middle-aged man, into the shallow end of the pool, merely intending to cause a big splash. The claimant's left foot struck the edge of the pool and he sustained severe injuries to his foot and ankle. He underwent five operations and ended up disabled. It was *held* – by Talbot, J – the claimant had not taken such part in the pool activities that he could be said to have willingly accepted the risk of personal injury and the defendant was guilty of both negligence and trespass to the person. The claimant succeeded.

Comment (i) It may be puzzling to the reader why this action was worthwhile in terms of the fact that the defendant would not have had a lot of money in his personal capacity. However, there was a household insurance policy available. Most modern household insurance policies have a public liability clause which provides cover, sometimes up to £1 million or more for accidents caused by the householder or his family.

(ii) In *Mullin* v *Richards* [1998] 1 WLR 1304 the defendant was a 15-year-old schoolgirl, as was the claimant. A play fight between the two with plastic rulers ended with the claimant getting a piece of plastic in her eye and losing the sight in it. The matter of the defendant's liability in negligence arose. The Court of Appeal ruled that she was not liable. There was not sufficient evidence to show that the accident was readily foreseeable by a ordinarily prudent and reasonable 15-year-old schoolgirl. There was no dangerous force used over and above that which was inherent in play fencing of this kind that the school had not prohibited.

Minors: liability of parents and others in charge of minors; negligent control

270 *Donaldson* v *McNiven* [1952] 1 All ER 1213

The defendant lived in a densely populated area of Liverpool and allowed his 13-year-old son to have an air rifle on condition that he did not use it outside the house. The defendant's house had a large cellar and the boy was told to use the rifle there. Without the defendant's knowledge, the boy fired the air rifle at some children playing near to the house, injuring the claimant, a child of five.

Held – in the circumstances the precautions taken by the defendant were reasonable and would have been adequate but for his son's disobedience, which could not have been foreseen because the boy was usually obedient. The defendant was not guilty of negligence.

271 *Bebee* v *Sales* (1916) 32 TLR 413

A father allowed his 15-year-old son to retain a shotgun with which he knew he had already caused damage. The father was *held* liable for an injury to another boy's eye.

Comment Cases **270** and **271** were decided on the ordinary principles of negligence at common law. However, since the Air Guns and Shot Guns Act 1962 (see now the Firearms Act 1968 and amending legislation), an action may lie against the parent for breach of statutory duty. The Act makes it a criminal offence to give an air weapon to a person under 14 years, and restricts the use or possession of air weapons by young persons in public places except under supervision. In any case, breaches of these statutory duties could be relied upon as evidence of negligence. Furthermore, a person injured might now claim compensation from the Criminal Injuries Compensation Board. The age of the child causing the injury is not a bar to a claim against the Board because payments will be made even though the child inflicting the injury is below the age of criminal responsibility. In *Gorely* v *Codd* [1966] 3 All ER 891, the claimant was injured by a pellet from Codd's air rifle when they were larking about in a field in open country. Codd was 16½ years of age, and when the claimant sued Codd's father, the court found that he had given proper instruction to his son and was not liable at common law. Since the shooting did not occur in a public place, there was no breach of the Air Guns and Shot Guns Act 1962 (see now the Firearms Act 1968 and amending legislation).

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

A boy aged four years was a pupil at a nursery school run by the appellants who were the local education authority. The boy and another were made ready to go out for a walk with the mistress in charge who left them for a moment in order to get ready herself. She did not return for 10 minutes, having treated another child who had cut himself. During her absence, the boy got out of the classroom and made his way through an unlocked gate, down a lane, and into a busy highway. He caused the driver of a lorry to swerve into a telegraph pole, as a result of which the driver was killed. His widow brought an action for damages for negligence.

Held – in the circumstances of the case the mistress was not negligent so the liability of the local authority was not vicarious. However, the local authority was negligent itself because it had not taken reasonable precautions to keep young children who used the premises from getting out into the highway.

273 *Butt* v *Cambridgeshire and Isle of Ely County Council* (1969) 119 NLJ 118

The claimant was a pupil in a class of 37 girls of nine and 10 years of age. She lost an eye when another girl in her class waved pointed scissors which the children were using to cut out illustrations. The teacher was giving individual attention to another child.

Held – by the Court of Appeal – her claim for damages failed. The teacher was not under a duty to require all work to stop while she was giving individual attention to members of the class. She was not negligent so that there was no vicarious liability in the local authority. The local authority was not liable for its own negligence in that evidence of experienced teachers showed that there was no fault in the system of using pointed scissors.

Mental patients: liability in tort

274 *Morriss* v *Marsden* [1952] 1 All ER 925

The defendant took a room at a hotel in Brighton, and whilst there he violently attacked the claimant, who was the manager of the hotel. Evidence showed that at the time of the attack the defendant was suffering from a disease of the mind. He knew the nature and quality of his act, but did not know that what he was doing was wrong. The claimant sued for damages for assault and battery.

Held – since the defendant knew the nature and quality of his tortious act, it did not matter that he

did not know what he was doing was wrong, and he was liable in tort.

Diplomatic immunity in tort: nature of

275 ***Dickinson* v *Del Solar*** [1930] 1 KB 376

The claimant had been knocked down by a car driven by the defendant's servant. The defendant was the First Secretary of the Peruvian Legation in London. The Head of the Legation directed the defendant not to plead diplomatic privilege, and the defendant entered an appearance in the action. The claimant succeeded and the defendant's insurance company refused to indemnify its client, saying, in effect, that his diplomatic immunity was immunity from liability.

Held – the insurer was liable to indemnify the defendant. Diplomatic agents are not immune from liability for wrongful acts, but are merely immune from suit. This immunity can be waived with the sanction of the sovereign of the state in question, or an official superior of the person concerned. The defendant's act in entering an appearance operated as a waiver of diplomatic privilege, and judgment was properly entered against him.

Corporations: as claimants in tort

276 ***D & L Caterers and Jackson* v *D'Anjou*** [1945] 1 All ER 563

The claimant owned a West End restaurant called the 'Bagatelle'. The defendant made certain statements alleging that the restaurant was operated illegally and obtained its supplies on the black market.

Held – the statements were defamatory and a limited liability company could sue for slander without proof of special damage. Where the slander related to its trade or business, the law implied the existence of damage to found the action.

Corporations: as defendants in tort

277 ***Poulton* v *London and South Western Railway Co*** (1867) LR 2 QB 534

The claimant was arrested by a stationmaster for non-payment of carriage in respect of his horse. The defendant (the employer of the stationmaster) had power to detain passengers for non-payment of their own fare, but for no other reason.

Held – since there was no express authorisation of the arrest by the defendant, the stationmaster was acting outside the scope of his employment and the defendant was not liable.

278 ***Campbell* v *Paddington Borough Council*** [1911] 1 KB 869

The defendant Council, in accordance with a resolution duly passed, erected a stand in Burwood Place in order that members of the Council might view the funeral procession of King Edward VII passing along the Edgware Road. The claimant, who occupied certain premises in Burwood Place, often let the premises for the purpose of viewing public processions passing along the Edgware Road. The stand obstructed the view of the funeral procession from the claimant's house and she was unable to let the premises for that purpose.

Held – as the stand constituted a public nuisance, the claimant could maintain an action for the special damage which she had sustained through the loss of view. The Council was properly sued, and the fact that the erection of the stand was probably *ultra vires* did not matter.

Comment The damages in this case must be regarded as parasitical because the law does not recognise a right to a view or prospect and it must be accepted therefore that a claimant may recover as part of his damages for injury to a recognised interest a financial loss related to another interest which would not in itself be protected by the law. (See also *Spartan Steel and Alloys Ltd* v *Martin & Co Ltd* (1972) in Chapter 21.)

Vicarious liability: who is a servant? Control and other tests; transfer of employees

279 ***Garrard* v *Southey (A E) and Co and Standard Telephones and Cables Ltd*** [1952] 2 QB 174

Two persons employed by electrical contractors were sent to work in a factory on electrical installations. The electrical contractors continued to employ the men, paying their wages, stamping their insurance cards, and retaining the sole right to dismiss them. The electricians worked exclusively at the factory and used the factory canteen. The occupiers of the factory supplied them with all materials, tools and plant, except for certain special tools belonging to the electricians themselves. They were supervised by a foreman employed by the occupiers and they followed the system laid down in the factory. One of the electricians was injured when he fell from a defective trestle owned by some building contractors who were also working in the factory.

Held – the occupiers of the factory, and not the electrical contractors, owed the injured electrician the common-law duty of a master to his servant (to provide proper plant and equipment) and they were liable to him for breach of that duty.

Comment It is worth noting that the *Garrard* decision is an extremely rare one. There is a very strong presumption that the general or permanent employer remains liable. Thus in *Morris* v *Breaveglen (t/a Anzac Construction Co), The Times*, 29 December 1993, the Court of Appeal held that an employer was liable to his employee sent to work under a labour-only sub-contract, which was under the direction and control of the main contractor, if the system of work was unsafe.

280 *Mersey Docks and Harbour Board* v *Coggins and Griffiths (Liverpool) Ltd and McFarlane* [1947] AC 1

A company of stevedores had hired from the Harbour Board the use of a crane together with its driver, Mr Newall, to assist in loading a ship lying in the Liverpool docks. The contract of hire was subject to the Board's regulations, one of which contained the clause: 'The driver provided shall be the servant of the applicants.' The driver of the crane was a skilled man appointed and paid by the Board, and the Board alone had power to dismiss him. The stevedores told the driver what they wanted the crane to lift but had no authority to tell him how to work the crane. McFarlane, who was a checker employed by the forwarding agents, was noting the number and marks on a case which the crane had picked up when he was trapped because of the negligence of the crane driver in failing to keep the crane still.

The question to be determined was whether in applying the doctrine of vicarious liability the general employer of the crane driver or the hirer was liable for his negligence. The Board contended that, under the terms of the contract between the Board and the stevedores, the stevedores were liable.

Held – by the House of Lords:

(*a*) The question of liability was not to be determined by any agreement between the general employer and the hirer, but depended on the circumstances of the case. The test to apply was that of control.

(*b*) The Board, as the general employer of the crane driver, had not established that the hirer had such control of the crane driver at the time of the accident as to become liable as employer for his negligence. Although the hirer could tell the crane driver where to go and what to carry, the hiring company had no authority to tell him how to operate the crane. The Board was, therefore, liable for his negligence.

Comment The answers given by Mr Newall to counsel's questions in this case were highly important. At one point he said: 'I take no orders from anybody.' Commenting on this, Lord Simonds said that it was 'a sturdy answer which meant that he was a skilled man and knew his job and would carry it out in his own way. Yet ultimately he would decline to carry it out in the appellants' way at his peril, for in their hands lay the only sanction the power of dismissal.'

281 *Wright* v *Tyne Improvement Commissioners (Osbeck & Co Ltd, Third Party)* [1968] 1 All ER 807

Tyne Improvement Commissioners hired a crane to Osbeck & Co Ltd, under a written contract whereby the hirer agreed 'to bear the risk of and be responsible for all damage, injury or loss whatsoever, howsoever and whensoever caused arising directly or indirectly out of or in connection with the hiring or use of the said crane'. The claimant, who was a docker employed by Osbeck & Co, was injured when a wagon, in which he was standing to receive timber, was negligently moved forward by the capstan driver causing the claimant to collide with timber being lowered into the wagon by the crane. The claimant and the crane driver did all they could to avoid the accident but failed to do so and it was accepted that the capstan driver, who was employed by the Commissioners, was wholly to blame. Under the doctrine of vicarious liability, the Commissioners were also to blame. When the action was tried at Newcastle-upon-Tyne Assizes, Waller, J awarded the claimant damages of some £2,985 against the Commissioners, but dismissed a claim by the Commissioners against Osbeck & Co, as the hirer of the crane, for an indemnity against the claimant's claim by virtue of the clause quoted above. The Commissioners now appealed against the dismissal of the claim for indemnity.

Held – by the Court of Appeal – as the accident arose directly, or at least indirectly, out of or in connection with the use of the crane, the indemnity clause entitled the Commissioners to an indemnity against Osbeck & Co even though the use to which the crane was being put was not a blameworthy cause of the accident.

282 *Cassidy* v *Ministry of Health* [1951] 2 KB 343

The claimant's left hand was operated on at the defendant's hospital by a whole-time assistant medical officer of the hospital. After the operation the claimant's hand and forearm were put in a splint for 14 days. During this time the claimant complained of pain but was merely given sedatives by the doctors who attended him. When the splint was removed, it was found that all four fingers of the claimant's hand were stiff, and that his hand was virtually useless. Someone – either the doctor, the surgeon, or a nurse

– had been negligent, but the claimant could not in fact point to which of these it was. The claimant sued the defendant for negligence.

Held – the defendant was liable, in spite of its absence of real control over the type of work done by the doctors it employed. Denning, LJ stated that only where the patient himself selects and employs the doctor will the hospital authorities escape liability for that doctor's negligence. If the person causing the harm is part of the organisation, the employer is liable.

Comment In this case Lord Denning used the doctrine *res ipsa loquitur* (see Chapter 21) in order to help the claimant to establish his case. In other words, he presumed negligence, thus relieving the claimant of the burden of actually having to point to a particular employee of the negligent Ministry.

283 *Ferguson* v *John Dawson & Partners (Contractors)* [1976] 3 All ER 817

The claimant who was working 'on the lump' was injured whilst working for the defendants who were contractors. No deductions were made by the defendants for income tax or national insurance contributions and the claimant had been told that he was working 'purely as a lump labour force'. The defendants' site agent was responsible for hiring and dismissing the workmen, including the claimant; he told them what to do and moved them from site to site. If tools were required for the work, the defendants provided them. The claimant was injured when he fell off a roof which had no guard rail and he brought this action against the defendants on the basis that they were liable as his employers for failing to provide a guard rail on the flat roof which was required by construction regulations. It was *held* – by the Court of Appeal – that whatever label was put on the parties' relationship, other factors should be considered, such as the fact that the defendants could dismiss the workmen, including the claimant, and tell them what to do and where to do it. Accordingly, the claimant was the employee of the defendants who were, therefore, liable under the construction regulations and must pay the claimant damages for breach of that statutory duty.

284 *Lee (Catherine)* v *Lee's Air Farming Ltd* [1960] 3 All ER 420

In 1954 the appellant's husband formed the respondent company which carried on the business of crop spraying from the air. In March 1956, Mr Lee was killed while piloting an aircraft during the course of topsoil dressing, and Mrs Lee claimed compensation from the company, as the employer of her husband, under the New Zealand Workers' Compensation Act 1922. Since Mr Lee owned 2,999 of the company's 3,000 £1 shares and since he was its governing director, the question arose as to whether the relationship of master and servant could exist between the company and him. He was employed as the company's chief pilot under a provision in the articles at a salary to be arranged by himself.

Held – Mrs Lee was entitled to compensation because her husband was employed by the company in the sense required by the Act of 1922, and the decision in *Salomon* v *Salomon & Co* was applied.

Comment The Employment Appeal Tribunal distinguished *Lee*'s case in *Buchan* v *Secretary of State for Employment* (1997) 565 IRLB 2 (see Chapter 19). Policy considerations were involved. Employment protection claims are met by the state and not, as in *Lee*'s case, by a company backed up by an insurance company.

Acts personal to the employee: a move towards greater employer liability

284a *Lister* v *Hesley Hall Ltd* [2001] 2 All ER 769

The claimants were boys at a school for children with emotional difficulties. It was owned and managed by the defendant company. The company employed a warden and housekeeper to look after the claimants. He systematically abused them. They brought claims for personal injury against the company as vicariously liable for the acts of the warden. The case reached the House of Lords on appeal. Their Lordships were faced by a defence that in essence stated that the warden in abusing the claimants was not acting in the course of his employment but was in abusing the claimants doing acts personal to himself. The abuse was no part of his employment. The employment merely gave him the *opportunity* to abuse the claimants. The House of Lords did not accept this defence. Whatever may be the grounds for this *fact* decision, it must be regarded as an essential background to the case that the employers were better able to pay any damages awarded to the claimants. Nevertheless, it would now seem to be the law that even though the act is not within the ordinary course of employment and where the employment merely gives the employee an *opportunity to commit the tortious act* the employer may nevertheless be held liable for it. A previous decision by the Court of Appeal in *Trotman* v *North Yorkshire CC* [1998] 1 CLY 2243 that acts of sexual abuse were beyond the scope of employment so that the employer was not liable was overruled by the House of Lords in the *Lister* case.

Comment The decision of the Court of Appeal in *Fennelly* v *Connex South Eastern Ltd* (2001) 675 IRLB 11 further liberalises the attitude of the courts to what can be regarded as within the scope of employment.

The facts of the case occurred at Bromley South railway station. Mr Fennelly had already shown his ticket to an inspector and refused to show it again to another inspector, a Mr Sparrow. There was an altercation that ended with Mr Sparrow assaulting Mr Fennelly by putting a headlock on him and dragging him down a a few steps on the station stairway. On being sued as vicariously liable for the assault, Mr Sparrow's employer Connex was held not liable because the trial judge said that Mr Sparrow had become angry and 'was pursuing his own ends'. The Court of Appeal did not agree and found Connex liable. The judgment says that the High Court from which the appeal was made had taken too narrow a view of the facts. What had occurred would not have done so without Mr Sparrow's power given by his employers to inspect tickets while he was on his employer's premises. The downside of decisions like this is that the business employer, who is normally insured against these risks has to pay higher insurance premiums. They are not helpful to the consumer either since the employer's insurance costs are normally passed on to the consumer by way of increased prices for the goods and/or services. The third party benefits, of course, but ultimately at the consumer's expense.

A further and later example is to be found in the ruling of the Court of Appeal in *Mattis* v *Pollock (t/a Flamingo's Nightclub), The Times*, 16 July 2003. In that case the defendant ran a nightclub and employed a doorman. The defendant knew that the doorman was prepared to use physical force when carrying out his duties. The claimant became involved in an altercation with the doorman. Afterwards the doorman went home and armed himself with a knife. He returned to the vicinity of the nightclub intending to take revenge for the injuries he had received earlier. He attacked the claimant with the knife. The claimant's spinal cord was severed and he was rendered a paraplegic. The claimant sued the defendant as owner of the nightclub and so vicariously liable for the damage caused by the injuries.

The Court of Appeal ruled that the defendant was vicariously liable because:

- the doorman had been encouraged by the defendant to carry out his duties in an aggressive and intimidatory manner. This had included man-handling the customers;
- the stabbing represented the end of an incident that had started in the club. It could not in any fair or just sense be treated in isolation from the earlier events. It was not a separate and distinct incident;
- at the moment of the stabbing, the responsibility for the acts of the aggressive doorman that rested with the defendant had not been extinguished and so the defendant was vicariously liable.

Vicarious liability: improper performance of acts within scope of employment

285 ***Century Insurance Co Ltd* v *Northern Ireland Road Transport Board*** [1942] AC 509

A tanker belonging to the respondent, and driven by one of its employees, was delivering petrol to a garage in Belfast. While the tanker was discharging petrol at the garage, the driver lit a cigarette and threw away the lighted match. The resulting explosion caused considerable damage. The contract under which the petrol was being delivered said that the respondent's employees were to take their orders from a petrol company to which the tankers were hired, a company named Holmes, Mullin and Dunn, though they were not by virtue of this to be deemed the hirer's employees. The appellant had insured the defendant against liability to third parties, and pleaded that no claim could be made on it because, although the driver was admittedly negligent, he was at the time the servant of the hirer.

Held – the appellant must pay the third-party claim because the terms of the contract as a whole did not involve a transfer of the employees to Holmes, Mullin and Dunn, therefore, the respondent was liable for the negligence of the driver and was entitled to claim under its insurance.

Comment (i) It would seem that, however improper the manner in which an employee is doing his work, whether negligently or fraudulently, or contrary to express orders, his employer is liable.

(ii) This case was followed in *Harrison* v *Michelin Tyre Company* [1985] 1 All ER 918 where the claimant, a tool grinder employed by the defendant, was injured at work when standing on a duckboard of his machine talking to a fellow employee. Another employee was pushing a truck along a passage in front of the claimant and decided as a joke to suddenly turn it two inches outside the chalk lines of the passageway and push the edge under the claimant's duckboard. The duckboard tipped. The claimant fell off and suffered injury. In an action against the defendant he claimed that the employee had acted in the course of his employment and that the defendant was vicariously liable. The defendant denied liability saying that the employee had embarked on a frolic of his own. It was held by Comyn, J that the employer was liable. The test for determining vicarious liability was whether a reasonable man would say either that the employee's act was part and parcel of his employment, even though unauthorised or prohibited, or that it was so divergent as to be plainly alien to it. In this case the employee's act was part and parcel of the employment.

(iii) There will always be a tendency to make the employer liable because of his greater wealth and

insurance. However, a contrast to *Harrison* is provided by *McCready* v *Securicor Ltd* (1992) 460 IRLIB 12 where it was held that the employer (Securicor) was not vicariously liable for the negligence of its employee in playing a prank. The employee concerned, as a prank, started to close the door of a secure vault, knowing Mr McCready was inside. Mr McCready rushed to get out and caught his hand in the door, suffering serious injury. The employee alone was held liable. Unlike *Harrison*, the act was totally unauthorised.

286 ***Limpus* v *London General Omnibus Co*** (1862) 1 H & C 526

The claimant's omnibus was overturned when the driver of the defendant's omnibus drove across it so as to be first at a bus stop to take all the passengers who were waiting. The defendant's driver admitted that the act was intentional, and arose out of bad feeling between the two drivers. The defendant had issued strict instructions to its drivers that they were not to obstruct other omnibuses.

Held – the defendant was liable. Its driver was acting within the scope of his employment at the time of the collision, and it did not matter that the defendant had expressly forbidden him to act as he did.

Comment As we have seen, the matter to be decided in these cases is whether the employee was doing what he was employed to do. If he is not, then the employer is not liable. Thus, in *Beard* v *London General Omnibus Co* [1900] 2 QB 530 a bus conductor, who turned the bus round when the driver was absent and injured the claimant whilst he was doing this, was held by the Court of Appeal to have been acting outside the course of his employment so that his employer was not liable.

287 ***Rose* v *Plenty*** [1976] 1 All ER 97

Leslie Rose, aged 13, was given to helping Mr Plenty, a milkman, to deliver milk. Co-operative Retail Services Ltd, who employed Mr Plenty, expressly forbade its milkmen to take boys on their floats or to get boys to help them deliver the milk. On one occasion, while helping Mr Plenty, Leslie was sitting in the front of the float when his leg caught under the wheel. The accident was caused partly by Mr Plenty's negligence. It was *held* – by the Court of Appeal (Lord Denning, MR and Scarman, LJ) – that Mr Plenty had been acting in the course of his employment so that his employer was liable to compensate Leslie Rose for his injuries. Lawton, LJ (dissenting) said that the case of *Twine* v *Bean's Express* (1946) and similar cases were indistinguishable and that, in giving Leslie a lift, Mr Plenty had acted outside the *scope* of his employment.

Comment There is really very little difference in the facts of *Rose* v *Plenty* and *Twine* other than the fact that Leslie Rose was more than a mere hitchhiker. His presence on the milk-float was connected with the delivery of the milk, which was the reason connected with the *scope* of employment, and this is why Lord Denning and Scarman, LJ felt able to distinguish *Twine* and other similar cases.

Vicarious liability: employee mixing employer's business with his own

288 ***Britt* v *Galmoye and Nevill*** (1928) 44 TLR 294

The first defendant, who had the second defendant in his employment as a van-driver, lent him his private motor car, after the day's work was finished, to take a friend to a theatre. The second defendant by his negligence injured the claimant.

Held – as the journey was not on the master's business and the master was not in control, he was not liable for his servant's act.

Vicarious liability at civil law for criminal conduct of employee

289 ***Morris* v *C W Martin & Sons Ltd*** [1965] 2 All ER 725

The claimant sent a mink stole to a furrier for the purpose of cleaning. The furrier later told the claimant by telephone that he did not clean furs himself but intended to send the stole to the defendants, one of the biggest cleaners of fur in the country. The claimant knew of Martin & Sons and agreed that the stole be sent to them. Martin & Sons did work only for the fur trade and had issued to the furrier printed conditions which provided that goods belonging to customers were at customer's risk when on the premises of Martin & Sons, and that they should not be responsible for loss or damage however caused, though they would compensate for loss or damage to the goods during the cleaning process by reason of their negligence, but not by reason of any other cause. The furrier knew of these conditions when he handed the stole to the defendants and the defendants knew that it belonged to a customer of the furrier, but they did not know that it was Morris. While in the possession of Martin & Sons, the fur was stolen by a youth named Morrisey, who had been employed by them for a few weeks only, though they had no grounds to suspect that he was dishonest. The claimant sued the defendants for conversion or negligence but the county court judge felt bound by *Cheshire* v *Bailey* [1905] 1 KB 237 and *held* that the act of Morrisey, who had removed the stole by wrapping it round his body, was beyond the scope of his

employment. In the Court of Appeal it was *held* that *Cheshire* v *Bailey* (1905) had been impliedly overruled by *Lloyd* v *Grace, Smith & Co* [1912] AC 716 (where it was held that a solicitor was liable for the criminal frauds of his managing clerk so long as the clerk was acting in the apparent scope of his authority). The defendants, as sub-bailees, were liable to the claimant, and on the matter of the exemption clause the Court of Appeal said that the terms of such a clause must be strictly construed, and since they referred only to goods 'belonging to customers' this could be taken to mean goods belonging to the furrier and not to the furrier's customer, and because of this ambiguity the clause was inapplicable.

Comment (i) The above decision applies only to bailees for reward and only in circumstances where the servant is entrusted with, or put in charge of, the bailor's goods by his master. The mere fact that the servant's employment gave him the opportunity to steal the bailor's goods is not enough. Thus, in *Leesh River Tea Co* v *British India Steam Navigation Co* [1966] 3 All ER 593 a stevedore stole a brass cover plate from the hold of a ship when he was unloading tea and the Court of Appeal held that he was not acting in the course of his employment on the ground that his job had nothing to do with the cover plate. Perhaps if the plate had been stolen by someone who was sent to clean it, that person would have been acting within the course of his employment.

(ii) The tortious or criminal act must be committed as part of the employment, i.e. as an act within the scope of the employment. In *Heasmans* v *Clarity Cleaning* [1987] IRLR 286 the Court of Appeal decided that the defendant was not liable when its employee, who was sent to the claimants' premises to clean telephones, made unauthorised telephone calls on them to the value of £1,400. He was employed to clean telephones, not to use them.

Vicarious liability: casual delegation to 'agents'; liability of 'principal'

290 ***Ormrod* v *Crosville Motor Services Ltd*** [1953] 2 All ER 753

By an arrangement between the owner of a motor car and his friend, the friend was to drive the car from Birkenhead to Monte Carlo in order that the owner, the friend and the friend's wife might use the car during their holiday in Monte Carlo. The owner of the car was travelling to Monte Carlo in another car as a competitor in the Monte Carlo Rally. Owing to the friend's negligent driving, the car was involved in a collision in which a motor bus was damaged. The question of the liability of the owner of the car for the damage arose.

Held – the friend was acting as the owner's agent in the matter. The owner had an interest in the arrival of the car at Monte Carlo, and the driving was done for his benefit. Accordingly, the owner was vicariously liable for his friend's negligence.

291 ***Vandyke* v *Fender*** [1970] 2 All ER 335

Mr Vandyke and Mr Fender were employed by the same company and lived 30 miles from the business premises. The employer agreed to supply a car to Mr Fender and to pay him 50p a day for petrol for the journey. The journey could have been made by train but was more convenient by car. Two other employees who lived in the same area were also carried. On one occasion the car loaned to Mr Fender was not available and he was allowed to use a car belonging to the company secretary. While driving this car, an accident occurred resulting in an injury to Mr Vandyke, who claimed damages from the company. It was *held* that the company was liable because Mr Fender, though not a paid driver, *was driving the car as the company's agent* and it was liable for his negligence. The question then arose as to which of the insurance companies involved should indemnify the company. If the risk was to be borne by the employer's liability insurance, it was necessary to show that the accident occurred during and in the course of Mr Vandyke's employment, otherwise the risk would be borne by a road traffic insurance policy of Mr Fender, which covered him while driving someone else's car. It was *held* – by the Court of Appeal – that a person going to or from work as a passenger in a vehicle provided by his or her employer for that purpose is not in the course of employment unless he or she is obliged by the terms of his employment to travel in that vehicle. If not, then, as here, the liability must be borne by the road traffic insurer and not by the employer's liability insurer.

292 ***Nottingham* v *Aldridge; Prudential Assurance Co*** [1971] 2 All ER 751

In this case a Post Office trainee was returning to his normal work in his father's van after spending the weekend at his home having attended a training course the previous week. He was carrying another trainee, Nottingham, as a passenger and was entitled to a mileage allowance from the Post Office for himself and his passenger. Nottingham was injured as a result of an accident caused by the defendant's negligent driving.

Held – by Eveleigh, J – the Post Office was not liable because the two trainees were not in the course of employment while travelling to work, *nor was Aldridge the agent of the Post Office for the purposes of the journey*.